EXHIBIT GG

FORMER PRESIDENT MR JACOB GEDLEYIHLEKISA ZUMA

JUDGMENTS & PLEADINGS REFERENCE BUNDLE

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

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INDEX: EXHIBIT GG - JUDGMENTS & PLEADINGS

#	Description	File	Pages
1.	Notice of Motion and Founding Affidavit in the Constitutional Court of South Africa Case No.: CCT 270/16: *CASAC v President Jacob Gedleyihlekisa Zuma and Others*	(a)	001 to 055
2.	**2.1** *President of the Republic of South Africa v Office of the Public Protector and Others (Economic Freedom Fighters and Others Intervening)* [2018] 1 All SA 576 (GP) (13 December 2017)	(a)	056 to 081
	2.2 Applicant's Replying Affidavit	(a)	082 to 092
3.	*Democratic Alliance v Zuma and Another* [2017] ZAGPPHC 612 (29 September 2017)	(a)	093 to 116
4.	*S v Zuma and Others* (CC358/05) [2006] ZAKZHC 22 (20 September 2006)	(a)	117 to 142
5.	*Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (17 March 2011)	(a)	143 to 273
6.	*Pikoli v President and Others* 2010 (1) SA 400 (GNP) (11 August 2009)	(a)	274 to 292
7.	*Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) (5 October 2012)	(a)	293 to 365

#	Description	File	Pages
8.	*Helen Suzman Foundation v Minister of Police and Others* (1054/2015) [2015] ZAGPPHC 4 (23 January 2015)	(a)	366 to 419
9.	*McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) (6 September 2016)	(b)	420 to 450
10.	*United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC) (22 June 2017)	(b)	451 to 490
11.	*General Council of the Bar of South Africa v Jiba and Others* 2017 (2) SA 122 (GP) (15 September 2016)	(b)	491 to 602
12.	*Hanekom v Zuma* (D6316/2019) [2019] ZAKZDHC 16 (6 September 2019	(b)	603 to 697
	12.1 Order and Judgment	(b)	603 to 635
	12.2 Respondent's Answering Affidavit"	(b)	636 to 697

1

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 279/16

CASE NO:

In the matter between:

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION (CASAC) Applicant

and

PRESIDENT JACOB GEDLEYIHLEKISA ZUMA First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the Applicant intends making application to the above Honourable Court on a date to be determined by the Registrar for an order in the following terms:

1 Declaring that the President failed to perform a constitutional obligation in terms of section 79(1) of the Constitution in that he failed to either assent to and sign the Financial Intelligence Centre Amendment Bill (B 33B – 2015) **(FICA Bill)** or to refer the FICA Bill back to the National Assembly for reconsideration of the specified reservations without delay.

2 Ordering the President to assent to and sign the FICA Bill within 10 (ten) days of the date of this Court's order.

3 Alternatively, if this Court is satisfied that the President has reservations about the constitutionality of the FICA Bill (specified reservations), ordering the President to refer the FICA Bill back to the National Assembly within 10 (ten) days of the date of this Court's order for reconsideration of the specified reservations.

4 Ordering such respondents as may oppose this application to pay the costs thereof, jointly and severally, the one paying the other(s) to be absolved.

5 Granting the Applicant further and/or alternative relief.

TAKE NOTICE FURTHER THAT the Founding Affidavit of **PARMANANDA NAIDOO** will be used in support of this application.

TAKE NOTICE FURTHER THAT the Applicant has appointed the offices of Bowman Gilfillan Attorneys of **165 West Street, Sandton,** as the address at which he or she will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER THAT should any of the Respondents intend opposing this application, such respondent is required:

(a) to notify the Applicant's attorneys in writing on or before the date 5 (five) days after service hereof on the Respondents and to appoint in such notification an address at which he/she will accept notice and service of all documents in these proceedings; and

(b) within 15 (fifteen) days after such respondent has given notice of his/her intention to oppose this application to file his/her answering affidavit, if any.

TAKE NOTICE FURTHER THAT if no such notice of intention to oppose is given, the Applicant will request the Registrar to place the matter before the Chief Justice to be dealt with in terms of Rule 11(4).

Dated at **SANDTON** this 1st day of **NOVEMBER 2016**.

BOWMAN GILFILLAN ATTORNEYS

Per:

C TODD / N REDDY
Applicant's Attorneys
165 West Street
Sandton
2146
Tel: (011) 669 9000/ (021) 480 7816
Fax: Fax: (011) 669 9001/ (021) 480 3256
Email: chris.todd@bowmanslaw.com; nikita.reddy@bowmanslaw.com
(Ref: CT/vvr/6141828)

TO: **THE REGISTRAR**
The Constitutional Court
BRAAMFONTEIN

AND TO: **THE PRESIDENT**
First Respondent
Tuynhuys Building
Parliament Street
CAPE TOWN
Tel: (021) 464 2100
Fax: (021) 461 2838
Email: president@po.gov.za
presidentrsa@presidency.gov.za

AND TO: **THE SPEAKER OF PARLIAMENT**
Second Respondent
Marks Building
90 Plein Street
CAPE TOWN
Tel No: (021) 403 2595
Fax No: (021) 461 9462
Email: speaker@parliament.gov.za

COPY

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 270/16

In the matter between:

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION (CASAC) — Applicant

and

PRESIDENT JACOB GEDLEYIHLEKISA ZUMA — First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY — Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

PARMANANDA NAIDOO

do hereby make oath and say that:

1. I am an adult male employed by the Council for the Advancement of the South African Constitution (CASAC) as the Executive Secretary.

2. I confirm that I am duly authorised to depose to this affidavit and bring this application on behalf of the Applicant by virtue of a resolution of the Executive Committee of the Applicant dated 21 October 2016, a copy of which is annexed hereto as "**PN1**".

3. The facts contained herein are within my personal knowledge unless otherwise stated or apparent from the context, and are to the best of my knowledge and belief true and correct.

4. Where I make submissions of a legal nature, I do so on the advice of the Applicant's legal advisors, which advice I verily believe to be true and correct.

THE PARTIES

5. The Applicant is Council for the Advancement of the South African Constitution (CASAC), a non-governmental organisation functioning as a voluntary association, with its head office situated at 85 Durban Road, Unit 7 Olympia Court, Mowbray. A copy of CASAC's constitution is annexed marked "**PN2**".

6. The First Respondent is Mr. Jacob Gedleyihlekisa Zuma, cited in his official capacity as the President of South Africa. Service to the President shall be effected at Tuynhuys Building, Parliament Street, Cape Town.

7. The Second Respondent is the Speaker of the National Assembly. The Speaker is cited in her nominal capacity on behalf of the National Assembly in terms of section 23 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 4 of 2004. No substantive relief is sought against the Speaker, save

for costs in the event of her opposing this application. The address of the Speaker is New Wing, Parliamentary Precinct, Cape Town.

RELIEF SOUGHT BY THE APPLICANT

8. The relief which the Applicant seeks in this application is set out in the Notice of Motion to which this Founding Affidavit is attached.

9. The purpose of this application is two-fold:

9.1 Firstly, the Applicant seeks a declaratory order that the President has failed to fulfil his constitutional obligations in terms of section 79(1) of the Constitution by failing to either assent to and sign the Financial Intelligence Centre Amendment Bill (B 33B – 2015) (**FICA Bill**) or refer the FICA Bill back to the National Assembly for reconsideration of identified justified reservations held by the President about the constitutionality of the FICA Bill.

9.2 Secondly, the Applicant seeks an order directing the President to comply with his constitutional obligations and to assent to and sign the FICA Bill or, alternatively, to refer the FICA Bill to the National Assembly for reconsideration of identified justified reservations held by the President about the constitutionality of the FICA Bill.

JURISDICTION AND STANDING

10. I am advised that this Court has exclusive jurisdiction to determine the present application as a court of first instance as only this Court is empowered, in terms of

section 167(4)(e) of the Constitution, to determine whether the President has failed to fulfil a constitutional obligation.

11. The President's obligation to assent to and sign bills, or refer them to the National Assembly for reconsideration of identified justified reservations held by him about the constitutionality of the FICA Bill is created by section 79(1) of the Constitution.

12. The Applicant is a civil society organisation that seeks to advance the South African Constitution as the platform for democratic politics and the transformation of South African society. It has standing to bring this application in the public interest, given the significance and import of the FICA Bill in fighting corruption, specifically money laundering, trafficking and the financing of terrorism.

BACKGROUND FACTS RELEVANT TO THIS APPLICATION

13. As a constitutional democracy integrated into the global financial system, South Africa has a long-standing and clear commitment to combating money laundering and the financing of terrorism. Consequently:

13.1 The Financial Intelligence Centre Act, 38 of 2001 (**FIC Act**) was enacted in 2001;

13.2 South Africa became a member of the Financial Action Task Force (**FATF**), an intergovernmental body that sets global standards and promotes effective implementation of legal, regulatory and operational measures for the combatting of money laundering, terrorism financing and other related threats, in 2003; and

13.3 The United Nations Convention Against Corruption was ratified in 2004.

14. The FICA Bill was published and tabled in the National Assembly on 27 October 2015.

15. It was promulgated in order to, *inter alia*, remedy the deficiencies in the FIC Act and to strengthen the applicable statutory and regulatory framework for anti-money laundering measures and the combating of terrorism financing.

16. A stated constitutional implication of the FICA Bill is that it proposes to amend section 45B of the FIC Act to ensure that the section complies with the Constitution, as ordered by the Constitutional Court in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC). The Court suspended the declaration of invalidity of section 45B for 24 months to afford the Legislature an opportunity to cure the invalidity. This period expired on 27 February 2016.

17. The enactment of the FICA Bill will also bring South Africa into line with its international obligations and to ensure that it complies with its obligations as a member of the FATF.

18. The FATF has developed a set of Recommendations which set out a comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction. The FATF Recommendations set an international standard, based on best practice and collective experience of its members, which countries should implement through measures adapted to their particular circumstances. The original FATF Forty Recommendations (as revised)

together with the Nine Special Recommendations, have been endorsed by over 180 countries, and are universally recognised as the international standard for anti-money laundering and countering the financing of terrorism.

19. South Africa is subject to constant follow-ups to monitor compliance improvements and it must report on its progress at every FATF Plenary. The 2009 FATF Mutual Evaluation on South Africa, which assesses South Africa's compliance with the Recommendations, identified significant gaps in South Africa's system in relation to, *inter alia*, beneficial ownership, customer due diligence, politically exposed persons and correspondent banking. The FICA Bill aims to deal with these gaps.

20. It is obvious that any delay in the promulgation of the FICA Bill leaves South Africa with a deficient statutory and regulatory framework for anti-money laundering measures and the combating of terrorism financing and continues to undermine its compliance with its international obligations.

21. This has a number of implications for international trade and investment in South Africa, as governments, financial institutions and businesses in many countries are reluctant to do business with countries considered to have weak anti-money laundering and countering of financing of terrorism regimes. Non-compliance may also result in South Africa being placed on a global "blacklist". After publication of the FICA Bill in October 2015, the Parliamentary process was conducted and completed seven months later, on 25 May 2016.

22. On 13 June 2016, the Secretary to Parliament addressed a letter to the Director-General in terms of which the FICA Bill was presented to the President for his assent as Act No. 7 of 2016. A copy of this letter is annexed hereto as "**PN3**".

23. By mid-September, some three months later, the President had neither assented to the FICA Bill nor referred it to Parliament for reconsideration.

24. As a result of the state of inaction, CASAC addressed a letter to the President on 19 September 2016, directing him to his constitutional obligations to assent to and sign the FICA Bill (or refer it to the National Assembly for reconsideration) and putting him to terms to do so within thirty (30) days of receipt of the letter. A copy of the letter is annexed hereto as "**PN4**".

25. Significantly, the President's attention was specifically drawn to section 237 of the Constitution which expressly requires all constitutional obligations to be performed diligently and without delay.

26. Despite the plea for expedience, the President has, to date, failed to furnish CASAC with a response to its letter, despite the Private Office of the President acknowledging its receipt of the letter within half an hour of its delivery. A copy of this acknowledgement is annexed hereto as "**PN5**".

27. It seems that the FICA Bill remains on the proverbial presidential desk awaiting assent by the President.

28. The President's failure to respond to CASAC and to assent to the FICA Bill has resulted in the present application before this Court as the only means of achieving

the President's compliance with his constitutional obligations under sections 79(1) and 237.

29. To my knowledge, the public hearings and Parliamentary proceedings held in relation to the FICA Bill did not yield any constitutional objections.

30. More than four months have elapsed since the FICA Bill was presented to the President for assent.

31. The President is therefore obliged, by section 79(1) read with sections 84(2)(a) and (b) of the Constitution, to assent to and sign the FICA Bill or, alternatively, to refer it to the National Assembly for reconsideration of identified justified reservations held by him about the constitutionality of the FICA Bill.

32. For the reasons as set out above, I humbly pray that an Order be granted as set out in the Notice of Motion to which this affidavit is attached.

PARMANANDA NAIDOO

I certify that the Deponent has acknowledged to me that she knows and understands the contents of this affidavit, which affidavit was signed and sworn to before me at CAPE TOWN on this the 28TH day of **OCTOBER 2016**, in accordance with the requirements of Government Notice R1258 dated 21 July 1972 as

amended by Government Notices R1648 dated 19 August 1977 and R1428 dated 11 July 1980 and by GN R774 of 23 April 1982.

COMMISSIONER OF OATHS

CRAIG ARTHUR WILTON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A
12TH FLOOR
11 BUITENGRACHT STREET
CAPE TOWN, 8001

"PN1"

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION

EXTRACT OF THE PROCEEDINGS OF A MEETING OF THE EXECUTIVE COMMITTEE OF COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION ("CASAC") HELD BY ROUND ROBIN ON THE 21st DAY OF OCTOBER 2016

IT WAS RESOLVED THAT:

1. CASAC institutes proceedings in the Constitutional Court for a declaratory order that the President of the Republic of South Africa has failed to fulfil his constitutional obligations in terms of section 79(1) of the Constitution, 1996 by failing to either assent to and sign the Financial Intelligence Centre Amendment Bill (B 33B – 2015) (**FICA Bill**) or refer the FICA Bill back to the National Assembly for consideration; and for an order directing the President to comply with his constitutional obligations and to assent to the FICA Bill or, alternatively, to remit the FICA Bill to the National Assembly for reconsideration; or for alternative relief, together with costs.

2. PARMANANDA "LAWSON" NAIDOO, in his capacity as Executive Secretary of CASAC, be and is hereby duly authorised and empowered to instruct attorneys and to do all such further things and to sign all affidavits or other documents necessary to pursue the litigation as set out in paragraph 1 above and with the authority to delegate further to other officials of CASAC without limitation.

Council for the Advancement of South African Constitution

Telephone: [+27 21] 685 8809 • Facsimile: [+27 21] 685 8819

info@casac.org.za www.casac.org.za

CERTIFIED A TRUE EXTRACT OF THE MEETING

SIGNED AND DATED AT on this day of **OCTOBER 2016**

[Name]
Chairperson of the meeting

[Name]
Executive Committee Member

Council for the Advancement of South African Constitution

Telephone: (+27 21) 065 8809 • Facsimile: (+27 21) 065 8819

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"PN2"

CONSTITUTION

of the

VOLUNTARY ASSOCIATION

known as the

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION

(Abbreviation : "CASAC")

RICHARD ROSENTHAL ATTORNEYS

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INDEX

Clause	Heading	Page
1	ESTABLISHMENT	1
2	DEFINITIONS AND INTERPRETATION	1
3	REGISTERED OFFICE AND SECRETARIAT	2
4	PURPOSE AND SOLE OBJECT	3
5	GUIDING PRINCIPLES	3
6	MEMBERSHIP	5
7	ADMISSION AND TERMINATION OF MEMBERSHIP	6
8	RIGHTS OF MEMBERSHIP	7
9	OBLIGATIONS OF MEMBERS	8
10.	EXECUTIVE COMMITTEE	8
11	VACATING OFFICE	9
12	PROCEDURE AT MEETINGS OF THE EXECUTIVE COMMITTEE	10
13	POWERS AND DISCRETIONS OF EXECUTIVE COMMITTEE	11
14	ADVISORY COUNCIL	12
15	NOTICES	14
16	ANNUAL FINANCIAL YEAR, BOOKS OF ACCOUNT, AND ANNUAL FINANCIAL STATEMENTS	15
17	BANKING ACCOUNTS AND SIGNATURES	16
18	AMENDMENT TO CONSTITUTION AND DISSOLUTION	16
19	INDEMNITY	17
20	AMBIT OF DISCRETIONS	18
21	PRESCRIBED FISCAL CONDITIONS	18
22	REGISTRATION : NONPROFIT ORGANISATIONS ACT	18
23	FURTHER MEETING FORMALITIES	20
24	CONFLICTS OF INTEREST	21

SCHEDULE "A" – General Investment and Administrative Powers

SCHEDULE "B" – Prescribed Fiscal Conditions

Initial Individual Members

Initial Board Members

* * * * * *

1.

ESTABLISHMENT

There is hereby established a Voluntary Association to be known as the

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION
(Abbreviation : **CASAC**)

in order to promote the Purpose and undertake the Sole Object hereinafter stipulated, upon the terms and conditions contemplated by this Constitution.

2.

DEFINITIONS AND INTERPRETATION

In this Constitution, unless the context clearly otherwise indicates:

2.1	"Advisory Council"	means the Members of the Advisory Council in General Meeting.
2.2	"CASAC"	means the Voluntary Association established in terms of this Constitution, known as the "Council for the Advancement of the South African Constitution"
2.3	"Commissioner"	means the Commissioner for The South African Revenue Service ("SARS").
2.4	"Executive Committee"	means the body vested with executive responsibility for the management of the affairs of CASAC.
2.5	"Members of the Advisory Council"	means initially the individual persons whose names are listed on the attached Schedule styled "Initial Members of the Advisory Council"; but the term shall thereafter include all such other persons as may from time to time be admitted to Membership

of the Advisory Council, in accordance with clause 6.1.1 of this Constitution.

2.6 "The Office" means the Registered Office of CASAC referred to in clause 3 of this Constitution.

2.7 "The Republic" means the Republic of South Africa.

2.8 The masculine includes the feminine; the singular includes the plural; and terms referring to persons include juristic persons; and *vice versa*, in each instance.

2.9 Any reference to the Income Tax Act; the Nonprofit Organisations Act; or any other Act or Statute mentioned or referred to hereunder, including the Schedules and Regulations applicable thereto, shall be deemed to denote such Acts, Statutes, Schedules, and Regulations as enacted, and amended from time to time, including legislation constituting a re-enactment or substitution thereof.

2.10 By virtue of the substantive terms of this Constitution, and pursuant to registration of CASAC in terms of the Nonprofit Organisations Act as contemplated by clause 22 hereunder, CASAC shall be a separate juristic person distinct from its members and office bearers; and as such, it may in its own name, enter into contracts; sue or be sued; acquire and hold assets; undertake liabilities; and engage generally in other transactions deemed appropriate from time to time.

3.

REGISTERED OFFICE AND SECRETARIAT

CASAC shall be established as a separate legal entity with its registered office located at the Democratic Governance and Rights Unit (DGRU) of the Department of Public Law, University of Cape Town. The DGRU shall constitute the secretariat of CASAC for such period determined by the Executive Committee as may be mutually agreed.

PURPOSE AND SOLE OBJECT

The Purpose and Sole Object of CASAC shall be to promote, develop, and affirm the rights and principles set out in the South African Constitution, in order to facilitate and advance progressive constitutionalism and deepen democracy in South Africa, which may include:

4.1 The initiation, funding and support of projects and programmes consistent with and conducive to the achievement of such Purpose and Object;

4.2 The sponsorship of relevant lectures, workshops, colloquia, public engagements, dialogue, research, publications, advocacy, and other similar activities;

4.3 The provision of information, counsel, and advice, and the initiation and conduct or support of relevant litigation and advocacy, in the public interest;

4.4 The conduct of a sustained engagement and dialogue with Government at all levels; and with political and advocacy bodies, labour unions, business organisations, faith communities, social movements, and other similar organisations within the Republic, and elsewhere;

4.5 The preparation and submission of representations and relevant information to Parliament, the Human Rights Commission, the Public Protector, and other statutory and independent bodies concerned with constitutional democracy within the Republic, or in an international context.

GUIDING PRINCIPLES

Whilst acknowledging the interdependence and importance of all rights and values represented in the South African Constitution, the following Guiding Principles are recorded as having motivated the establishment of CASAC, viz:-

5.1 *That the idea of "progressive constitutionalism" should be seen as a pivotal founding principle.*

5.2 *That the Constitution as the supreme law of the land, provides a framework for the social and economic transformation of South Africa, and for a deliberative, participatory, and inclusive democracy. This framework together with its underlying values and founding principles needs to be protected and advanced.*

5.3 *That the Constitution must be subject to on-going critical appraisal, to assess its efficacy as the needs of the country change. There may be a need to debate and lobby for constitutional and legislative reform to enhance the legitimacy of the democratic political process. The Constitution must be a living, not a static document that evolves to deepen democracy.*

5.4 *That the Principle of the Rule of Law is a critical building block in seeking to pursue the concept of constitutionalism; public and private power must be exercised within the law in order to retain legitimacy, and to enhance a culture of responsibility and accountability to guard against the arbitrary use and abuse of power and authority.*

5.5 *That judicial independence is, in turn, an indispensable element, if not a pre-requisite for the Rule of Law and the integrity of the court system if it is to dispense justice that promotes substantive equality as well as procedural fairness.*

5.6 *That in order for people to organise lawfully to claim rights, and to participate meaningfully in democratic decision-making, civil liberties such as freedom of speech, access to information, and a free and tolerant political process are essential.*

5.7 *That the realisation of socio-economic rights is intertwined with civil liberties and political freedoms. Social and economic marginalisation deprives people of their fundamental right to live with security and dignity and is a betrayal of the Constitution. Endemic poverty and inequality renders South Africa a fragile society, where the poor and the vulnerable, especially women and children, are condemned to the fringes and easily exploited. There is an unacceptable and unsustainable gap between the vision of the Constitution and the lived reality for far too many citizens. This gap must be closed. Providing people with access to decent education, adequate housing, and health care, and with the protection of a social security net, is essential for a cohesive society and the future prosperity of the nation.*

5.8 *That as traditional orthodoxies are being questioned in the global economy, so too must the Constitution take into consideration the socio-economic context in which it exists and be responsive to the scale, urgency and inter-connectedness of the challenges of globalization and sustainable development.*

5.9 *That the values that contribute to building a society with effective systems of open governance – ethical behaviour, accountability, competence, hard work, a spirit of public service with consequences for poor performance or corrupt conduct, non-violent resolution of disputes, and non partisanship – also need to be respected.*

5.10 *That a rights-based culture must also focus on the responsibilities and obligations that go with these rights, encouraging citizens to be active in improving their own lives and communities, in holding government to account through participative processes and sustained social dialogue. The goal is a deliberative democracy that celebrates diversity, where respect for the views and beliefs of others is the norm, and thus builds solidarity between people from different social groups*

6.

MEMBERSHIP

6.1 Upon initial establishment of CASAC there shall be only one category of Membership – viz: Membership of the Advisory Council - provided that provision is also made for the subsequent establishment of other categories of

Membership, as may be deemed appropriate by the Executive Committee from time to time, that is to say:-

6.1.1 **Membership of the Advisory Council**
This category of Membership shall comprise those individual persons who are admitted as such in terms of this Constitution upon initial establishment of CASAC, and whose names are reflected in the Schedule attached hereto. Such initial membership may be augmented from time to time to include such other individual persons as the Executive Committee may deem appropriate, at its discretion.

6.1.2 **Associated Membership**
This category of Membership shall comprise such institutions, organisations, and other juristic persons, as the Executive Committee in its sole and absolute discretion may deem appropriate from time to time.

6.1.3 **Honorary Membership**
This category of Membership shall comprise such eminent persons as the Executive Committee, in its sole and absolute discretion, may wish to acknowledge in this manner by the conferment of honorary membership status, in recognition of their personal contribution to the advancement of constitutionalism and democracy in South Africa.

6.2. Other categories of Membership may also be established at any time by decision of the Executive Committee, at its sole discretion may deem appropriate, in which event such further categories of Membership shall confer upon their constituent members such rights, and be subject to such conditions, as the Executive Committee may then stipulate with reference thereto.

7.

ADMISSION TO AND TERMINATION OF MEMBERSHIP

7.1 In admitting new Members to the Advisory Council, and new Members to any other category of Membership, the Executive Committee may at its sole and

entire discretion, determine the appropriate eligibility criteria and conditions attaching to such membership, as it may deem appropriate from time to time. Such criteria shall include that any new member shall subscribe to the Guiding Principles as outlined in clause 5 above.

7.2 Membership of, the Advisory Council, and Membership of any other category of Membership shall be terminable at any time at the sole and absolute discretion of the Executive Committee, should it deem this to be in the best interests of CASAC, provided such decision must be approved by a majority of all Members of the Executive Committee comprising not less than Two-Thirds ($^2/_3$) of their number at the relevant time,

7.3 Membership of CASAC shall also terminate *ipso facto*:

7.3.1 upon the death of a member who is a natural person; or upon the dissolution or final liquidation of any Member which is an organisation, or juristic person; or

7.3.2 upon receipt at The Office of the written resignation of the Member concerned.

7.4 For the avoidance of doubt, it is hereby confirmed that the Executive Committee shall have discretion with regard to the admission, suspension, or termination of Membership as the case may be. The Executive Committee shall if requested furnish reasons or maturation with respect to any such decision.

8.

RIGHTS OF MEMBERSHIP

Members of the Advisory Council set the strategic framework for the projects and other interventions of CASAC, making recommendations and assisting the Executive Committee to define CASAC's projects and priorities.

With respect to the rights and prerogatives of Members, it is hereby stipulated, notwithstanding anything to the contrary hereinbefore contained, as follows :-

8.1 That only Members of the Advisory Council shall have the right to attend, speak, and vote at General Meetings.

8.2 That Members in other categories, or their duly authorised representatives, may be invited to attend and speak – but they may not vote – at General Meetings.

8.3 That all Members, irrespective of their category of Membership, shall be entitled to receive copies of the Annual Financial Statements and Annual Reports issued by the Executive Committee from time to time.

9.

OBLIGATIONS OF MEMBERS

9.1 Subject to the prior approval of General Meeting of the Advisory Council, the Executive Committee may from time to time impose a membership levy or contribution to make provision for CASAC's operational costs and financial commitments, in which event there may be a differentiation in the amounts payable by different categories of Member, and by different Members within the same category.

9.2 In the event of a Member failing to remit payment of any such required membership levy or contribution as may be required at any time, and remaining in default for a period of not less than Thirty (30) days following a written request requiring payment thereof, the Executive Committee shall be entitled subject to the provisions of 7.2, to suspend or terminate such membership; provided that the Executive Committee shall be entitled at its discretion, to condone or compromise any such default.

10.

THE EXECUTIVE COMMITTEE

10.1 Responsibility for the executive management and governance of the organisation, including the determination of its budget and strategic direction, shall vest in the Executive Committee.

10.2 The Executive Committee shall comprise a minimum of Six (6) and a maximum of Eleven (11) persons, of whom one shall be chosen by the Executive Committee as its Chairperson. Other Office Bearers may be appointed from time to time by the Executive Committee as it may consider necessary, including:

10.2.1 A Deputy Chairperson; and/or

10.2.2 An Executive Secretary.

10.3 The initial members of the Executive Committee shall comprise those Members of the Advisory Council as are so designated in the Schedule to this Constitution. Such initial Members of the Executive Committee shall hold office until the second-occurring Annual General Meeting following the adoption of this Constitution, but they shall be eligible for re-appointment thereafter in terms of the succeeding provisions.

10.4 At the second-occurring Annual General Meeting, the Members of the Advisory Council shall elect from their number the persons who are to serve on the Executive Committee for the ensuing Two (2) year period; with the intent and purpose that at 2-year intervals a similar election shall take place (at alternate Annual General Meetings) in order to make due provision for the appointment of the persons who shall serve as Members of the Executive Committee for the ensuing 2-year period.

10.5 Subject to the maximum number of Members stated above, the Executive Committee may from time to time by majority decision co-opt other Members of the Advisory Council to serve with them as additional Members of the Executive Committee. Any such co-opted Members shall hold office until the next-occurring Annual General Meeting, but shall remain eligible for re-cooption or re-election thereafter.

10.6 Notwithstanding the aforegoing, the Executive Committee may, by Resolution supported by no less than Seventy-Five percent (75%) of its members suspend or remove from office any member of the Executive Committee, whether elected or co-opted, if it shall consider this to be in the best interests of the organisation.

11.

VACATING OFFICE

Members of the Executive Committee shall vacate office in the event that any such member:-

11.1 dies or tenders her/his resignation in writing; or

11.2 completes the term of office for which she/he shall have been appointed, without subsequent re-election or reco-option; or

11.3 becomes of unsound mind; or otherwise unfit or incapable of acting in this capacity;

11.4 becomes disqualified in terms of The Trust Property Control Act, or The Companies Act, or any legislation substituted therefor from time to time, from acting as a Trustee, Director, or in another fiduciary capacity; or

11.5 is removed, in terms of a Resolution of the Executive Committee duly passed in accordance with the provisions of clause 10.6 above.

12.

PROCEDURE OF THE EXECUTIVE COMMITTEE

The Executive Committee shall conduct its meetings and regulate its proceedings, as it may find convenient from time to time, provided that:

12.1 The Chairperson, or in his/her absence, the Deputy Chairperson, if any, shall chair meetings of the Executive Committee. In the absence of both the Chairperson and Deputy Chairperson, the remaining members of the Executive Committee shall elect from their number an acting Chairperson.

12.2 The Chairperson or Deputy Chairperson, if any, may at any time requisition and convene a meeting of the Executive Committee, but they shall be obliged

to do so, if so requested in writing by any Two (2) Members of the Executive Committee.

12.3 The quorum necessary for the transaction of any business by the Executive Committee shall be a majority of its members.

12.4 At all meetings of the Executive Committee each of its members shall have ONE (1) vote.

12.5 Questions arising shall be decided by a majority of votes. In the event of an equality of votes, the Chairperson shall have a second or casting vote.

12.6 Written minutes shall be kept of all proceedings of the Executive Committee, including a record of all persons present and participating at each such meeting. The Minutes shall be signed by the person who chairs the relevant meeting, or the next-succeeding meeting, and shall be available for inspection or copying by any member of the Executive Committee.

12.7 The Executive Committee may delegate any of its powers and responsibilities to a special Sub-Committee, as it may deem appropriate from time to time. Any such sub-Committee to which a delegation is made shall conform to any directions and procedures as may be stipulated by the Executive Committee from time to time; and the Executive Committee shall not be divested of any of its powers and responsibilities by reason of such delegation. In effecting a delegation, the Executive Committee may also at its discretion :-

12.7.1 Appoint, remove, and substitute any of the persons to whom such delegation is made, and include new appointees who need not necessarily be members of the Executive Committee; and

12.7.2 Nominate the person/s who shall serve as Chairperson (and, if deemed necessary, as Deputy Chairperson) of any such sub-Committee; and

12.7.3 Stipulate the period of notice; the quorum; the voting; and any other procedural formalities affecting meetings and decisions of such sub-Committee

POWERS AND DISCRETIONS OF THE EXECUTIVE COMMITTEE

Subject to the **Prescribed Fiscal Conditions** referred to in clause 21, the Executive Committee shall have the undermentioned powers and discretions, viz :

13.1 The power to determine projects, programmes, and activities of CASAC, and generally the manner in which the resources of CASAC shall be deployed and appropriated from time to time.

13.2 The power to determine how the funds of CASAC shall be invested from time to time, with the intent and purpose that all such funds shall be available to the Executive Committee to appropriate in pursuance of the Purpose and Sole Object as the Executive Committee may deem appropriate, from time to time.

13.3 The General Investment and Administrative Powers, set forth in Schedule "A" hereto, subject to the provisions contained in the overriding Prescribed Fiscal Conditions referred to in clause 21.

13.4 The power to accumulate and capitalise any portion of its receipts, and to determine which of such receipts should be regarded as income, and which receipts should be regarded as capital; including liquidation dividends received, or any return of capital or capitalisation of profits (in the case of companies whose shares constitute a portion of the funds of CASAC); and the Executive Committee may generally decide any other question affecting the distinction between capital and income, as it may deem appropriate.

13.5 Any such further powers and discretions as the Executive Committee may find necessary to execute its mandate and responsibilities hereunder, and generally to promote the stated Purposes and Sole Object of CASAC.

ADVISORY COUNCIL

A General Meeting of the individual voting members of CASAC shall be termed the Advisory Council, which may be convened and shall conduct its affairs in accordance with the following provisions, viz:-

14.1 Annual General Meetings

An Annual General Meeting of the Advisory Council shall be held in each year, the first of which shall be held within a period of fifteen (15) months after the adoption of this Constitution. Subsequent Annual General Meetings shall be held as soon as possible, but in any event within four (4) months after the end of each financial year, The business of an Annual General Meeting shall include, *inter alia*:

14.1.1 The presentation and adoption of the Executive Committee's Annual Report;

14.1.2 The consideration of the Annual Financial Statements;

14.1.3 The consideration of an annual Budget for the ensuing year/s;

14.1.4 The election at 2-year intervals, or as and when required, of persons to serve as members of the Executive Committee;

14.1.5 The appointment of Auditors; and

14.1.6 Such other matters as may be considered appropriate by the Meeting.

14.2 Other General Meetings

Other General Meetings of the Advisory Council may be convened from time to time as may be considered necessary, at the instance of:

14.2.1 The Executive Committee; or

14.2.2 The Chairperson (or Deputy Chairperson), if any; or

14.2.3 Ten (10) or more Members of the Advisory Council, or 20% of its Members (whichever number may be the greater).

14.3 General Meeting Notices

Annual General Meetings shall be convened on not less than twenty-one (21) days' prior written notice addressed to all Members of the Advisory Council. Other General Meetings shall be convened on not less than Fourteen (14) days' written notice to such Members. The notice shall state in broad terms the business to be transacted at the forthcoming Meeting.

14.4 Resolutions and Voting

14.4.1 A resolution put to the vote at a meeting of the Advisory Council shall be decided by a show of hands, unless the person chairing the meeting shall decide that a poll is required. A poll shall be taken in such manner as may be directed by the chair; and the result of the poll shall be deemed to constitute the resolution of the Meeting.

14.4.2 Each, Member of the Advisory Council present or represented, at the meeting shall be entitled to One (1) vote. Members in other categories may be invited to attend, but shall have no vote. Unless otherwise stipulated in terms of this Constitution, all matters arising shall be determined by simple majority, provided that in the event of an equality of votes, the Chairperson shall be entitled to exercise a second or casting vote.

14.5 Quorum

The quorum necessary for a meeting of the Advisory Council shall comprise at least Twenty percent (20%) of its members present or deemed to be present at such Meeting.

14.6 Adjournment

In the event of any meeting of the Advisory Council being duly convened but no quorum being present, the meeting may be adjourned to another date, which must be not less than Five (5) days thereafter, as may be determined by the Executive Committee. Written notice of such adjournment must be given to all Members of the Advisory Council. At such reconvened General Meeting, the Members of the Advisory Council then present or deemed to be present shall then be deemed to constitute a quorum.

14.7 Written Minutes shall be kept of all proceedings of the Advisory Council, including a record of all persons present or deemed to be present. The Minutes shall be signed by the person who chaired the meeting, or the person who chairs the next-succeeding meeting, and they shall be available for inspection or copying by any member of the Advisory Council.

15.

NOTICES

15.1 Notices of Meetings shall be delivered either personally, electronically, by prepaid registered post, or in such other manner as may be deemed appropriate by the Executive Committee, and they shall be directed to the last known address of the Members concerned.

15.2 The inadvertent, but *bona fide*, omission to address notices to any member shall not invalidate the proceedings of the ensuing meeting.

15.3 If delivered personally, notices shall be deemed to have been received on the date of delivery.

15.4 If despatched electronically, notices shall be deemed to have been received twenty-four (24) hours after data transmission.

15.5 If despatched by prepaid registered post to an address in the Republic, notices shall be deemed to have been received five (5) days after date of despatch.

16.

ANNUAL FINANCIAL YEAR, BOOKS OF ACCOUNT, AND ANNUAL FINANCIAL STATEMENTS

16.1 Unless otherwise determined by Resolution of the Advisory Council, with the authority of the Commissioner, the Annual Financial Year of CASAC shall be from 1 March in each year to the last day of February in the succeeding year.

16.2 The Executive Committee shall ensure that CASAC keeps proper books of account. Financial Statements (including Capital and Revenue accounts) shall be prepared at least once a year, in accordance with generally accepted accounting practice in the Republic, and shall clearly reflect the affairs of CASAC. The books of account and Financial Statements shall be audited and certified by an independent practising Chartered Accountant, or in such other manner as may be deemed appropriate by the Executive Committee.

16.3 A copy of the Annual Financial Statements shall be made available to each Member of CASAC as soon as possible after the close of the financial year.

17.

BANKING ACCOUNT AND SIGNATURES

17.1 CASAC's financial affairs shall be conducted by means of a banking account.

17.2 All cheques, promissory notes, and other documents requiring signature on behalf of CASAC shall be signed by such one ore more persons as may be authorised thereto by the Executive Committee from time to time.

18.

AMENDMENTS TO CONSTITUTION AND DISSOLUTION

18.1 The Members of the Advisory Council at a duly convened and quorate Meeting may at any time resolve that:-

18.1.1 the terms of this Constitution be amended; and/or

18.1.2 the name of CASAC be changed; and/or

18.1.3 CASAC be dissolved;

Provided that, in any such instance, written notice must be given to all Members of the Advisory Council not less than Twenty-Eight (28) days prior to the date of the Meeting at which the Resolution is to be considered, and the notice must state the nature of the resolution to be proposed.
Any such resolution shall be deemed to have been duly adopted only if it is supported by no less than a Seventy-Five percent (75%) majority of all the Members of the Advisory Council actually present or represented at a quorate Meeting.

18.2 A copy of the Amending Deed or Resolution, as the case may be, shall be submitted forthwith upon its adoption to the Commissioner, and if applicable, also to the Director appointed in terms of the Nonprofit Organisations Act.

18.3 In the event of the dissolution of CASAC, any net residue of funds remaining after provision for all its residual commitments, liabilities and expenses, shall be given or transferred to one or more other eligible institutions having the same or similar objectives to those of CASAC, as may be determined by Resolution of the Advisory Council, and approved by the Commissioner as required in respect of a tax exempt Public Benefit Organisation.

19.

INDEMNITY

19.1 Subject to the limitations of the applicable law, each member of the Executive Committee, and all other office bearers, shall be indemnified by CASAC for the consequences of acts done and decisions taken in good faith on CASAC's behalf; and it shall be the duty of CASAC to pay all costs and expenses which any such person may incur, or become liable for, as a result of contracts entered into, or acts done in such capacity, with the authority of the Executive Committee.

19.2 Subject to the provisions of any relevant statute, no member of the Executive Committee or other office bearer of CASAC, shall be liable for the acts,

receipts, neglects or defaults of any other member or office bearer, or for having joined in any receipt or other act for conformity, or for any loss or expense suffered by CASAC through the insufficiency or deficiency of title to any property acquired by CASAC; or for the insufficiency or deficiency of any security in or on which the monies of CASAC may be invested; or for any loss or damage arising from the bankruptcy, insolvency or delictual act of any person with whom any monies, securities or effects are deposited or for any loss or damage caused in any other way, which occurs in the execution of their duties, unless it arises in consequence of that person's dishonesty or failure to exercise that degree of care, diligence and skill which is required by law.

20.

AMBIT OF DISCRETIONS

Where discretions are vested in the Executive Committee or in the Members of the Advisory Council in terms of this Constitution, such discretions, shall be complete and absolute except where expressly limited.

21.

PRESCRIBED FISCAL CONDITIONS

Anything to the contrary hereinbefore contained or implied notwithstanding, the powers of the Executive Committee and of the Advisory Council, shall be subject to compliance at all times with the conditions stipulated in respect of Public Benefit Organisations in terms of section 30 of the Income Tax Act, as read with the Ninth Schedule thereto.

22.

REGISTRATION : NONPROFIT ORGANISATIONS ACT

The Executive Committee shall be required to procure that CASAC is registered in terms of the Non-Profit Organisation's Act, No. 71 of 1997. Accordingly, and having regard to the requirements of that Act, it is hereby recorded and stipulated with respect to CASAC (Hereinafter in this clause referred to as ("the organisation"), as

follows:

22.1 The organisation's name shall be as stated in clause 1;

22.2 The organisation's Purpose and Sole Object shall be as stated in clauses 4 and 5;

22.3 The organisation's income and property shall not be distributable to its Members or to its office-bearers, save insofar as they may be reimbursed for reasonable out of pocket expenses incurred in the execution of their duties, with the authority of the Executive Committee;

22.4 The organisation shall be deemed to be a body corporate, and shall have an identity separate and distinct from its Members, as envisaged by clause 2.8;

22.5 The organisation shall continue to exist notwithstanding periodic changes that may occur in the composition of its Membership, as envisaged by clauses 2.8 and 6;

22.6 The members and Office-Bearers shall have no rights in the property or other assets of the organisation by virtue of their Membership or office;

22.7 The powers of the organisation shall be as set forth in this Constitution, including clause 13, as read with Schedules A" and "B" hereto;

22.8 The organisational structure and mechanisms for the organisation's governance shall be as set forth in this Constitution, including clauses 6, 10 and 14;

22.9 The rules for convening and conducting meetings, including quorums required for, and the minutes to be kept of those meetings, shall be as stated in clauses 12 and 14;

22.10 The manner in which decisions are to be made shall be as stated in clauses 12 and 14;

22.11 The Organisation's financial transactions must be conducted by means of a banking account, as stated in clause 17.1;

22.12 The date for the end of the organisation's financial year shall be as stated in clause 16.1;

22.13 The procedure for changing the constitution shall be as stated in clause 18;

22.14 The procedure by which the Organisation may be wound up or dissolved shall be as stated in clause 18;

22.15 If the Organisation is wound up or dissolved, any asset remaining after all its liabilities have been met, must be transferred to some other eligible Public Benefit Organisation, having the same or similar objectives, as stated in clause 18.3, as read with Schedule "B".

23.

FURTHER MEETING FORMALITIES

23.1 A "round robin" resolution – that is a resolution in writing, supported and signed unanimously by all persons eligible to vote thereon – shall be as valid as if passed at a duly convened meeting; and, unless stated to the contrary, shall be deemed to have been passed as at the date of the last signature thereto. Any such "round robin" Resolution may be recorded in a single document, or in several documents, as may be found most convenient.

23.2 For the avoidance of doubt, it is further stipulated that general meetings of the Advisory Council, and meetings of the Executive Committee, may be held at any time or times, and at any place or places, subject to due notice having been given thereof; and such meetings may be held simultaneously in more than one place, provided that all persons involved are linked to each other by

telephone, video, teleconference or other facilities whereby they may communicate and participate effectively in the business of the meeting, as if actually present together at the same time and place.

24.

CONFLICTS OF INTEREST

In accordance with the law governing fiduciary responsibility, members of the Executive Committee shall be obliged forthwith to declare any self-interest or conflict of interest that may arise with respect to matters to be considered and/or decided by the Board. In any such event, after declaring their interest, the affected persons shall be obliged promptly to recuse themselves, and to take no further part in the deliberations concerning that matter. Such persons shall subsequently refrain from participating in further discussions or decisions affecting the relevant matter, unless the continued presence and participation of the persons concerned is unanimously requested and approved by all other members of the Board. The Minutes of the Meeting shall record any such declaration of interest, recusal, and (if applicable) the continued presence and participation of the persons concerned.

THIS CONSTITUTION WAS DULY CONFIRMED AND ADOPTED BY THE INITIAL MEMBERS OF THE ADVISORY COUNCIL AT A MEETING HELD AT ON THE DAY OF 2010

CERTIFIED,

CHAIRPERSON **DATE**

SCHEDULE "A"

GENERAL INVESTMENT AND ADMINISTRATIVE POWERS

Subject to the limitations set forth in the **Prescribed Fiscal Conditions** (Annexure "B"), the Executive Committee shall have the following **General Investment and Administrative Powers**, in addition to those special powers and discretions as are set forth in the Constitution to which this Schedule is annexed, viz:

1. To invest and reinvest the funds of CASAC in a manner permitted by law, as they may deem appropriate, in their sole and absolute discretion; which may include, if deemed appropriate, the transfer and investment of funds off-shore.

2. To retain, or take over assets and investments constituting the subject matter of donations made to CASAC, and to retain them in the form in which they are received, or realise and re-invest the proceeds thereof.

3. To realise or vary any investments from time to time forming part of the funds of CASAC, and re-invest the proceeds thereof in any authorised investments.

4. To allow investments forming part of the funds of CASAC to remain uninvested, or in their original state of investment upon acquisition by CASAC.

5. Lend money to CASAC, with or without security, and with or without provision for interest, as may be deemed appropriate.

6. To borrow on such terms and conditions as The Board may consider fit for any of the purposes of CASAC; including the payment of liabilities of CASAC; the payment of capital to any other permitted beneficiary; the making of any loan in furtherance of the Sole Object of CASAC; the preserving or acquiring of any assets or investments; the subscription of any shares with powers from time to time to consent to any alteration or variation in the terms applicable thereto; and as security for any moneys so borrowed, The Board shall be entitled to mortgage, pledge, either generally or specifically, or otherwise encumber, all

or any portion of the funds of CASAC, in such manner and upon such terms and conditions as it may deem fit, with the right also to replace such borrowings or security.

7. To guarantee (either gratuitously or for a consideration) the performance of contracts or obligations of any third party in order to promote the sole object of CASAC, upon such conditions, and with or without security, as The Board in its sole and absolute discretion may deem fit; provided that such transaction is entered into for the benefit of CASAC.

8. To exercise the voting power attached to any shares forming part of the funds of CASAC, as The Executive Committee may consider appropriate in the best interests of CASAC; and to enter into arrangements as it may consider necessary for the purpose of causing the liquidation, reconstruction, or amalgamation of any company of whose capital the shares shall form portion.

9. To deal with, and turn to account, any of the assets forming part of the funds of CASAC, by way of exchange, sale, lease or otherwise and in exercising any powers of sale, The Executive Committee shall be entitled to cause such sale to be effected by public auction, tender, or private treaty as it may consider appropriate.

10. To purchase or acquire both movable and immovable property for use by CASAC itself in the conduct of its affairs, and in furtherance of the Specified Activities.

11. In respect of any immovable property donated to, or forming part of the funds of CASAC, at any time:

11.1 to develop, maintain, exchange, sell, lease or otherwise deal with any such immovable property or any portion thereof, and to grant rights or options in respect thereof; to register mortgage bonds; and to procure the maintenance, repair, improvement, demolition or reconstruction of any buildings situated thereon;

11.2 to execute any act or deed relating to alienation, partition, exchange, transfer, mortgage, hypothecation, or otherwise, in any Deeds Registry,

Mining Titles or other public office; to deal with servitudes, usufructs, limited interests or otherwise; and to make any applications, grant any consents and agree to any amendments, variations, cancellations, cessions, releases, reductions, substitutions or otherwise generally relating to any deed, bond or document and to obtain copies of deeds, bonds or documents for any purposes and generally to do or cause to be done any act whatsoever in any such Registry or office.

12. To transfer shares or other assets into the name of any nominee/s for CASAC, or into the name/s of any one or more of The Board.

13. To cause any Company to be incorporated, or any Trust, Foundation, or Council not for Gain, to be established, which is owned or controlled, directly or indirectly by CASAC; for the purpose of holding specific assets or undertaking specified activities which serve to promote the Sole Object of this COUNCIL, in the Republic or elsewhere, in accordance with the provisions of this Constitution.

14. To sue for, recover and receive all debts or sums of money, goods, effects and other things whatsoever, which may become due, owing, payable or vested in CASAC, and bring sequestration, liquidation or judicial management proceedings against any person.

15. To defend, oppose, adjust, settle, compromise or submit to arbitration all accounts, debts, claims, demands, disputes, legal proceedings and matters which may subsist or arise between CASAC and any person and, for the purposes aforesaid, to do and execute all necessary acts or documents.

16. To attend meetings of creditors of any person indebted to CASAC whether in insolvency, liquidation, judicial management or otherwise, and vote for the election of a Trustee, liquidator or judicial manager, and also vote on all questions submitted to any such meeting of creditors and generally exercise all rights of a creditor.

17. To exercise the voting power attaching to any share, stock, debenture or unit, in such manner as The Executive Committee may deem fit, for the purpose of amalgamation, merger or compromise, in any Company or Trust in which any

such share, stock, debenture or unit is held.

18. To exercise and take up or sell and realise any rights of conversion or subscription attaching, accruing or appertaining to any share, debenture or unit forming part of the assets of CASAC.

19. To engage employees in a part-time or full-time capacity; determine their remuneration; and terms of employment, and delegate to them such duties as The Board may determine; and to dismiss them.

20. To give receipts, releases or other effectual discharges for any sums of money or things recovered.

21. To treat as income any periodic receipts although received from wasting assets; and to make provision for the amortisation thereof, if deemed necessary and appropriate.

22. To determine in such manner as The Executive Committee may consider fit what shall be treated as income and what shall be treated as capital, in respect of any liquidation dividend, or return of capital, or capitalisation of profits, in the case of companies whose shares are being held as portion of the assets of the TRUST; and generally to decide any question which may arise as to what constitutes capital and what constitutes income, by effecting an apportionment in such manner as the Executive Committee may consider fit.

23. To employ accountants, attorneys, agents, brokers, or other professional advisers to transact any business of whatever nature required to be done pursuant to this Constitution, and to pay all such charges and expenses so incurred as a first charge, and not to be responsible for the default of any such appointees, or for any loss occasioned by their employment.

24. To exercise all such management and executive powers as are normally vested in the Board of Directors of a Company with regard to the affairs of CASAC.

25. To exercise any of such powers and authorities not only in the Republic, but also in any other part of the world.

26. Generally, to deal with assets or investments forming part of the funds of CASAC, in such manner as The Executive Committee may deem advisable; and to this end it shall be vested with any such additional powers and authorities as it may require to enable it to do so.

* * * * * * * *

SCHEDULE "B"
PRESCRIBED FISCAL CONDITIONS
[In terms of sections 18A and 30 of the Income Tax Act]

Upon the approval being granted by the Commissioner of CASAC as a Public Benefit Organisation in terms of the Income Tax Act, CASAC (hereinafter referred to as "the Organisation") shall become bound to conform to the relevant conditions prescribed in terms of fiscal legislation, including any amendments thereto as may be enacted or prescribed from time to time. Such Prescribed Fiscal Conditions, as are applicable as at the date of adoption of this amended Constitution, are as follows :

1. **As a Public Benefit Organisation approved by the Commissioner for purposes of section 18(A)(1) of the Income Tax Act, the Executive Committee shall, insofar as this may be applicable :**

1.1 Ensure that any eligible donations actually paid or transferred to the Organisation, are applied solely to undertake, or to enable other Eligible Beneficiaries to undertake Public Benefit Activities as listed from time to time in Part II of the Ninth Schedule; including the provision of funds or assets to assist other Eligible Beneficiary organisations, institutions, boards or bodies to conduct such Activities, including such as may be determined by the Minister from time to time for purposes of section 18A of the Act. The term "Eligible Beneficiaries" shall include the Government itself, and any provincial administration or local authority contemplated in section 10(1)(a) or (b) of the Income Tax Act.

1.2 Ensure that during each year of assessment preceding the year of assessment of the Organisation during which a qualifying donation is received, it distributes or incurs the obligation to distribute at least Seventy-Five Percent (75%) of the funds so received by or accrued to it by way of donations which qualify for a deduction in terms of section 18A of the Income Tax Act; unless the Commissioner upon good cause shown agrees to waive, defer or reduce such obligation to distribute, as contemplated by the proviso to section 18A(1)(b)(ii) of the Act, and in that event, subject to any such conditions as the Commissioner may determine.

1.3 Comply with, and have regard to, any such additional requirements as may be prescribed by the Minister from time to time in terms of section 18A(1), or as

may be otherwise imposed by the Commissioner in terms of the Act, including any additional requirements prescribed by the Minister as binding upon Eligible Beneficiaries carrying on any specified activity before donations shall be allowed as a deduction for purposes of section 18A.

1.4 Ensure that an audit certificate is provided upon submission by the Organisation to the Commissioner of its annual return for each year of assessment, confirming that all donations received or accrued by the Organisation in that year, in respect of which section 18A receipts were issued by the Organisation, were utilised in the manner contemplated by that section.

2. As a Public Benefit Organisation approved by the Commissioner for purposes of section 30 of the Income Tax Act, the Executive Committee shall, insofar as this may be applicable :

2.1 Carry on the public benefit activities of the Organisation in a non-profit manner, and with an altruistic or philanthropic intent.

2.2 Ensure that no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary, or employee, of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee.

2.3 Procure that at least Eighty-Five Percent (85%) of such activities, measured as either the cost related to the activities or the time expended in respect thereof, are carried out for the benefit of persons in the Republic, unless the Minister of Finance, having regard to the circumstances of the case, directs otherwise; provided that the cost incurred for the benefit of persons outside the Republic shall be disregarded to the extent of donations received by the Organisation from persons who are not resident in the Republic, and receipts and accruals derived directly or indirectly therefrom, which donations, receipts, and accruals have not previously been taken into account for purposes of this proviso.

2.4 Take reasonable steps to ensure that each such activity as is carried on by it is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups);

2.5 Comply with such conditions, if any, as the Minister may prescribe by way of regulation to ensure that the activities and resources of the organisation are directed in the furtherance of its objects.

2.6 Submit to the Commissioner a copy of the Constitution, Will or other written instrument under which it has been established.

2.7 Be required in terms of such Constitution, to have at least three persons, who are not connected persons in relation to each other, to accept the fiduciary responsibility of the organisation, and that no single person directly or indirectly controls the decision making powers of the organisation.

2.8 Be prohibited from distributing any of its funds to any person (otherwise than in the course of undertaking any public benefit activity) and be required to utilise its funds solely for the objects for which it has been established.

2.8 Be required on dissolution to transfer its assets to :

2.8.1 any public benefit organisation which has been approved in terms of section 30(3) of the Income Tax Act;

2.8.2 any institution, board or body which is exempt from tax under the provisions of section 10(1)(cA)(i) of that Act, which has as its sole or principal object the carrying on or any public benefit activity; or

2.8.3 any department of state or administration in the national or provincial or local sphere of government of the Republic, contemplated in section 10(1)(a) or (b) of that Act.

2.9 Be prohibited from accepting any donation which is revocable at the instance of the donor for reasons other than a material failure to conform to the designated purposes and conditions of such donation, including any misrepresentation with regard to the tax deductibility thereof in terms of section 18A; provided that a donor (other than a donor which is an approved public benefit organisation or an institution, board or body which is exempt from tax in terms of section 10(1)(cA)(i), which has as its sole or principal object the carrying on of any public benefit activity) may not impose conditions which could enable such donor or any connected person in relation

to such donor to derive some direct or indirect benefit from the application of such donation.

2.10 Be required to submit to the Commissioner a copy of any amendment to the Constitution, Will or other written instrument under which it was established.

2.11 Ensure that it is not knowingly a party to, and does not knowingly permit itself to be used as part of any transaction, operation or scheme of which the sole or main purpose is or was the reduction, postponement or avoidance of liability for any tax, duty or levy, which, but for such transaction, operation or scheme, would have been or would have become payable by any person under the Act or any other Act administered by the Commissioner.

2.12 Not pay any remuneration, as defined in the Fourth Schedule to the Income Tax Act, to any employee, office bearer, member or other person which is excessive, having regard to what is generally considered reasonable in the sector and in relation to the service rendered; and has not and will not economically benefit any person in a manner which is not consistent with its objects.

2.13 Comply with such reporting requirements as may be determined by the Commissioner.

2.14 Take reasonable steps to ensure that the funds which it may provide to any association of persons as contemplated in paragraph (b)(iii) of the definition of "Public Benefit Activities" in section 30 of the Act, are utilised for the purpose for which they are provided.

2.15 Shall not use its resources directly or indirectly to support, advance or oppose any political party.

2.16 Ensure that any books of account, records or other documents relating to its affairs are :

2.16.1 where kept in book form, retained and carefully preserved by any person in control of the organisation, for a period of at least four years after the date of the last entry in any such book; or

2.16.2 where not kept in book form, are retained and carefully preserved by

any person in control of the organisation, for a period of four years after the completion of the transaction, act or operation to which they relate.

INITIAL MEMBERS OF THE ADVISORY COUNCIL

Mr Zackie Achmat
Prof Cathi Albertyn
Mr Oupa Bodibe
Adv Geoff Budlender SC
Prof Richard Calland
Prof Hugh Corder
Adv Susannah Cowen
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Mr Mathatha Tsedu
Adv Faranaaz Veriava

INITIAL MEMBERS OF THE EXECUTIVE COMMITTEE

Prof Cathi Albertyn

Adv Geoff Budlender SC

Prof Richard Calland

Mr Lawson Naidoo

Adv Tembeka Ngcukaitobi

Mr Sipho Pityana (Chairperson)

"PN 3"

No. 7

13 June 2016

Cassius Lubisi, PhD
The Director-General and Cabinet Secretary
The Presidency
CAPE TOWN
8000

Dear Director-General

ASSENT OF PRESIDENT TO BILL

The following Bill, which has an official translation into Afrikaans, is hereby presented to the President for his assent as Act No. 7 of 2016:

Financial Intelligence Centre Amendment Bill (B 33B – 2015)

Yours sincerely

G MGIDLANA
SECRETARY TO PARLIAMENT

CLSO/ly/Act7/2016
3rd Session, Fifth Parliament

"PN4"

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION

19 September 2016

The Honourable J.G Zuma
President of the Republic of South Africa
Pretoria

Per email: mike@presidency.gov.za

Dear Mr President

We write with regard to the Financial Intelligence Centre Amendment Bill, which was duly passed by Parliament in May 2016. The Bill awaits your assent.

The Financial Intelligence Centre Amendment Bill will strengthen South Africa's capacity to fight corruption, specifically money laundering, trafficking and finance of terrorism. It will bring us into line with international standards on combating financial crime and in particular our obligations as a member of the Financial Action Task Force.

It has been reported that you have received an objection to the Bill based on its constitutionality from Mr Mzwanele Manyi on behalf of the Progressive Professionals Forum.

We wish to remind you that in terms of section 79(1) of the Constitution you are required to either assent to and sign the Bill, or if you have reservations about its constitutionality, refer it back to the National Assembly for its reconsideration.

You have thus far chosen neither option. Your attention is also drawn to section 237 of the Constitution which provide that "All constitutional obligations must be performed diligently and without delay".

We therefore request that you exercise your obligation in terms of s.79 (1) within 30(thirty) days of this letter, failing which we will approach the courts for appropriate redress.

Yours sincerely

Naidoo

Lawson Naidoo
Executive Secretary

Council for the Advancement of South African Constitution

Telephone: [+27 21] 685 8809 • Facsimile: [+27 21] 685 8819

info@casac.org.za www.casac.org.za

"PN5"

Chloë Woodin

Subject: FW: Attention: Hon JG Zuma (President)

From: Mike Louw [mailto:Mike@presidency.gov.za]
Sent: Monday, 19 September 2016 12:23 PM
To: Madeniyah Hendricks <madeniyah@casac.org.za>
Cc: Charmaine Fredericks <Charmaine@presidency.gov.za>; Robert Ngobeni <Robert@presidency.gov.za>; President RSA <PresidentRSA@presidency.gov.za>; Vukosi Nkuna <Vukosi@presidency.gov.za>
Subject: RE: Attention: Hon JG Zuma (President)

Dear Ms Hendricks,

We acknowledge with thanks, receipt of your correspondence addressed to the President of the Republic of South Africa, His Excellency, President Jacob Zuma.

The matter will receive the required attention and a response will be communicated soonest.

Please direct future correspondence to PresidentRSA@presidency.gov.za

Thank you

Michael Louw
Director: Support Services
Private Office of the President
West Wing, Union Buildings
PRETORIA

tel: +27 12 300 5200
fax: +27 86 683 5332
e-mail: mike@presidency.gov.za
web: www.thepresidency.gov.za

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA

From: Madeniyah Hendricks [mailto:madeniyah@casac.org.za]
Sent: 19 September 2016 11:59 AM
To: Mike Louw; Mike Louw
Subject: Attention: Hon JG Zuma (President)

Dear Mr Louw

Please see attached correspondence for the attention of President Zuma.

Please acknowledge receipt of email.

Thank you and kind regards

Madeniyah Hendricks
Senior Administrator
CASAC: Council for the Advancement of the South African Constitution
Tel: 021 685 8809
Fax:021 685 8819
Cell: 078 785 2918
Email: madeniyah@casac.org.za
Website: www.casac.org.za

2

JZ 017

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

CASE NO: 79909/16

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

13 December 2017 .....

DATE SIGNATURE

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Applicant

And

THE OFFICE OF THE PUBLIC PROTECTOR First Respondent

PUBLIC PROTECTOR Second Respondent

Intervening parties

ECONOMIC FREEDOM FIGHTERS First Intervening Party

UNITED DEMOCRATIC MOVEMENT Second Intervening Party

CONGRESS OF THE PEOPLE Third Intervening Party

DEMOCRATIC ALLIANCE Fourth Intervening Party

VYTJTIE MENTOR Fifth Intervening Party

JUDGMENT

MLAMBO JP:

[1] The crisp issue requiring determination is whether the President of the Republic of South Africa, President JG Zuma (the President) should personally bear the legal costs incurred in this matter. The President, represented by the State Attorney, had launched an urgent application, on 13 October 2016, being the day before the release of a report by the Public Protector on what has become known as State Capture.[1] The sole objective of the President's application was to interdict the Public Protector from finalising and releasing that report.

[2] The President sought to prevent the finalisation and release of the report through the interdict, until such time as he had been afforded a reasonable opportunity to provide input into the investigation carried out by the Public Protector. The President's application sparked off a frenzy of activity by way of intervening applications by the Economic Freedom Fighters (EFF), United Democratic Movement (UDM), Congress of the People (Cope), Democratic Alliance (DA),[2] Ms Vytjie Mentor (Ms Mentor) and much later, the Minister of Corporate Governance and Traditional Affairs, Mr David Douglas Van Rooyen (Minister Van Rooyen). The President initiated two further interlocutory applications. All the applications mentioned were initiated and dealt with in an atmosphere of urgency with the consequence that the Deputy Judge President of the Division became involved in case managing the matter.

[3] When the stage was set for the President's application to be heard, he withdrew it and tendered costs on the attorney and client scale as well as the costs occasioned by the employment of two counsel where applicable. It was then that argument was advanced by all the intervening parties, that the President be ordered to pay all the legal costs occasioned by his application personally.

[4] The basis for the order sought against the President is firstly that the application launched by him had nothing to do with his official responsibilities

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1 We use this phrase following the title given to the Report by the Public Protector – 'State of Capture'. This is the Public Protector's report in the investigation into complaints of improper and unethical conduct by the President and officials of state organs due to their alleged inappropriate relationship with members of the Gupta family.

2 These are all political parties registered with the Independent Electoral Commission and have representation in the National Assembly.

as President and Member of the National Executive, but was aimed at protecting his personal interests. For this reason, so it was contended, he had no justifiable basis to appoint the State Attorney to represent him in the matter, it being contended that he should have enlisted his own private legal representatives. The other basis advanced for the personal costs order sought against the President is that he conducted the litigation in an unreasonable and reprehensible manner that would justify this Court mulcting him, personally, in a punitive costs order, as a mark of its displeasure.

[5] Argument was heard from all the intervening parties, save for the first and second respondents, who elected to abide the decision of the court. The President opposed the order sought against him. After hearing argument on the point, we reserved Judgment and invited all the parties to file further written argument within two weeks if they so wished. The order granted for this part of the hearing on 1 November 2016 was to the following effect:

> 1. 'The application is withdrawn.
> 2. The Public Protector is ordered to publish the report forthwith and by no later than 17:00 on 2 November 2016, including through publication on the Public Protector's website.
> 3. The applicant is ordered to pay the costs of the application on the attorney and client scale, including the costs of two counsel where so employed, including the costs of the Public Protector.
> 4. The question whether the costs so ordered are to be paid by the applicant in his personal capacity is reserved."

[6] All the parties submitted further written argument on the costs issue. This court is indebted to the parties for the written arguments received. The determination sought to resolve the costs question renders it necessary to briefly set out the salient background circumstances and litigation chronology of the matter. Where necessary we also consider the contentions of the parties in the main matter as some aspects thereof are relevant to the resolution of the issue. The report which is at the centre of this matter arose out of an investigation undertaken by the Public Protector into a complaint lodged by the Democratic Alliance (DA), one of the intervening parties, and another entity, The Dominican Order, relating to alleged improper and

unethical conduct by the President and other officials of state organs arising from their alleged inappropriate relationship with members of the Gupta family and one of the President's sons.

[7] Upon receipt of the complaints, the Public Protector wrote to the President in March 2016, informing him of the complaints. The Public Protector also informed the President that her office was still considering her options regarding the requested investigation. She further stated that her office didn't have the necessary resources to undertake an investigation of such magnitude. The Public Protector also invited the President to provide comment, if any, regarding the allegations made against him. That letter was not received by the President and the Public Protector resent it in April 2016 and this time it was received by the President. In her letter the Public Protector stated that she was obliged in terms of section 3 of the Executive Members Ethics Act 82 of 1998 (the EMEA) to investigate and report on alleged breaches of the Executive Members' code within 30 days of receipt by her office of a complaint. The letter also stated that the Public Protector would not be able to meet this deadline due to inadequate resources. The President did not respond to this letter.

[8] During September 2016, the Public Protector wrote a further letter to the President requesting a meeting with him, inter alia, to brief him about the investigation into allegations of State Capture as well as afford him an opportunity to answer to the allegations levelled against him. Subsequent to this letter and more correspondence exchanges between the two offices, the Public Protector met with and interviewed the President. The meeting was short-lived as the President requested more information as well as additional time to consider the allegations made against him. He also requested an opportunity to put questions to those who had made allegations against him. The Public Protector subsequently refused to accede to the President's requests and notified him that she was continuing with her investigation with a view to releasing a report by mid October 2016.

[9] The Public Protector's intention to proceed and finalise the preliminary investigation galvanised the President to launch his urgent application on 13

October 2016 to be heard on 18 October 2016. The President's basis for launching this application, on the urgent court roll was that he was at risk of being the subject of adverse factual findings without having been afforded an opportunity to be heard and to question those who had made allegations against him as well as to provide answers and input into the investigation.

[10] On the same day i.e. 13 October 2016, a somewhat identical application was also launched by Minister Van Rooyen. Notably Minister van Rooyen did not enlist services of the State Attorney to represent him, but briefed lawyers in private practice. In Part A (the interdict part), set down for hearing on 14 October 2016, Minister van Rooyen sought an urgent interim interdict against the Public Protector from finalising and releasing her report, to operate as a rule nisi pending the determination of Part B of the application. Minister Van Rooyen's basis for the application was similar to that of the President. Part A of that application was to be heard the following day i.e. 14 October 2016, being the date of the intended release of the report. Coincidentally 14 October 2016 was also the last day of the term of office of the outgoing Public Protector, Adv Madonsela, who had conducted the investigation resulting in the targeted report.

[11] On receipt of Minister Van Rooyen's application on 13 October, the attorneys acting for the Public Protector and her office, wrote to Minister Van Rooyen's attorneys, informing them that the Public Protector's report expressed no adverse findings and recommendations regarding Minister Van Rooyen and that, for that reason, there was no longer any basis to interdict the release of the report. The Minister was invited to withdraw his application. This letter was followed by an answering affidavit, on behalf of the office of the Public Protector, responding to the Minister's application. The deponent to that affidavit, Mr Christoffel Hendrik Fourie (Fourie), the Head of Legal Services in that office, stated that the Public Protector was in the process of completing the report into the investigation relating to the 'relationship between the Gupta family and the President'. Fourie stated, in the affidavit, that there was no risk of the report causing prejudice to Minister Van Rooyen in that it made 'no findings, expresse[d] no point of view, and [made] no recommendations involving allegations concerning' the Minister. However, Fourie in a later

paragraph in the same affidavit, made the disclosure that the Public Protector had actually finalised and signed the report. The apparent contradictory statements by Fourie in that affidavit feature prominently in the contentions of the parties in the main matter as well as with regard to the costs aspect. I will return to these shortly.

[12] Despite the invitation in the letter to withdraw his application and the averments in Fourie's affidavit, Minister Van Rooyen pressed for Part A of his application to be heard. The matter came before Fourie J[3] on 14 October 2016. Present in court were the legal teams representing the respondents ie the Office of the Public Protector and the Public Protector, Minister van Rooyen and the President. Also represented in court were the lawyers representing the EFF, UDM and COPE, who, on that day, launched a joint application to intervene in the Minister's and President's applications, coupled with a counter application. The DA was also represented in court even though it had not at that stage launched an intervening application.

[13] All the parties represented in court, through their legal representatives, engaged in discussions about the further conduct of the litigation and eventually consented to an order that effectively consolidated the two applications. That order also specifically provided that the Public Protector's report be preserved and put into safekeeping pending the final determination of the two applications. The full text of the 14 October 2016 order is:

'Order by agreement

1. The present application[4] is postponed to 1 November 2016 for hearing contemporaneously with the application under case number 79808/16[5] together with any intervention applications.

2. Pending the determination of this application in this court:

   a. The Public Protector's report in the investigation into complaints of improper and unethical conduct by the President and officials of state organs due to their alleged inappropriate relationship with members of the

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3 Judge D Fourie is also a member of this Bench.
4 The Van Rooyen application.
5 The President's application.

Gupta family, finalised and signed on 14 October 2016 ("the report"), will not be released to the public.

b. The report shall be preserved and kept in safe keeping.

3. The following dates shall apply to the filing of pleadings:

a. The Democratic Alliance is to file its application for intervention by 17 October 2016.

b. All answering affidavits must be filed by 21 October 2016.

c. All replying affidavits must be filed by 25 October 2016.

d. Heads of argument, if any, must be filed by 12:00 on 27 October 2016.

Costs are reserved.'

[14] In their application to intervene the EFF, UDM and COPE, sought leave to intervene in both applications ie the Van Rooyen and President's applications, and sought orders dismissing the said applications. They sought an order, in their counter application, that the Public Protector be ordered to issue her report forthwith but not later than 15 October 2016 as well as an order for costs in the event of opposition on the attorney and client scale as well as costs of two counsel. It must be pointed out, however, that in their intervening applications, these parties used the case number[6] allocated to Minister Van Rooyen's application. This fact becomes topical in the stance adopted by the President to the intervening application to his application by these parties. I will deal with this aspect later in this Judgment.

[15] The EFF, UDM and Cope specifically took issue with the President's utilisation of the State Attorney to represent him in the matter. They contended that the allegations that formed the subject of the Public Protector's investigation against the President were that he had, in his personal capacity, acted in concert with the Gupta family in an irregular and corrupt manner. They made the point that in his alleged dealings with the Gupta family, he was not acting in his official capacity as the President of the country and Member of the National Executive. They asserted that the President should have enlisted the services of private attorneys at his own

6 80707/16.

cost as was done by Minister Van Rooyen. In their view there was no basis for the President to burden the taxpayer with the legal costs of his application. They thus contended that the President ought to be held liable, in his personal capacity, for the costs incurred in the matter.

[16] On 21 October 2016 the incoming Public Protector, Adv B Mkhwebane, filed an answering affidavit to both applications. For present purposes, it is relevant to mention only that in that affidavit, Adv Mkhwebane stated that her office would abide the decision of the court regarding the applications. She also stated that information at her disposal was that her predecessor, Adv Madonsela, had finalised her report on 14 October 2016 ie the day on which her term of office ended. Fourie also filed an affidavit confirming the averments in Adv Mkhwebane's affidavit.

[17] On the same day Minister Van Rooyen withdrew his application in its entirety, the parties having reached agreement that each party would bear their own legal costs in respect thereof. The notice of withdrawal expressly stated that no purpose would be served by pursuing the application as the Public Protector had confirmed that her report expressed no adverse findings and recommendations against the Minister.

[18] On 24 October 2016 the President filed an affidavit responding to the application for intervention by the EFF, COPE and the UDM. In that affidavit the President stated that even though he was cited as the second respondent by the intervening parties, it was clear when reference was made to the main application ie Minister Van Rooyen's application, that he, the President, was not a party in that application and that he was not permitted by law to respond to the intervening application until he had been joined as a party in that application. The President therefore did not respond to the allegations made by the intervening parties against his application.

[19] On the same day the President filed his answering affidavit to the DA's intervening application. The stance adopted by the President in that affidavit was to oppose the DA's application on the basis that the DA had neither *locus standi* nor a direct and substantial interest in the matter. On this basis the President opposed the DA's intervention and sought an order refusing the

DA's application. In this affidavit the President disputed the DA's allegation that the Public Protector had finalised her report. In this regard the President referred to Fourie's affidavit filed on 14 October 2016, specifically referring to the part where Fourie stated that the Public Protector was in the process of finalising her report.

[20] The President then referring to the DA's assertions that the Public Protector had finalised the report on 14 October 2016, stated that if the Public Protector had finalised her report without affording him an opportunity to respond to the issues raised against him, then she would have been in constructive contempt and would have violated his right to just administrative action. It was his contention that the investigation by the Public Protector was administrative action. As such her actions were subject to the administrative justice provisions. This entailed that any person affected by such action had the right to be afforded a reasonable opportunity to respond to allegations made against him/her before the investigation was finalised. He however stated further that if indeed the Public Protector had finalised her report in those circumstances, then the report had to be released. His actual words are 'then in that event the report should be released'.

[21] The President further stated that in those circumstances he still had the right to review the findings in the report. He also stated that should it transpire that the Public Protector had indeed finalised the investigation and signed the report, then in that event she was *functus officio*. She had, he argued, infringed his right to just administrative action. He further stated that his rights, as an implicated person in terms of section 7 of the Public Protector Act 23 of 1994, were infringed by the conduct of the Public Protector in allegedly failing to afford him a reasonable opportunity to make input in the investigation and before finalising it. He asserted such right in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). He stated that even though the report had been finalised he retained the right to review it as he had not been afforded an opportunity to make an input before same was finalised.

[22] The President's statements about the report having to be released in view of the finalisation thereof by the Public Protector, unleashed a stream of

correspondence from all the lawyers representing the intervening parties. In such correspondence the assertion is made that the President's statements had the consequence that there was no longer a live issue and that all that the President had to do was to withdraw his application and that the report be released without further ado. Furthermore, all the lawyers included a threat in their correspondence that should the President persist with the litigation and not withdraw his application they would seek a punitive costs order against him personally.

[23] In fact the DA's attorneys, in their letter dated 24 October 2016, proposed that the President should consent to a draft order providing for the withdrawal of his application and for the report to be released and that each party pay their own costs. The letter requested that if the proposed order was accepted then such acceptance was to be communicated to them by 12 noon the next day failing which a punitive costs order would be sought against the President in his personal capacity. The State Attorney, on behalf of the President, rejected all proposals for the President to withdraw his application and for the report to be released.

[24] On 26 October 2016 the DA filed its replying affidavit to the President's answering affidavit to its intervening application. In that affidavit the DA refers to the statements by Fourie, in his 14 October 2016 affidavit that the report had been finalised and signed, as well as the President's statement to the effect that in those circumstances the report be released. On this basis the DA contended that this being the situation there was no longer a live dispute requiring resolution by the court. According to the DA there was no longer any basis for the President's application.

[25] On 27 October 2016 the EFF, UDM and Cope filed their replying affidavits to the President's answering affidavits to their application to intervene and to the DA's similar application. These affidavits reiterate these parties' interest in the applications and point out that the President's continuation with his application was misconceived. These intervening parties reiterated the relief they sought that the report be released without delay by no later than 8 November 2016. The President then elected to oppose the intervention application of the EFF,

UDM and COPE on the grounds that it was irregular and had not been properly brought. He relied on his stance that he had not been properly joined in their intervening application. In this regard, he issued a Notice in terms of Rule 30 seeking relief to set aside the intervening application.

[26] Amidst this litigation and correspondence frenzy, another intervening application was launched by Ms Mentor on the basis that she had a direct and substantial interest in the matter, especially as she was one of the persons who had alleged personal experience of some of the matters investigated by the Public Protector involving the Gupta family. She also made the point that the Public Protector was *functus officio* and that the relief sought by the President had become moot. The President opposed Ms Mentor's intervention application on the basis that she did not have a direct and substantial interest in the matter and that she lacked *locus standi* to enter the fray.

[27] On Saturday 29 October 2016, the President filed a supplementary affidavit wherein he sought to amend his initial notice of motion. The President later on in the same day filed an application for the postponement of the main application. These applications were preceded by a letter from the State Attorney to the respondents and all the intervening parties, suggesting that the matter was not ripe for hearing and seeking their consent for the matter to be postponed to a time when all necessary papers would have been filed. This approach was rejected by all the intervening parties hence the formal application for a postponement. The State Attorney had also on Saturday, 29 October 2016, written a letter to the Office of the Deputy Judge President seeking new directives in the light of his amendment and postponement applications.

[28] The primary basis for the President's postponement application was that it was only on 28 October 2016 that the Public Protector clarified that the investigation and report were finalised on 14 October 2016. The President stated that for this reason, he had to consider the impact of this clarification as well as the possibility of supplementing his original application. He stated that the issues raised by Ms Mentor in her intervening papers clearly showed that

the matter was not ripe for hearing hence the reason he had decided to supplement his papers, and also seek the postponement of the application.

[29] In his affidavit in support of the amendment application, the President stated that in view of the clarification of when the report was finalised, he sought amended relief. That amended relief was that he now sought an order declaring the conduct of the Public Protector in finalising the investigation, and signing the report as unlawful. The President further stated that the statement contained in his answering affidavit to the DA's intervening application, to the effect that if the report was final then it had to be released, was not what he intended to convey and that a typing error led to his statement being expressed in those terms.

[30] The President clarified that he had meant to say: 'Should it later transpire that the Public Protector produced a final report without affording me my right to just administrative action, then in that event the report should not be released.' He buttressed this statement by stating that the report could not be released in the format it was in as the Public Protector in finalising same without providing him with just administrative action, infringed his constitutional right. He was advised, he continued, that these were procedural irregularities that compromised the process leading to the finalisation of the report and thus the report had to be declared unlawful. He then contended that the Public Protector could not be *functus officio* of an unlawful report. In this regard the President referred to his statement in the answering affidavit to the DA's intervening application where he stated that the Public Protector was *functus officio* and argued that to the extent that his statement may be regarded as a concession, such concession was wrong in law. In this regard the President stated that he was advised that the court could not be bound by a concession that was wrong in law.

[31] Soon after the President launched his interlocutory applications, Minister Van Rooyen sought to re-enter the fray by launching another urgent application but this time, to intervene in the President's application. His primary basis was, as was the case in his previous application, to prevent the release of the report. This evoked opposition from the respondents and other intervening

applicants. At that stage on 31 October 2016, all possible applications having been filed, we then heard argument regarding the intervening applications of the EFF, UDM, Cope, DA, and Mentor in the President's application. We also heard argument regarding Minister Van Rooyen's urgent application to intervene in the President's application. Having heard full argument lasting a whole day, the intervening applications by the EFF, UDM, COPE, DA and Mentor were granted. The last minute attempted re-entry by Minister van Rooyen in the form of an urgent intervening application was struck off for lack of urgency, with costs. The President's applications for a postponement and for amended relief were refused. The order granted to dispose of all these applications reads as follows:

1. 'The Application of the Democratic Alliance to intervene as a party in the application of the *President of the Republic of South Africa v The Public Protector case no. 79606/16* is granted with costs.
2. The application of the Economic Freedom Fighters, United Democratic Movement and Cope to intervene as a party in the application of the *President of the Republic of South Africa v The Public Protector case no. 79606/16* is granted with costs.
3. The application of Ms MP Mentor to intervene as a party to the application of *President of the Republic of South Africa v The Public Protector case no. 79606/16* is granted with costs.
4. The costs of those applications, that is the intervention applications in *President of the Republic of South Africa v The Public Protector case no. 79606/16* shall include costs consequent upon the employment of two counsel where applicable.
5. The applications of the Democratic Alliance, the Economic Freedom Fighters, the United Democratic Movement and Cope to intervene as parties to the application of *Mr DD Van Rooyen case no. 84803/2016* are granted with costs, including the costs consequent upon the employment of two counsel where applicable.
6. The application of *Mr DD Van Rooyen case no 84803/2016* is struck from the roll for lack of urgency with costs including the costs consequent upon the employment of two counsel where applicable.
7. The application for postponement and for amended relief by the President is refused with costs including the costs consequent upon the employment of two counsel where applicable.'

Issues requiring resolution:

[32] Having traversed the above background facts and circumstances as well as the chronology of the litigation, it is now opportune to turn to the issues requiring resolution. In essence two questions must be answered i.e. did the President conduct this litigation in a manner unbecoming of a reasonable litigant and was he vindicating his personal interests in doing so.

[33] The case advanced by the intervening parties that the President should be personally muicted with the costs of this litigation, is that he has conducted this litigation in a manner unbecoming of a reasonable litigant. The gist of this argument is that the President's continuation with this litigation after the Public Protector's office had filed an affidavit on 14 October 2016 that the investigation had been finalised and the report signed, was unreasonable. In addition, it was argued that there was no justifiable basis for the continuation with the litigation by the President after he had stated in his answer to the DA's intervention application, that if the investigation was finalised and the report signed, then the report had to be released.

[34] It is necessary to undertake a factual enquiry of the circumstances on which the contentions of the parties are based. I can best do this by undertaking a simple factual analysis of the chronology of events from 14 October 2016. At that stage the only affidavits/papers (pleadings) that had been filed were the President's application, the intervention application of the EFF, UDM and Cope as well as the Public Protector's answering affidavit to Minister Van Rooyen's application, which sat the cat amongst the pigeons so to speak. According to the intervening parties, the office of the Public Protector made it clear in that affidavit that the investigation had been finalised and the report had been signed. They contend that, that should have been the end of the matter, if one considers the foundational premise of the President when he launched his application. That premise was an investigation that was not finalised and no signed report.

[35] The President's written argument does not deal with these aspects of the case but focusses specifically on the argument that he committed perjury. This refers to the typing error aspect which I will deal with shortly. I am of course cognisant of the President's stance in his answer to the DA's intervention application as well as in his supplementary affidavit seeking a postponement and amended relief. What comes out clearly is that the President's mind-set is that Fourie's affidavit was contradictory as to whether the investigation had been finalised and the report signed.

[36] It is correct that in his affidavit, Fourie made two statements which appear to contradict each other. The President's stance is that this contradiction remained unresolved until this was clarified by the Public Protector on 28 October 2016, when Adv Mkhwebane confirmed that in fact the investigation had been finalised and that the report was signed on 14 October 2016 by Adv Madonsela. It should be pointed out, however, that this was not Adv Mkhwebane's first statement to this effect. She said so in her affidavit filed on 21 October 2016, in which she gave notice that her office would abide the decision of this court regarding the President's application.

[37] The President relies on this contradiction in his later affidavits, suggesting that this was because it was unclear to him what the correct position was. I must make the point that it is only the President who says he remained unclear about the true status of the report. Other parties accepted that the report had been finalised and signed. The President was clearly aware, from affidavits flying around, that all parties other than him accepted the finalised status of the report. The question must then be asked: if in fact the President was unclear about the status of the investigation and report, as he maintains, why was a letter not penned by his legal representatives to the Public Protector's lawyers seeking this clarification?

[38] I accept that when the President launched his application, there was no indication by the Public Protector that her report had been finalised. The only indication from her office was that she had intended to release her report on 14 October 2016 being the last day of her term in office. We, however, hold the view that everyone in court on 14 October, including the President's legal

representatives, was aware of Fourie's affidavit, more importantly the recordal he made in his second statement, that the Public Protector had finalised her investigation and signed the report. Significantly, this was recorded in the 14 October court order which was consented to by all the parties represented in court on that day, including the President (See para 15 above).

[39] The issue therefore is: was it reasonable for the President to simply focus on the first statement made by Fourie and ignore the second? My view is that it was completely unreasonable for the President to have persisted with his stance that the finalised status of the report remained unresolved from 14 until 26 October 2016. Furthermore, it was also unreasonable of him not to seek early clarification of the status quo in view of the fact that everyone involved in the litigation held a contrary view to his. I need say no more in this regard. The facts speak volumes of the clearly unreasonable stance adopted by the President.

[40] Attention must now be focused on what the President regards as allegations levelled at him that he has committed perjury. This is in relation to the President's statements in his answer to the DA's intervening application that if indeed the investigation was finalised and the report signed, then in that event the report had to be released. The intervening parties have argued that the President had accepted, when he made that statement, that if the Public Protector had already finalised the investigation and signed the report then there was no basis for the interdict that he was seeking. Their argument is that once he made that statement there was no longer any live issue in the application and he should have withdrawn it.

[41] It is noteworthy, of course, that the President subsequently filed a supplementary affidavit clarifying that his statement in the answering affidavit was incorrectly typed as he intended to convey that the report should not be released despite being finalised and signed. It was for this reason that the President sought to persist with the application but seeking the amended relief that the report was unlawful and should be set aside as he had not been afforded his rights before the process was finalised.

[42] Does the context of the case made out by the President support the President's submission that we are dealing with a typing error here? A notable fact is that the President's typing error correction so to speak, refers only to the first statement he made. He is completely silent about the two subsequent statements he also made. This is where the President comes unstuck. A simple consideration of the latter statements rules out a typing error or the possibility thereof. Reading in a typing error in the first statement simply creates an irreconcilable contradiction with his subsequent statements. I illustrate this by revisiting the statements at issue here:

(i) that if the investigation had been finalised and the report signed then the report had to be released;

(ii) that even if the report had been signed and the investigation finalised he still had the right to review the conduct of the public protector and seek the setting aside of the report; and lastly

(iii) that in the event the investigation had been finalised and the report signed then the Public Protector was *functus officio*.

[43] Clearly the second and third statements sequentially follow on the first and we should have been told whether they too suffered from typing errors. If they are left as they are, they remain at complete odds with a state of mind that the report should not be released as the President would have us believe. In fact the President's argument that his functus officio statement is wrong in law, presupposes a finalised and signed report. In fact the President's argument that his *functus officio* statement is a wrong in law, presupposes a finalised and signed report. The only conceivable reason one can fathom for the President's assertion of a typing error is that this was an attempt to buttress his quest for amended relief. However, that route is also doomed. The amended relief the President sought was confronted by serious legal conceptual difficulties. He sought to review and set aside the report without it being released. That this was conceptually flawed stems from the fact that the amended relief the President now sought was to review administrative action without following the mandatory Rule 53 or the Promotion of Administrative Justice procedure. There can clearly be no review and setting aside of

administrative action without the impugned decision being final and in the absence of in the absence of the record underpinning that decision. These findings render it unnecessary for us to further investigate if the President's conduct amounts to perjury. That is not our task in the context of this matter.

[44] Clearly the inevitable realisation that must have dawned on the President and his legal team was that his statements in his answering affidavit coupled with the amended relief he sought, ineluctably pointed to his application having lost its whole foundational premise. The right to review the report can only be premised on a finalised report and the Public Protector being *functus officio*. That meant that on all possible interpretations, the report had to be released and with that went the basis for the application. No other conclusion is possible and to suggest that in those circumstances the report was not to be released is misconceived. Faced with those odds the President must have realised that there was no basis whatsoever for him to persist further with the litigation; hence the decision to withdraw the application at the eleventh hour and tender costs.

[45] This demonstrates that the other unavoidable finding one must make is that the President was grossly remiss in ignoring all indications from 14 October 2016 that the previous Public Protector had finalised her investigation and signed the report. Whatever one may say about Fourie's statements in his affidavit of 14 October, the indications were clear from that day that the door had been firmly shut by the previous Public Protector. The recordal in the order of that day only emphasised the finality of that part of the previous Public Protector's investigation. A reasonable litigant would have realised this and aborted the application then and there.

[46] The President's persistence with the litigation, in the face of the finality of the investigation and report, as well as his own unequivocal statement regarding that finality, clearly amounts to objectionable conduct by a litigant and amounts to clear abuse of the judicial process. An abuse of the judicial process is evinced when a party conducts litigation in an unreasonable manner to the prejudice of those who are naturally forced to defend their interests. It is such conduct that has been viewed by courts as a justifiable

basis to mulct the culpable litigant with a punitive costs order. See in this regard *In Re Alluvial Creek Ltd*:[7]

'An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious.'

The decision in *Alluvial Creek* has been followed in a number of cases: see *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd & Another* 1997 (1) SA 157 (A) at 177D-F; *Camps Bay Ratepayers' and Residents Association & Another v Harrison & Another* 2011 (4) SA 42 (CC) para 76 and footnote 72.

[47] My view is that in this case a simple punitive costs order is not appropriate. I say this because that would make the tax payer liable for the costs. This is a case where this Court would be justified in finding that this is an unwarranted instance for the tax payer to carry that burden. The conduct of the President, and the context of the litigation he initiated, requires a stemer rebuke. There is not the slightest doubt that, properly considered, the background of the matter and the circumstances of the litigation show that the President had no acceptable basis in law and in fact to have persisted with this litigation. In fact, the President's conduct amounts to an attempt to stymie the fulfilment of a constitutional obligation by the Office of the Public Protector.

[48] In *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government*[8] the SCA specifically discussed the personal liability of public officials for legal costs. It said:

'In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the Board, cannot conclusively be said to constitute contempt of court. However, that does not excuse their

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7 1929 CPD 532 at 535.

8 2013 (5) SA 24 (SCA) para 54. See also Democratic Alliance v South African Broadcasting Corporation SOC Ltd; Democratic Alliance v Motsoeneng & Others [2017] 1 All SA 530 (WCC) paras 220-222 and Solidarity and Others v South African Broadcasting Corporation 2016 (6) SA 73 (LC) paras 74-78.

behaviour. The MEC, in her responses to the opposition by the Board, appeared indignant and played the victim. She adopted this attitude whilst acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the Board and Mafoiane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred.' (Emphasis added)

[49] The finding made regarding the issues considered and discussed on this aspect can only result in one conclusion, that the President persisted with litigation and forced the intervening parties to incur costs in circumstances when this should and could have been avoided as well as delaying the release of the report. In so doing he clearly acted in flagrant disregard for the constitutional duties of the Public Protector. What is also aggravating is the fact that the President's application was based on self-created urgency. Simply put, the President had become aware some six (6) months before his abortive application that the Public Protector was in possession of complaints implicating him in serious misconduct and he did nothing when he was invited for comment.

[50] Having come to this finding it is unnecessary to consider the interesting question whether the President was vindicating his personal interests when he initiated this litigation. It is necessary, however, to express the view that, without deciding the issue conclusively, the case made by the intervening parties on this leg was also not without merit. This is based on the fact that it is common cause that in his request for an investigation contained in the complaint lodged with the Office of the Public Protector, the leader of the DA stated:

'It is our contention that President Jacob Zuma may have breached the Executive Members Code by (i) exposing himself to any situation involving the risk of a conflict between their official responsibilities and their private interests, (ii) acted in a way that is inconsistent with his position and (iii) use their position or any information entrust to them, to enrich themselves or improperly benefit any other person. The prerogative to appoint Ministers and Deputy Ministers fall squarely at the feet of the President. He and only he is empowered by section 91 (2) of the Constitution of the Republic of South Africa, this power may not be delegated. If the allegations levelled by Ms Mentor that the President had knowledge and was present when members of the Gupta family offered her the position of Minister of Public Enterprise, he would be wilfully allowing persons to other than himself to appoint members of the Cabinet.

This conduct we submit would be a breach of the aforementioned provisions of the Executive Members Code.'

[51] In the letter to the President notifying him of the complaint received from the DA, the Public Protector, stated:

'In terms of Section 3 of the Executive Members Ethics Code, I have a peremptory duty to investigate a properly submitted complaint of a Member of Parliament. If you have any comments on the allegations levelled against you, I will appreciate a letter indicating such comments from you." In the same letter the Public Protector also mentioned the complaint received from the Dominican Order requesting her office to "conduct a systematic investigation under the Public Protector Act (PPA) 23 of 1994 into undue influence Ministers' and Deputy Ministers' appointments, possible corruption, undue enrichment and undue influence in award of tenders, mining licences and government advertisements...'

The Public Protector stated further in that letter that the request to her office was:

'To investigate the allegations of the two ANC members, Mcebisi Jonas (the deputy finance minister) and Vytjie Mentor, (previously the Chairperson of the Portfolio Committee on Public Enterprises), that they were offered cabinet positions in exchange for executive decisions favourable and beneficial to the business interest of the Gupta family. To investigate whether the appointment of Des van Rooyen to Minister of Finance was allegedly known by the Gupta family beforehand.'

[52] The portions mentioned in the preceding paragraph encapsulated the critical allegations that related to the President directly and they formed the basis of the investigation conducted by the Public Protector. The report that is at the centre of this litigation was the result of the investigation conducted by the Public Protector into the allegations referred to above, insofar as the President is concerned.

[53] The President's overarching basis for launching the application in the first place was that he faced the risk of the Public Protector issuing a report 'which may in all probability make findings adverse to me or my interests without any input on my part'. He further asserts that if 'the interim report impugns my integrity, it will no doubt be a breach of my fundamental right to dignity – a constitutional right. The Public Protector, as a Chapter 9 institution cannot be the one undermining the entrenched fundamental rights which everyone, including me, enjoys.' The President further stated that he had not been able to exercise his right to be heard in relation to the allegations made against him

and that the public interest in releasing the report 'cannot outweigh my right to enforce a constitutional right to just administrative action,' and 'I therefore state that my constitutional right to just administrative action has been infringed.' (Emphasis added)

[54] The language used by the President, justifying his Court bid is clear and unambiguous – he was vindicating his individual rights under the Bill of Rights. That he was protecting his individual rights comes out more in his answer to Ms Mentor's application. He states therein that he was protecting his personal interests. Nowhere in his papers does he state in what respects the office of the Presidency would be detrimentally affected by the release of the report. In this regard the President's argument that the mere fact that the investigation was in terms of the EMEA is sufficient to locate this matter in the realm of his official capacity misses the point. That conclusion cannot simply follow as contended by the President, it is the nature of the conduct investigated that determines if the issue is personal or official. The President's argument boils down to this – any conduct of a Member of the Executive will qualify as official as long as it is investigated under the EMEA. This is a misnomer. Members of the Executive have private dealings in their personal capacities and these are quite distinct from their conduct whilst pursuing the interests, objectives and responsibilities of the departments they lead. Put differently, if that conduct falls outside the confines of the Constitution, more particularly Chapter 5 thereof, we fail to see how such conduct can be regarded as conduct of the Head of State acting in his official capacity.

[55] In the final analysis the President's overall conduct leaves me one option but to find that he must be held personally liable for all the costs that were occasioned from 14 October 2016, when Fourie stated that the previous Public Protector had finalised the investigation and signed the report. The President compounded matters when he persisted with the litigation, based on a supposed typing error, after initially conceding that the report be released if indeed the Public Protector had finalised the investigation and signed the report.

[56] In the circumstances the following order is granted:

1. The President is ordered to personally pay the costs referred to in paragraph 3 of the order made by this court on 1 November 2016 to the extent that such costs were incurred after 14 October 2016.

D MLAMBO

JUDGE PRESIDENT

GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

I agree

PM MOJAPELO

DEPUTY JUDGE PRESIDENT

GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

I agree

DS FOURIE

JUDGE

GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

Date of Hearing	1 November 2016
Date of Judgment	13 December 2017

Legal Representatives

Counsel for the Applicant:	Adv Anthea Platt SC
	Adv Myron Dewrance
Instructed by:	State Attorney
Counsel for the First and Second Respondent:	Adv Nick Ferreira
Instructed by:	Adams and Adams Attorneys
Counsel for the First Intervening Party:	Adv Dumisa Ntsebeza SC
	Adv Thembeka Ngcukaitobi
Instructed by:	Ian Levitt Attorneys
Counsel for the Second and Third Intervening Parties:	Adv Dali Mpofu SC
	Adv Mpati Qofa

Instructed by:	Mabuza Attorneys
Counsel for the Fourth Intervening Party:	Adv Etienne Labuschagne SC
	Michael Bishop
Instructed by:	Mincle Shapiro Smith Inc
Counsel for the Fifth Intervening Party:	Adv Nicole Lewis
Instructed by:	Webber Wentzel Attorneys

JZOM

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 79808/16

In the application for intervention of:

DEMOCRATIC ALLIANCE — Intervening Party

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — Applicant

and

THE OFFICE OF THE PUBLIC PROTECTOR — First Respondent

THE PUBLIC PROTECTOR — Second Respondent

APPLICANT'S REPLYING AFFIDAVIT

I, the undersigned,

JACOB GEDLEYIHLEKISA ZUMA

J.G.Z.

do hereby make oath and state that:

1. I am the President of the Republic of South Africa ("the President"), duly appointed in terms of section 87 of the Constitution of the Republic of South Africa, 108 of 1999 ("the Constitution"). I am the applicant in the matter. I have previously deposed to the founding affidavit in this matter.

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

3. Any legal submissions that are made by me are made on the advice of my legal representatives.

THE PUBLIC PROTECTOR'S DECISION TO ABIDE

4. Before replying to the DA's answering affidavit, I wish to deal with the Public Protector's affidavit only insofar as it relates to the status of the report.

5. In my answering affidavit to the DA's intervention application, I demonstrated that Fourie delivered an affidavit in the Van Rooyen application which contains a contradiction. On the one hand, he stated that

JGZ

the investigation had been finalised but, on the other hand, that it is finalised and that the report had been signed. I pause to mention that, at the time of launching the application, I received no indication that the report would be finalised. I was requested to provide my answers to the questions to the Public Protector by 11h00 on Thursday, 13 October 2016 (annexure "K" to the founding affidavit). This application was launched on 13 October. The application was served on the Public Protector at 11:17. I have already dealt with the importance of this letter in my answering affidavit to the DA's intervention application and do not intend repeating it here.

6. The Public Protector has now delivered a notice to abide the decision of the Honourable Court on 21 October 2016. She filed an "*answering affidavit*" together with a notice to abide.

7. She then sets out her position in order "*to be of assistance to the Court in adjudicating upon the matter*". She specifically states that she has not been able to fully acquaint herself in detail with the process that Adv Madonsela followed in conducting the investigation and preparing her report. Nevertheless, she received a briefing from Foutie relating to the conducting of the investigation and the preparing of the report. She concedes that paragraphs 13 to 27 of my founding affidavit (excluding paragraph 21) and

the correspondence between myself and Adv Madonsela, "*appear*" to be accurate and constitute the common cause facts in this application.

8. She also states that she cannot form a view on the appropriateness of the process followed in the preparation of the report and it is unclear, from a legal perspective, whether she is permitted to revisit the findings contained in the report which "*has been finalised and signed by [her] predecessor, Advocate Madonsela*". Therefore, she is not "*in a position to either advocate that the report prepared and finalised by [her] predecessor be released or that [I] first be given additional time in which to submit representations*". Therefore, in her view, the appropriate course of action is for this Honourable Court to decide whether or not the report should be released or whether I should first be given additional time within which to submit my representations.

9. In my answering affidavit to the DA's intervention application, I indicated that Fourie's answering affidavit in the Van Rooyen application contains a contradiction in that he alleges that the Public Protector is in the process of completing her report but, on the other hand, also alleges that the Public Protector has already finalised and signed off the report.

10. In the Public Protector's answering affidavit in this application, the new incumbent of the office of the Public Protector states that she has been

advised that Adv Madonsela finalised the report on 14 October 2016 and that the report has been signed (para 6.1 read with para 8). The aforementioned advice could only have been given to her by Fourie because a confirmatory affidavit from Fourie is attached. Therefore, when the new Public Protector states that the report has been prepared and finalised by her predecessor, it can only be done on the advice of Fourie. The new Public Protector does not conclusively state that the report is final.

11. It is still unclear whether the report is final or not because the contradiction contained in Fourie's affidavit in the Van Rooyen application has not been clarified in this application. The only way to determine whether the report is final or not is for the Public Protector to say so in no uncertain terms. In this regard, I invite her to do so. I also invite Fourie to explain the contradiction contained in his affidavit in the Van Rooyen application. I attach a copy of Fourie's affidavit in the Van Rooyen application as annexure **"RA1" hereto.**

12. I now deal *seriatim* with the allegations contained in the DA's founding application. This affidavit is not intended to deal with or traverse all allegations in the answering affidavit but that this reply must be read in the light of the facts as contained in the founding affidavit in relation to this urgent application.

J.GZ

Ad paragraph 28 thereof

13. I deny the content of this paragraph.

14. "Primary subject" is not the same as an "implicated person". Subject as defined in the Concise Oxford English Dictionary 10th Edition, revised, 2002, means "a person to thing that is being discussed or dealt with or that gives rise to something. "Implicate" as defined in the Concise Oxford English Dictionary 10th Edition, revised, 2002 means "show to be involved in a crime".

15. It is clear from the admitted facts of the Public Protector that, for the purposes of section 9 of the Public Protector Act, I became an implicated person on 2 October 2016.

Ad paragraph 29 - 31 thereof

16. I deny the content of these paragraphs.

17. The DA has admitted that it has no knowledge of the section 7(9) notice questions or its contents. Therefore, all its allegations which are based on the section 7(9) questions are mere speculation and conjecture and should be struck out on that basis.

18. It is clear that the Public Protector has not taken issue with the section 7(9) notice.

Ad paragraph 33 thereof

19. It is clear that the DA admits that I have the right to just administrative action. They contend that I have been given a reasonable opportunity to answer those questions. Again, the DA speaks from no knowledge of the facts of this matter. The Public Protector has admitted to the fact that the section 7(9) notice was only provided on 2 October 2016 and therefore there was not a reasonable opportunity for me to answer meaningfully the questions.

Ad paragraph 35 thereof

20. I admit that all state organs have a constitutional obligation to assist the Public Protector.

21. The rights I seek to protect are those that attach to a person when they become an implicated person in terms of section 7 of the Public Protector Act.

Ad paragraph 37 thereof

22. I deny the content of this paragraph.

23. The Public Protector in her letter of 11 October 2016, being annexure "K" to the founding affidavit, provides a legitimate expectation that I would be given the right to ask questions through the Public Protector. Paragraph 11 of that letter specifically states that *"I look forward to receiving the questions you wish to pose to witnesses who have appeared before me. I shall make a determination on such questions in accordance with the Public Protector Act."*

Ad paragraph 38 thereof

24. I deny the content of this paragraph. It is clear that the Public Protector has admitted that the briefing session on 6 October 2016 had changed to an opportunity for me to answer questions.

25. Again, the DA speaks from a position of not knowing the actual facts and basis its allegations on speculation and conjecture.

J. Zuma

Ad paragraph 39 thereof

26. I deny the content of this paragraph. The Public Protector has admitted this fact.

Ad paragraph 40 thereof

27. I deny the content of this paragraph. I aver that in order to ask questions of any witness it is necessary to establish what was said, which in the context of this case would be to obtain the record of the interview or the statement relied upon.

Ad paragraph 42 thereof

28. I deny the content of this paragraph.

29. The DA confuses being the subject of an investigation and being an implicated person in an investigation.

Ad paragraph 46.2 thereof

30. I deny that I chose not to take advantage of the opportunity to make representations.

J.G.Z.

31. The Public Protector admitted that I sought an opportunity to make representations and also admitted to giving me an opportunity to provide questions.

Ad paragraph 49 thereof

32. I deny the content of this paragraph.

33. The DA has not seen the two sets of questions provided to me and therefore cannot determine whether a reasonable opportunity was provided to me.

WHEREFORE I persist with the relief as contained in the Notice of Motion.

JACOB GEDLEYIHLEKISA ZUMA

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at CAPE TOWN on this the 25 day of OCTOBER 2016

2016, the regulations contained in Government Notice No 3619 of 21 July 1972 and No 1648 of 19 August 1977 having been complied with.

K.T. Cele

COMMISSIONER OF OATHS

Adrian Van Greuven

SA Police Services

SOUTH AFRICAN POLICE SERVICE
UNIT COMMANDER FOR CAPE TOWN
PROTECTION AND SECURITY SERVICES
2016 -10- 25
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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
CASE NO: 21029/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

29/09/2017
DATE

.....
SIGNATURE

In the matter between:

DEMOCRATIC ALLIANCE — Applicant

and

JACOB GEDLEYIHLEKISA ZUMA
(PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA) — First Respondent

THE PUBLIC PROTECTOR OF SOUTH AFRICA — Second Respondent

JUDGMENT

MAKUME, J:

[1] In this matter there are two applications. In the first application the Applicant seeks the following relief:

1.1 Declaring that the remedial action taken by the Public Prosecutor in paragraph 8.4 of the Report titled "State Capture" (the Report)

against the President in terms of Section 182 (1) (c) of the Constitution is binding unless and until paragraph 8.4 of the Report is set aside by a court of law.

1.2 Directing the President to comply with the remedial action set out in paragraph 1 above within thirty days of the date of this order;

1.3 Declaring that the President's failure to comply with the remedial action referred to in paragraph 1 is inconsistent with Section 83 (b) read with Section 181 (3) and 182 (1) (c) of the Constitution and is invalid;

1.4 Directing the President to pay the costs of suit including the costs of two counsel; and

1.5 Granting the Applicant such further or alternative relief as this court may deem fit.

[2] In the second application the First Respondent (The President) seeks relief in the following terms:

2.1 Staying the implementation of paragraph 8.4 of the remedial action contained in the State Capture Report number 6 of 2016/2017 published on 2 November 2016 (the Report) pending

the finalisation of the review application under case number 91139/16.

2.2 Costs of suit in the event of opposition.

2.3 Further and or alternative relief

[3] The First application is dated the 23 March 2017. The second application is dated the 12th June 2017. It is convenient at this stage to briefly set out the facts and events that led to the two applications.

[4] On the 2nd November 2016 the Public Protector released a report about a complaint laid by the Applicant and others in connection with the relationship between the President and the Gupta Family including other person connected to institutions controlled by the Government. The report is titled "The State of Capture". It needs mentioning that the release of that report itself was not without difficulties the process was finally resolved when a court order was granted to the Public Protector to release the report.

[5] In the report the Public Protector directed the President to appoint a commission of inquiry within 30 days to be headed by a judge selected by the Chief Justice and in any case only one name of the incumbent judge would be provided to the President for appointment.

[6] On the 25th November 2016 the office of the President announced that the President intended to institute review proceedings against the remedial action prescribed by the Public Protector. On the 28th November 2016 the Applicant's attorney in responding to that announcement addressed a letter directly to the President and said the following in paragraph 6 and 7 thereof:

"[6] The Democratic Alliance notes your intention to review the Public Protector report and remedial action as is your right. However you are required to comply with it within 30 days. Neither an intention to launch a review nor launching the review itself will absolve you of the obligation to comply with the Public Protector's remedial action. Unless you obtain an interim interdict staying the Public Protector's remedial action pending the outcome of your review, you are obliged to comply notwithstanding any attempt to review her remedial action."

[7] I therefore write to advise you that unless you obtain an interim interdict entitling you not to comply with the Public Protector's remedial action by 2 December 2016, the DA will approach the appropriate court on an urgent basis to compel you to comply. In addition, the DA will seek a declarator that you have, again failed to comply with your constitutional obligation in terms of section 83(b) of the Constitution read with Sections 181 (3) and 182 (1) (c). If you intend to obtain such an interdict, please inform me at your earliest convenience."

[7] On the 1st December 2016 the State Attorney advised the Applicant attorneys that the President will launch his review application by the 2nd December 2016 and will cite all relevant and interested parties. On receipt of that letter, Applicant's Attorney wrote back to the State Attorney and in that letter the following was said:

"[2] You indicated that you instructions are that the President will be launching his review on 2 December 2016 to all relevant parties.

[3] Your attention is drawn to the matter of ***City of Tshwane Metropolitan Municipality v Afriforum and Another (157/15)[2016] ZACC 19; 2016 (a) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016).***

[4] It is not sufficient to merely launch a review of the Public Protector's report but your client must obtain a court order determining the review application prior to 2 December 2016 in order to suspend his obligation to comply with the Public Protector's remedial action."

[8] As promised the President launched his review application on the 2nd December 2016 and cited all the relevant and interested parties it is common cause that the review application is set down for hearing in this court on the 23 and 24 October 2017.

[9] Notwithstanding service of the application to review the Applicant opted to launch their own application on the 5th December 2016 seeking exclusive and direct access to the Constitutional court with the aim to ask the Constitutional Court to declare that the President had violated his obligations in terms of the Constitution by failing to comply with the Public Protector's remedial action in not appointing a commission of inquiry as set out in paragraph 8.4 of the Public Protector report.

[10] The President opposed that application. The Second Respondent being the Public Protector filed a notice to abide. On the 8th February 2017 the Constitutional Court dismissed that application. The order of the Constitutional Court reads as follows:

"The Constitutional Court has considered the application for direct access. It has concluded that the application should be dismissed as it is not in the interest of justice to hear the matter at this stage."

[11] It was shortly after the dismissal of the application in the Constitutional Court that the Applicant launched their application to compel compliance with paragraph 8.4 of the Remedial action taken by the Public Protector. It is the application that I have referred to as the first application in paragraph 1 above.

[12] Pleadings became closed in the President's review application case no 91139/2016 as well as in the first application. The applications were case managed by the Deputy Judge President and directives issued.

[13] It was on the 12th June 2017 when it became clear that the Applicants were not conceding that the launching of the review application suspends the operation of the Public Protector's remedial action that the President on advise launched the conditional counter application. It is the application that I refer to as the second application in paragraph 2 above.

[14] The Public Protector is not opposing the application by the Democratic Alliance to compel compliance with the remedial action, a notice to abide was filed on the 18th May 2017. However, on receipt of the President's conditional counter application (the second application) the Public Protector filed a Notice to Oppose and has duly filed an Answering Affidavit as well as Heads of Argument.

THE REMEDIAL ACTION

[15] The full text of the Public Protector's remedial action which she argues was taken in pursuit of Section 182 (1) (c) of the Constitution of the Republic of South Africa read as follows:

"To The President

8.4 The President to appoint within 30 days a commission of enquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President.

8.5 The National Treasury to ensure that the commission is adequately resourced.

8.6 The judge to be given the power to appoint his/her own staff and to investigate all the issues using the record of this investigation and the report as a starting point.

8.7 The commission of enquiry to be given powers of evidence collection that are no less than that of the Public Protector.

8.8 The commission of enquiry to complete its task and to present the report with findings and recommendation to the President within 180 days. The President shall submit a copy with an indication of his/her intention regarding the implementation to Parliament within 14 days of releasing the report.

8.9 Parliament to review within 180 days the Executive Members Ethics Act to provide better guidance regarding integrity, including avoidance and management of conflict of interest. This should clearly define responsibilities of those in authority regarding a proper response

to whistle blowing and whistle blowers. Consideration should also be given to a transverse code of conduct for all employees of the state.

8.10 The President to ensure that the Executive ethics code is updated in line with the review of the Executive Members Ethics Act.

8.11 The Public Protector in terms of Section 6 (4) (c) (i) of the Public Protector Act brings to the notice of the National Prosecuting Authority and the DPCI those matters identified in his report where it appears crimes have been committed.

[16] The remedial action taken by the Public Protector as set out in 8.5, 8.6 and 8.8 are all dependant on remedial action 8.4. If 8.4 falls away the rest follow. However, it would seem to me that the remedial action taken in 8.9, 8.10 and 8.11 have nothing to do with the appointment of a commission of enquiry they are independent remedial actions to be dealt with by different institutions. It is therefore not surprising that the Applicant in the first application is seeking primarily an order directing the President to comply with remedial action 8.4 Prayers 2 and 3 of the Applicants notice of motion are inseparable and represent the main order that the Applicant seeks. In the conditional counter application the President seeks a stay of the implementation of the remedial action set out in paragraph 8.4 of the report.

THE ISSUE

[17] The crisp and sharp points of dispute between the parties are the following:

17.1 Whether the President's application in case no. 91139/16 to review the Public Protector's remedial action has the automatic effect of staying implementation of the remedial action.

17.2 In the event that this court finds that the review application does not have the effect of automatically putting on hold or suspending implementation of the remedial action whether the President is entitled to the relief in the conditional counter application for a stay of the implementation of the remedial action pending the outcome of the review application.

[18] At the centre of the dispute in the review application are the Constitutional powers and obligations of the President *vis-à-vis* the Constitutional court findings in the matter of ***Economic Freedom Fighters vs Speaker of the National Assembly and Others 2017(3) 580 CC***. In short the Applicants argue that, that decision referred to as the Nkandla decision concluded that remedial actions by the Public Protector are binding and should be implemented. The Applicant also relied to a large extent on the decision of the Constitutional Court in the matter of ***Tshwane City vs Afriforum and Another 2016 (SA) 279***

CC in its contention that an application for review does not result in the automatic suspension of the remedial action. The Applicant says that what is required is an interdict or a stay application. It is not surprising that prayer 2 in the Applicant's notice of motion is worded in precisely the same terminology as the order granted by the Constitutional Court in the Nkandla decision which reads as follows:

> *"(3) The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of S 182(1) (c) of the constitution is binding."*

Prayer 4 of the Application also mirrors the wording in the order of the Nkandla decision which reads as follows:

> *"The failure by the President to comply with the remedial action taken against him by the Public Protector in her report of 19 March 2014 is inconsistent with Section 83(b) of the Constitution read with SS 181(3) and 182 (1) (c) of the Constitution and is invalid."*

[19] Before I deal with the issues before me I deem it appropriate to refer to a paragraph in the Nkandla decision at page 609 being paragraph 71 which reads as follows; *"In sum the Public Protectors Powers to take appropriate remedial action is wide but certainly not unfettered. Moreover the remedial action is always open to judicial scrutiny"*. It is

also not inflexible in its application but situational and at paragraph 74 the court emphasising the fact that decisions although binding are not immune from judicial scrutiny said the following:

> *"This is so because our Constitutional order hinges also on the rule of law. No decision provided in the Constitution or law may be disregarded without recourse to a court of law. To do so would amount to a licence to self help."*

[20] In the review application as well as in his answering Affidavit to the application to compel compliance the President has raised pertinent and crucial constitutional issues which can be summarised as follows:

20.1 The remedial action directing the President to appoint a commission of enquiry is dictatorial and offends separation of powers doctrine which is part of our rule of law.

20.2 Section 84(2) (f) of the Constitution grants exclusive and executive power to the President and no one else to appoint commissions of inquiry.

20.3 That no arm of government can constitutionally intrude into the sphere of the other unless authorised by the Constitution.

20.4 That the remedial action is inconsistent with the Constitution and

accordingly invalid

[21] In the matter of ***City of Tshwane Metropolitan Municipality v Afriforum and Another 2016 (6) SA279*** Afriforum had obtained an interdict preventing the City of Tshwane from replacing the old street name in Tshwane with new names. That interdict was granted pending the review application brought by Afriforum to review the city's decision.

[22] The City of Tshwane held the view that the interim interdict should not prevent it from carrying out it decision and thus filed an appeal against the granting of the interim interdict. The full court of this division dismissed the appeal so did the Supreme Court of Appeal. The City then petitioned the Constitutional Court for direct access to appeal the decision of the High Court.

[23] That matter was finally decided on the basis that Afriforum had not satisfied the requirements for an interim interdict to be granted in their favour hence the appeal was upheld and Tshwane was permitted to continue with the name changes notwithstanding the pending review application.

[24] There is a distinction between the issue and facts in the City of Tshwane vs Afriforum matter and what is in issue in the present matter. It must be recalled that in the City of Tshwane vs Afriforum matter,

Afriforum issued its first interdict and when the City suspended the idea of the name changes Afriforum did not launch a review application it was only after 7 months when nothing was happening that when the City recommenced with the name changes that Afriforum then filed a fresh interdict. In dealing with the aspect of Afriforum having failed to prove that it will suffer irreparable harm if the interdict was not granted the Constitutional Court held that irreparable harm implied that the effect of the harm could not be reversed. The Constitutional Court found that the review court could reinstate the old names if Afriforum was successful.

[25] The irreparable harm referred to in the Afriforum matter cannot in my view be compared to the irreparable harm that will follow should I conclude that the remedial action should be implemented notwithstanding the pending review application.

[26] It must be kept in mind at all times that what the President is asking for in the review application is that the remedial action in 8.4 be set aside on the basis that it is unconstitutional, dictatorial and usurps the powers that vest in the President only. That application strikes at the very heart of the powers of the Public Protector and the extent to which her remedial action is authorised and circumscribed by the constitution.

[27] It is significant to note that the Public Protector is not opposing the review application but has filed an application opposing the application

to stay the implementation application. The Public Protector in her affidavit opposing the stay says no more than that the President as well as other ANC leader have at various platforms indicated that he is not opposed to setting up a commission enquiry but not on the terms as dictated to by the Public Protector.

[28] When the Constitutional Court refused to hear the DA's application during February 2017 it was aware that a review application had been launched. It is therefore not surprising that the Constitutional Court said that it was not in the interest of justice to hear the matter at that stage. In my view the Constitutional Court implied that the review application must be dealt with and finalised before the President could be compelled to comply with the remedial action set out in paragraph 8.4.

[29] The Public Protector conceded at paragraph 5 of her Answering Affidavit to the stay application and said that this court has a discretion to stay the remedial action pending the determination of review if this court is satisfied that it is in the interest of the court to do so.

[30] In my view it will not be in the interest of justice to direct the President to implement the remedial action prior to the review court having finalised the constitutional dispute raised by the President.

[31] I say that it will not be in the interest of justice because once the President appoints such a commission or even before he does so he will be entitled to challenge the decision compelling him to do the appointment. This will result in parallel procedures based on the same issues namely the review and the appeal against my decision. In my view it will not only be a waste of resources but may very well amount to abuse of legal process. Secondly I enquired from Applicant's counsel what will happen to the commission if the review court sets aside the impugned remedial action I did not get a clear answer safe to say that it will stop to function. I am not told what will happen to the decision the commission may have already taken. The commission may have incurred expenses in setting up offices, issued subpoenas to witnesses and called for written submissions. In my view it will not be in the interest of justice at this stage to compel the President to implement the remedial action.

[32] In the recent unreported matter between: ***South African Reserve Bank v Public Protector and 5 others Case Number 43769/17*** a judgment by my brother Murphy J dated 15th August 2017 the court had to deal with the challenge by the Reserve Bank against the remedial action taken by the Public Protector. At paragraph 9 of that judgment the court said the following:

"Despite initially opposing the application, the Public Protector filed an answering affidavit in which she conceded the merits and consented to

all the relief sought She has agreed that her remedial action is unlawful in that only Parliament has the power to amend the Constitution and that she has no power to dictate to Parliament."

[33] The question to be asked is if that is what she said recently about parliament will her view be different when it is the President who claims the sole constitutional authority to appoint a commission of enquiry. That question will have to be answered on the 23rd October 2017.

[34] The Applicant has failed to demonstrate what prejudice or harm will befall it if the President does not appoint a commission of enquiry now 10 months after the report by the Public Protector. Nothing has happened in the last 10 months it will therefore not make any difference if the commission is appointed after the review shall have been heard should the President fail in his application to set aside the remedial action.

[35] In the matter of ***MEC for Health Eastern Cape and Another vs Kirland Investments (Pty) Ltd 2014 (3) S 481 CC*** the court held that when an administrator errs those decisions exist and have legal effect until set aside on review.

[36] The review application raises important legal and constitutional issues and is a matter of great public interest on which this court still has to pronounce itself and accordingly to compel the President at this stage

will not only be tantamount to denying him a hearing or his day in court but it may also be understood to mean that the Public Protector powers are unassailable irrespective of the content of her decision. That cannot be correct.

[37] In my view it is immaterial whether the review application suffices to stay the Applicant's application to compel or whether an order shall be granted as per the conditional counter application. The result will be the same. The Applicant is being technical by insisting that the application to stay should have preceded the application to review. Interlocutory applications can be brought at any time during the proceedings.

[38] In summarising their opposition to the granting of the conditional counter application the DA conceded that the standard for a stay application is the same as the standard for an interim interdict and rely on the decision of ***City of Tshwane vs Afriforum*** (Supra) also the decision of ***International Trade Administration Commission v Scaw South Africa (Pty) Ltd 2010 (5) BCLR 457 (11)*** and lastly the decision in the matter of ***National Treasury & Others v Opposition to Urban Tolling Alliance & Others 2012 (11) BCLR 1148 (CC).***

[39] In the ***National Treasury & Others v Opposition to Urban Tolling Alliance*** (matter) otherwise popularly referred to as the OUTA matter, the then Deputy Chief Justice Moseneke in granting National Treasury

leave to appeal the decision of the High Court made the following remarks at paragraph 22:

"[22] I am of the view that the pending judicial review raised at least two constitutional issues. The review has been brought under Section 6 of the Promotion of Administrative Justice Act Section 3 of 2000 (PAJA) a statute enacted to give effect to the right to just administrative action guaranteed by the Constitution. Secondly the review poses the question whether the relief sought entails an improper trespass on the exclusive domain of the Executive. Similarly in the Appeal before us the prominent issue is whether the grant of the interim interdict has impermissibly trenched upon the Constitutional tenet of separation of powers. These are constitutional issues of considerable importance."

[40] I have kept in mind that in deciding this application it would be in appropriate for this court to express a view or usurp the functions of the review court. What is of prime importance is the considerable constitutional issues that have been raised one of which is the aspect of separation of power. The constitutional court in the OUTA matter in upholding the appeal expressed itself strongly on this issue.

[41] Lastly in a unanimous decision of the Constitutional Court in the matter of ***International Trade Administration Commission vs SCAW*** (Supra) it was held that since the Interdict had the effect of curtailing executive power to formulate and implement trade policy and also

caused irreparable harm by maintaining antidumping duties which would have otherwise ended, leave to appeal had to be granted. The court strongly discouraged judicial intrusion on executive domain. In the present matter the President makes the point that the Public Protector in taking remedial action 8.4 is intruding on his executive domain.

[42] In my view it will be in the best interest of justice to grant the President a stay of the implementation of the remedial action pending a decision in the review application. In any event the Democratic Alliance itself makes the point that only a court order will suffice to suspend implementation of the remedial action.

[43] In the result I make the following order:

1. The Application by the Democratic Alliance (Applicant) in which it seeks implementation of the remedial action 8.4 taken by the Public Protector is hereby stayed pending finalization of the review application under case number 91139/16.

2. The Applicant (Democratic Alliance) and the Second Respondent (Public Protector) are ordered to pay the costs of this application which shall include the costs of two counsels.

DATED at PRETORIA on this the 29TH day of SEPTEMBER 2017.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	:	12 & 13 SEPTEMBER 2017
DATE OF DELIVERIN	:	29 SEPTEMBER 2017
FOR APPLICANT	:	Adv Katz Sc
WITH HIM		Adv M Bishop
		Adv S Kazee
INSTRUCTED BY	:	Messrs Minde Shapiro Smith Inc.
		c/o Klagsbrun Edelstein
		Pretoria
FOR FIRST RESPONDENT	:	Adv IAM Semenya SC
(PRESIDENT OF SA)		Adv AL Platt SC
		Adv M Dewance
INSTRUCTED BY	:	State Attorney
		Pretoria
FOR SECOND RESPONDENT	:	Adv H Mcentyre SC
(PUBLIC PROTECTOR)		Adv N Ferreira
INSTRUCTING	:	Messrs Adams and Adams
		Pretoria

4

IN THE HIGH COURT OF SOUTH AFRICA
NATAL PROVINCIAL DIVISION

CASE NO : CC358/05

In the matter between :

THE STATE

and

JACOB GEDLEYIHLEKISA ZUMA	**ACCUSED 1**
THINT HOLDINGS (SOUTHERN AFRICA) (PTY) LTD	**ACCUSED 2**
THINT (PTY) LIMITED	**ACCUSED 3**

J U D G M E N T

MSIMANG J

Three accused in this matter stand indicted on four (4) counts of contravening the sections of the Corruption Act 94 of 1992 and on a number of alternative counts also relating to the contravention of the said Act, the contravention of the Prevention and Combating of

the Corrupt Activities Act, 12 of 2004 and the contravention of the Prevention of Organised Crime Act 121 of 1998.

During October of 2005 counsel for all the parties met with the Judge President of this division and, during that meeting, a date of trial of the matter was agreed upon, to wit, 31 July 2006 and it was further agreed that a provision would be made for the trial to run for at least four (4) months thereafter. However, on 7 April 2006, the authority charged with the prosecution in the matter, namely, the Directorate of Special Operations (DSO), addressed a letter to the attorneys for accused numbers 2 and 3, copying the same to the attorneys for accused number 1 and to the Registrar of this court, in which letter the said authority, *inter alia,* for the first time informed all concerned that it would appear that the agreed trial date was becoming increasingly unrealistic, ascribing that state of affairs to the delays in finalising the indictment and investigations occasioned by certain litigation. A suggestion was made that a meeting again be arranged with the Judge President to discuss the way forward.

Thereafter an exchange of correspondence ensued between the defence and the DSO resulting in the letter dated 11 July 2006 addressed to the DSO by the attorneys for accused number 1 in which letter a suggestion was made that, should the DSO still desire to apply for a postponement of the trial on 31 July 2006, they should do so by means of a substantive application supported by affidavit. This suggestion was later agreed upon by all the parties, save that in its letter dated 11 June 2006 (sic) the DSO expressed a view that, while they were in agreement, in principle,

that the exchange of affidavits in advance of the trial date may be of assistance to the court and may avoid any delay in disposing of the application for a postponement, such a procedure is not provided for in the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) and therefore that the arrangement should not be construed as subjecting the parties to the rules of court governing the conduct of civil applications on motion.

It was against the background of these facts that on 19 July 2006 the DSO filed a Notice of Motion accompanied by a supporting affidavit in which Notice it gave notice that on the trial date an application would be made for an order in terms of section 168 of the Criminal Procedure Act that the trial be adjourned to a date during the year 2007 to be arranged in consultation with the trial Judge and/or the Judge President.

When the matter was called on 31 July 2006 the defence, in turn, gave notice that they intended to oppose the said application for a postponement and, in addition, that they would launch their own counter-application claiming a permanent stay of the prosecution or, in the alternative and in the event of such a stay not being granted, that, in terms of section 342 A of the Criminal Procedure Act, the court strike the matter off the roll and impose conditions relating to the reinstitution of the prosecution. Together with the said notice defence counsel from the bar handed their own papers in the form of affidavits opposing the State's application for a postponement and in support of their counter-application. After listening to argument I made the following order, namely, that :-

(a) The State files its replies and answers in the application by no later than 14 August 2006;

(b) The defence files their replies by no later than 21 August 2006;

(c) The defence files Heads of Argument by no later than 28 August 2006;

(d) The State files Heads of Argument by no later than 31 August 2006;

(e) The applications are adjourned for argument to 5 September 2006.

Indeed, voluminous papers have since been filed by the parties in terms of the said Order with the result that, to date and excluding the Heads of Argument, the papers amount to a total of four thousand and forty three (4043) pages.

Before dealing with the issues raised in the applications, and for purposes of doing so, I first set out the surrounding facts of this case.

Accused number 1 is an adult male and is well-known within the Republic of South Africa. His struggle credentials, as briefly set out in the Judgment of VAN DER MERWE J in the decision in *S v*

ZUMA, [1] are legendary and impeccable. As set out in the indictment, upon his return from exile he occupied a number of important government positions including the one of being the Deputy President of this country from which he was removed on 14 June 2005. He presently holds the position of Deputy President of the ruling African National Congress Party which position he has held since December 1997.

Accused Number 2 is a company duly registered with limited liability in terms of the company laws of this country and is represented in the present proceedings by its director MR PIERRE JEAN-MARIE ROBERT MOYNOT.

Accused number 3 is also a company registered in terms of the company laws of this country and represented in the present proceedings by its director MR PIERRE JEAN-MARIE ROBERT MOYNOT.

The genesis of the troubles in which the accused now find themselves can be traced back to the South African Defence Review which was approved for implementation by Parliament during April of 1998. Later during that year the office of the Auditor-General identified the procurement of the Strategic Defence Packages (SDP's) as a high risk area from an audit point of view and decided to perform a special review of that procurement process. The special review, in turn, identified a number of shortcomings in the procurement process and made recommendations leading to certain hearings and deliberations in the Parliamentary

[1] [2006] 3 All SA 8 (W) at 49 - 50;

Standard Committee on Public Accounts resulting in the conducting of the Joint Forensic investigation by the office of the Public Protector, the office of the Auditor-General and the National Prosecuting Authority (NPA). During November 2001 this joint-investigation produced a report, *inter alia*, declaring that no evidence had been found of any improper or unlawful conduct by the Government and therefore that there were no grounds to suggest that the Government's contracting position was flawed.

It would appear that by then the Director of the then Investigating Directorate : Serious Economic Offences (DSEO) had already commenced its own investigations and, for that purpose, had instituted a preparatory investigation in terms of section 28 (13) of the National Prosecuting Authority Act 32 of 1998 (The National Prosecuting Authority Act) which related to allegations of corruption and/or fraud in connection with the acquisition of armaments at the Department of Defence in respect of negotiations and/or contracts concluded with regard to the purchase of corvettes, sub-marines, light utility helicopters, maritime helicopters, lead in fighter trainers and advanced fighter aircraft.

This preparatory investigation had been triggered by the discovery of what has now become to be notoriously known as *"the encrypted fax"* from a secretary of MR ALAIN THÉTARD (THÈTARD). The latter was, at all material times, the Executive Chairman of the board of directors and Chief Executive Officer of THOMSON HOLDINGS. He was also a director of THOMSON (PTY) LTD. In middle of 2001 the DSO's investigations led them to, among others, this secretary who testified that in March 2000

THÈTARD had given her a letter handwritten by him in French to type and to thereafter fax it in an encrypted form to THOMSON-CSF COMPANY THALES INTERNATIONAL AFRICA LTD in Mauritius and to THOMSON-CSF (INTERNATIONAL) in Paris. She could recall the contents of the correspondence as being to the effect that THÈTARD, SHAIK and accused number 1 had met in Durban and that during that meeting accused number 1 had given a coded indication that it had been agreed that, in exchange for a payment to accused number 1 of a sum of R500 000.00 per annum, the latter would protect THOMSON-CSF against the investigation into the arms deal and would support and lobby for THOMSON-CSF in future projects. When the secretary later made available to the investigators the original handwritten document what she had earlier on related to the investigators was confirmed.

On 24 August 2001 this preparatory investigation had been transformed into an investigation as contemplated in terms of section 28(1)(a) of the National Prosecuting Authority Act and the investigation would then include the suspected commission of offences of fraud and/or corruption in contravention of the Corruption Act 94 of 1992 arising out of armaments acquisition for the Department of Defence involving certain prime bidders and contractors.

Notwithstanding aforementioned terms of the report of the Joint-investigation, it would appear that the criminal investigations conducted by the DSO did not come to a halt as it had been found by that body that certain individuals within the Government Departments, parastatal bodies and in their private capacities had

used their positions improperly to obtain undue benefits in relation to the SDPS.

On 22 October 2002 the investigation was, in terms of section 28(1)(c) of the National Prosecuting Authority Act, extended to include investigation of the suspected commission of fraud and/or corruption in contravention of the Corruption Act 94 of 1992 arising out of payments to or on behalf of or for the benefit of accused number 1 by SHABIR SHAIK (SHAIK) and/or his NKOBI GROUP OF COMPANY or by the THOMSON/THALES GROUP OF COMPANIES (which group presumably included accused numbers 2 and 3) and the protection of and/or wielding of influence for and/or using public office to unduly benefit the private business interests of SHABIR SHAIK and/or his NKOBI GROUP OF COMPANIES and/or the THOMSON/THALES GROUP OF COMPANIES by accused number 1.

The next important event in the chronology of events in this matter was a press statement issued by the erstwhile National Director of Public Prosecutions MR BULELANI THANDANANI NGCUKA (MR NGCUKA) on 23 August 2003 and pursuant to which he announced, *inter alia,* that the investigations against accused number 1 and SHAIK had been finalised, that the DSO would prosecute SHAIK on various counts of corruption, fraud, theft of company assets, tax evasion and reckless trading. Regarding the position of accused number 1 MR NGCUKA informed all present that, though the investigating team had recommended that he should also be prosecuted, after careful and dispassionate consideration of the evidence and the facts of the case, it was concluded that, whilst

there was a *prima facie* case of corruption against this accused, the prospects of success in a prosecution were not strong enough and that it was not certain that the case against him was a winnable one. This conclusion had been tested with senior counsel who was very skilled in these types of matters who had concurred with the same. Accordingly, the National Director concluded, a decision had been made not to prosecute accused number 1.

Indeed, in November 2003 SHAIK, together with eleven (11) related corporate entities, was duly indicted in the Local Division of this division. Among these corporate entities was accused number 3 who was indicted on charges of corruption as accused number 11 in that trial (SHAIK trial).

On 19 April 2004 MR NGCUKA held a meeting with the representatives of THOMSON-CSF. It is common cause that in that meeting an agreement was concluded to the effect that, should THÈTARD depose to an affidavit stating that he was the author of aforesaid encrypted fax, the National Prosecuting Authority would, among other things, withdraw the prosecution against accused number 11 in that trial. Pursuant to that agreement and on 20 April 2004 THÈTARD deposed to an affidavit confirming his authorship of the fax which affidavit was handed over to the DSO on 26 April 2004. Indeed, when the matter in the SHAIK trial was called on 11 October 2004, the State withdrew all charges against accused number 3, accused number 11 in that trial.

The trial against SHAIK and the rest of the corporate entities duly proceeded resulting in the conviction on a number of counts and

the pronouncement of sentences on 8 June 2005. SHAIK has since appealed against the convictions and sentences and his appeal is pending before the Supreme Court of Appeal.

On 20 June 2005, following SHAIK'S conviction and no doubt as a result of the success the prosecution achieved in the SHAIK trial, the new National Director of Public Prosecutions decided to prosecute accused number 1 on afore-mentioned counts of corruption.

On 8 August 2005, presumably in terms of the relevant section of the National Prosecuting Authority Act, the DSO further extended the investigation against accused number 1 to include the suspected commission of the offences of fraud and the contravention of the Income Tax Act 58 of 1962, relating to declarations which accused number 1 allegedly made to Parliament, Cabinet and to the South African Revenue Service.

Since 29 June 2005 accused number 1 appeared in the Magistrate's Court on a number of occasions and, on 12 November 2005, an indictment was served upon him and the matter was formally transferred to the High Court on the date which had been arranged with the Judge President.

In the meantime the National Director of Public Prosecutions took a decision also to prosecute accused numbers 2 and 3 and, on 4 November 2005, an indictment was also served upon these accused in which indictment they were being summonsed to appear in the

High Court on 31 July 2006 together with accused number 1 for the trial of the matter.

A stage has now been set for dealing with certain incidents which, though they do not form part of the main plot, are relevant to the determination of the applications before us.

During August 2005 and at the instance of the DSO the Judge President of the Transvaal Provincial Division granted orders for the issue of search warrants authorising that body to conduct search and seizure operations at various premises, including the residences of accused number 1, the offices of two attorneys associated with him, the business premises of accused numbers 2 and 3 and the residential premises of their director MR MOYNOT. The searches, which were subsequently conducted in terms of the warrants, unleashed strong court challenges by some of the subjects of those searches. In one of those challenges mounted during September 2005 the Witwatersrand Local Division set the relevant warrant aside and declared the search conducted on the strength thereof to have been unlawful. The DSO was, however, subsequently granted leave to appeal against that order, which appeal is pending before the Supreme Court of Appeal. Another application was decided in favour of accused number 1 and his attorney by the Local Division of this division and we have been told that, though the DSO has filed a Notice of Application for Leave to Appeal, that application has as yet to be set down for argument. Another similar application which is worth mentioning here is the one launched by accused number 2 and MR and MS MOYNOT in the Transvaal Provincial Division. In that application the court upheld the warrant

concerned, thus dismissing the application. All we have been told is that the applicants in that matter are contemplating an appeal against that order.

This then completes the synopsis of the factual background against the backdrop of which relief is being sought in the present applications.

At the commencement of argument and after having listened to counsel I ruled that the matter would proceed first on the State's application for a postponement and that application would be argued and judgment thereon be given before attention is given to the defence counter-applications. Pursuant to that ruling what follows in this judgment will relate solely to that application.

Before analysing and discussing the legal issues raised by the facts and at the risk of stating the obvious, it is important, in view of the circumstances of the present matter, to briefly allude to the import of the equality clause of our Constitution.

There can be no doubt that accused number 1 is a prominent member of the South African community which prominence is born of years of his dedication to the struggle for the liberation of the oppressed masses of this country. Also, that he is respected and idolised by a large sector of the community cannot be gainsaid. His standing within the community can, however, not alter his position in the eyes of the law. Our Constitution proclaims that everyone is equal before the law and has the right to equal

protection and benefit of the law.[2] We are therefore enjoined by the Constitution to treat accused number 1 in exactly the same manner as we would treat any other person. As a corollary to that decree and as equally important is the decree that, by virtue and because of his standing within the community, accused number 1 should be treated no worse. I am reminded of a pronouncement once made by a Judge of the Canadian Supreme Court when a prominent politician was on appeal before that court. During the course of his judgment the said Judge warned himself as follows :-

> *"(135) Everyone in this country, however prominent or obscure, is entitled to the equal protection of the law. As a politician of some prominence, the appellant was not entitled to be treated any better than other individuals, but nor should he have been treated worse."*[3]

It is this important principle which will, at all times, guide us in the determination of the issues before us in this matter, the principle which is enshrined in our Constitution for which accused number 1, together with many others, fought so hard.

Applications for postponements in criminal proceedings are governed by the provisions of section 168 of the Criminal Procedure Act which provide that :-

> *"A Court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the Court may seem proper*

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[2] Section 9(1) of the Constitution of the Republic of South Africa Act 198 of 1996;
[3] Per Binnie J in S v Regan 91 C.R.R. (2d) 51 at 99;

and which are not inconsistent with any provision of this Act."

The provisions have been the subject of judicial scrutiny and interpretation on a number of occasions and it has become trite during these interpretations that the section confers to the court a discretion which should be exercised judiciously. In the exercise of the same the court should be guided by two general principles, namely, that :-

> *"....it is in the interests of society and accordingly of the State that guilty men should be duly convicted and not escape by reason of any oversight or mistake which can be remedied. The other, no less valid, is that an accused person, deemed to be innocent, is entitled, once indicted, to be tried with expedition"* [4]

The courts have also emphasized that *'an adjournment of a criminal trial is not to be had for the asking'.* [5] It must be motivated in terms of the Criminal Procedure Act and the court must be satisfied that the persons in respect of which the postponement is being sought are material witnesses, that the party seeking an adjournment has not been guilty of any remissness or neglect in an endeavour to procure their attendance and, thirdly, that there is a reasonable expectation of his being able to procure their attendance on the adjourned date. [6]

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[4] S v Geritis 1966(1) SA 753 (W) at 754 E - F;
[5] S v Acheson 1991(2) SA 05 (Nm Hc) at 811 C;
[6] Geritis case (supra) at 754 H - 755 B;

Finally, in the exercise of judicial discretion the court must take into consideration the tenor and spirit of the Constitution. It was in this context that the HONOURABLE KRIEGLER J remarked as follows in *WILD AND ANOTHER v HOFFERT NO AND OTHERS* [7] :-

> *"(34) It goes without saying that, should an application for a remand be made by the prosecutor, the Magistrate will remain mindful of the provisions of the Bill of Rights. In particular the Magistrate should keep in mind the demands of s 25(3)(a) and the need to consider countering prejudice by using appropriate remedy....."*

An indictment which was served upon accused number 1 on 12 November 2005 is, with minor alterations, a mirror image of the indictment upon which SHAIK was tried and convicted during 2005 and the one that was served upon accused numbers 2 and 3 on 4 November 2005 is, with minor alterations, also a mirror image of the indictment which had been served upon accused number 11 (accused number 3 in the present trial) in the SHAIK trial. It accordingly follows that by the date of trial of the present matter, namely, 31 July 2006, the DSO could have furnished the accused with all documents, statements and further particulars to those indictments and that, if that had happened, in all probability, the matter would have been ready to proceed to trial on those indictments on that date. No such documents, statements or further particulars had, however, been furnished by that date.

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[7] 1998(2) SACR 1 (CC) AT 14 h - I;

Instead the DSO applied for a postponement of the matter, stating that the search and seizure operations had yielded over 93000 documents that needed to be scanned, copied and scrutinized for purposes of compiling a forensic report from which they intended to formulate a fresh indictment to replace the one that had already been served upon accused number 1 and to reply to a request for further particulars. The legal challenges by MS MOHAMED and accused number 1 and his attorney to these operations had a delaying effect on the investigation since the documents in question could not be inspected until the cases involving these challenges are disposed of. In view of these delays the DSO had, on 23 May 2006, instructed their forensic accountants to commence with the finalisation of the report, using all the available documentation. The same instruction had been given regarding the documents that had been seized during the search upon accused number 2.

The process of compilation of the report had reached an advanced stage and it was anticipated that the report would be ready as soon as possible after 31 July 2006. It was only after the compilation of the report that the State would be able to provide outstanding further particulars and finalise an indictment which will, with the leave of the court, replace the existing one. All these processes would be completed in time for the trial to commence during the first half of 2007.

Indeed, when the matter was called before us on 5 September 2006 we were informed that the level of preparedness of the State had undergone a dramatic metamorphosis. The task, which had been considered to be impossible when the legal challenges were

launched, had now been completed. The forensic report had then been compiled and copies were ready to be given to the defence. All that was left was the formulation of an indictment which would be completed by 15 October 2006. It was on the basis of these facts that the prosecution urged this court to find that it is *"necessary or expedient"* that the proceedings in this matter be adjourned and therefore that the application should be granted.

The defence persisted with their resistance to the application, contending that a case had not been made for such an adjournment and that, to postpone the matter, would infringe upon the constitutional right of the accused to a trial within a reasonable time.

Notwithstanding arguments of the defence to the contrary, it would appear that the evidence which was not available on the date of trial and in respect of which the adjournment is sought by the prosecution (contested evidence) is material to its case. The allegation is made that such evidence is contained in the forensic report and that it will be used to formulate an indictment. This allegation is not denied by the defence. The only finding that can be legitimately made on the facts is therefore that such evidence is necessary to bolster the case for the prosecution and that it is material.

However, not only must such evidence be material but there must also be a *"reasonable expectation"* that it will be procured on the adjourned date. The word *"expectation"* is defined as follows :-

"awaiting : anticipation .....probability of a thing's happening....." [8]

Clearly therefore the enquiry involves a belief in the future occurrence of an event. The preceding adjective qualifies the type of the belief required, namely, that it must be *"a reasonable one,"* connoting that such a belief must be sensible and one based on sound judgment. [9]

The contested evidence comprises, *inter alia,* of evidence of the documents which were seized during the search and seizure operations upon the office and residence of MS MOHAMED and upon the residences of accused number 1, his former office as well as upon the offices of his attorney of record in the present proceedings. The warrants in terms of which these searches were conducted and documents seized were declared to have been unlawfully obtained and unlawfully executed in the decisions of two High Courts, the MS MOHAMED ones by the Witwatersrand Local Division on 9 September 2005 [10] and those involving accused number 1 and his attorney, by the Durban and Coast Local Division on 15 February 2006.[11] On 24 October 2005 the Witwatersrand Local Division granted leave of appeal to the Supreme Court of Appeal against its order. That appeal is pending as no date has as yet been fixed for the hearing of the same. Though notice of application for leave to appeal was noted on 15

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[8] The Concise Oxford Dictionary 7 ED at 339;
[9] Ibid at 863;
[10] Mohamed v National Director of Public Prosecutions and Others (2006) 1 All SA 127 (W);
[11] Zuma and Anther v National Director of Public Prosecutions and Others (2006) 2 All SA 91 (D);

February 2006 in respect of the other order, no steps have yet been taken to set the same for argument.

The position regarding the availability of the contested documents on the trial date is therefore presently uncertain. Even assuming (without deciding) that the prosecutor's submission to be a correct one, namely, that the noting of appeals by them in the MS MOHAMED and ZUMA – HULLEY matters suspended the operation of the orders in those cases and that, pending the variation of those orders by the Appeal Court, they are entitled to utilize the contested evidence, in my judgment, to make use of those documents when their legal status have not been clarified would not be a sensible move. I shudder to think of the consequences should the Appeal Court thereafter dismiss the appeals thus upholding the decisions of the High Courts.

Besides, it is clear from the proven facts that the availability of the contested evidence is dependant upon the successful prosecution of the appeals by the State which should therefore have provided some evidence as to their prospects in those appeals.

The court in the *Acheson* case (supra) was faced with a similar situation. There the procurement of witnesses on the adjourned date was dependant on the success of certain diplomatic initiatives. MAHOMED AJ (as he then was) pronounced himself as follows on the issue :-

> *"I say this because central to all the three possible mechanisms suggested by Mr Heyman for procuring the*

attendance of the absentees concerned is some successful diplomatic initiative, and I would therefore need some evidence as to the prospects of such diplomatic initiatives if I were to hold that there is a reasonable possibility of procuring the attendance of these absentees." [12]

No such evidence was placed before us in the present proceedings.

Something must also be said about social prejudice in this matter, namely, that prejudice associated with embarrassment and pain accused persons suffer as a result of negative publicity engendered by the nature of the charges. During argument the prosecution conceded that, as a result of the charges, the accused in this matter did and still suffer from this type of prejudice. Not that the prosecution had any choice. We cannot imagine any case in recent times which has triggered as much negative publicity in the media as the present one. Having made that concession the prosecution hastened to add that such prejudice is inavoidable and constitutes an unintended consequence of our criminal justice system. It comes with the territory.

That may well be so. However, as it was pointed out in the *Sanderson* case, [13] the problem with this kind of prejudice is that it closely resembles the kind of punishment that ought only to be imposed on convicted persons and is therefore inimical to the right to be presumed to be innocent enshrined in the Constitution. Much as such prejudice is inevitable in our criminal justice system, the accused's right to a trial within a reasonable time demands that the

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[12] Acheson case (supra) at 814 G –t H;
[13] Sanderson v Attorney-General, Eastern Cape 1998(1) SACR 227 (CC) at pp 238 – 239 para 23;

tension between the presumption of innocence and the publicity of trial be mitigated.

As we have already found, the prosecution has not satisfied us that the required evidence will be procured on the adjourned date. Should the matter then be further postponed, the accused will continue to suffer this type of prejudice, unnecessarily so, in our judgment. It would therefore be appropriate at this stage to curtail this non-trial related prejudice and to counter the same by using an appropriate remedy. [14]

Having perused the papers filed of record and having listened to counsel's argument, it has dawned to us that it was inevitable that the State's efforts to prosecute in this matter would flounder. From the very outset when a decision was taken to prosecute those efforts were anchored on an unsound foundation. In the *Sanderson* case [15] KRIEGLER J counsels as follows:-

> *"But the prosecution should also be aware of those inherent delays and factor them into the decision of when to charge a suspect. If a person has been charged very early in the complex case that has been inadequately prepared, and there is no compelling reason for this, a court should not allow the complexity of the case to justify an over-lengthy delay."*

It is now history that these words of wisdom emanating from one of our eminent judges were jettisoned by the State in favour of some non-procedural policy and a precipitate decision was taken to prosecute accused number 1, a mere twelve (12) days after what

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[14] Wild Case (Supra) at p 15 para 35;
[15] Sanderson Case (Supra) at 243 para 36;

the prosecution perceived to be their success in the SHAIK trial. The implementation of that decision constituted the beginning of the end of the edifice. Thenceforth the State case limped from one disaster to another.

Perhaps matters could have been rectified during October of 2005 when accused number 1 was due to appear in the Magistrate's Court for the second time. The defence applied pressure, threatening to resist further efforts to keep the matter in the Magistrate's Court and demanding to be given an indictment and the matter to be transferred to the High Court. Because of its earlier precipitate and ill-advised decision, the State could do neither. Instead of forcing the issue and arguing for a postponement for further investigations in that forum, it gave in to defence pressure and opted for an easy way out. It struck a deal. It would now provide an indictment based on the SHAIK trial charges to the defence and agree to a consultation of all the parties with the Judge President to arrange a date of trial. That was the only business of the meeting with the Judge President on 12 October 2005 and 31 July 2006 was produced as the agreed trial date. And yet the prosecution knew very well that they would not use that indictment at the trial. Hence the characterisation of the document by MR SINGH as *"a sham"*. Another false foundation for which the State was bound to pay.

Again, as they had failed to factor the inherent delays into their headstrong decision to prosecute, they could not have entertained a reasonable expectation that they would manage what was admittedly a mammoth task, that is, the marshalling of their evidence in time

for the arranged date of trial. There were legal challenges to the warrants which were far from having been resolved, a lengthy forensic report to be compiled, an indictment to be formulated, an application for an amendment to the indictment to be attended to and the requests for further particulars to the indictment to be responded to. To use the description of the situation by their counsel later during argument, they took their chances.

During May 2006 the chickens came home to roost. At the time they stared the trial date in the face without adequate preparations. Another knee-jerk reaction to the crisis. They will now instruct their accountants to compile a report utilising all the documents, including the contested ones, again taking their chances that the trial court would come to their rescue and admit such evidence in terms of section 35(5) of the Constitution, overlooking the fact that, even for that purpose, for them to be granted a postponement in the matter, they needed to show that such evidence would be available on the adjourned date, the task, we have found, they were not equal to.

I digress to also allude to what we regarded as a material inaccuracy in the papers filed by the State in this matter. The State's founding affidavit was deposed to by MR JOHAN DU PLOOY who is described as a Senior Special Investigator employed at the Director of Special Operations. In paragraph 36 thereof he declares that the decision to refer all the documentation to the forensic accountants on 23 May 2006 was taken with the agreements reached in principle with the legal representatives of MS MOHAMED and accused number 1. The statement was

repeated by their counsel MR TRENGOVE during argument. However, after counsel for the accused had indicated that no such agreements had been concluded I broached this subject again with MR DOWNER during his replying argument. It now seemed that the version was that the decision was taken in anticipation of an agreement but that no agreement (either in principle or otherwise) had ever been concluded. No explanation was given for this inaccuracy which, in our judgment, was an important one and one that could have influenced our decision directing it in the favour of the State.

Explaining the reason for the decision to use the contested documents in the Forensic Report notwithstanding the fact that litigation in respect thereof was outstanding, MR TRENGOVE informed us that *'implicit in that decision, is a decision (for the State) to take its chances.'* This submission was confirmed by MR DOWNER in his replying argument who went further to inform us that *'.....obviously the State every day in every court case takes chances.....'*

It is not necessary, for purposes of the enquiry before us, to pronounce upon the propriety of such a conduct on the part of the prosecution neither can I confirm whether taking chances is what prosecutors do every day in our courts. What is, however, evident in the present case is that there were clear judicial guidelines available to the State which should have informed their decision to prosecute. There was accordingly no need for them to take any chances. They ignored those guidelines to their peril.

In view of the circumstances set out herein, in particular the conduct of the prosecuting team as well as the lack of a reasonable expectation, I have been driven to the conclusion that it would be inappropriate for me to exercise my discretion in favour of the prosecution in this matter and the application for the postponement of the case is accordingly dismissed.

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CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/10
[2011] ZACC 6

In the matter between:

HUGH GLENISTER	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER FOR SAFETY AND SECURITY	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
together with	
HELEN SUZMAN FOUNDATION	Amicus Curiae

Heard on : 2 September 2010

Decided on : 17 March 2011

JUDGMENT

NGCOBO CJ:

Introduction

[1] This is an application for leave to appeal against a decision of the Western Cape High Court, Cape Town (High Court) and an application for direct access. These applications concern the constitutional validity of the National Prosecuting Authority Amendment Act[1] (NPAA Act) and the South African Police Service Amendment Act[2] (SAPSA Act). These two statutes, together, will be referred to as the impugned laws. The gravamen of the complaint relates to the disbanding of the Directorate of Special Operations (DSO), a specialised crime fighting unit that was located within the National Prosecuting Authority (NPA), and its replacement with the Directorate of Priority Crime Investigation (DPCI), which is located within the South African Police Service (SAPS). The impugned laws brought this about.

[2] The DSO was established in 2001 under section 7(1) of the National Prosecuting Authority Act[3] (NPA Act). Its purpose was to supplement the efforts of existing law enforcement agencies in addressing organised crime. The DSO was vested with powers to investigate and institute criminal proceedings relating to organised crimes or other specified offences. On 27 January 2009, the President signed into law the impugned laws. The combined effect of the impugned laws was to disband the DSO and establish the DPCI. It is this effect of the impugned laws which is at the centre of the present

[1] 56 of 2008.

[2] 57 of 2008.

[3] 32 of 1998.

constitutional challenge. The applicant, Mr Glenister, a businessman, challenged the impugned laws in the High Court on various grounds.

The background

[3] These applications are a sequel to *Glenister v President of the Republic of South Africa and Others* (*Glenister I*).[4] In *Glenister I*, Mr Glenister and others unsuccessfully challenged the decision of the Cabinet to initiate the impugned laws. After they were signed into law, the applicant challenged their validity on various grounds in the High Court. This challenge, too, suffered the same fate but on different grounds. The applicant now seeks leave to appeal against the decision of the High Court, alternatively, an order granting him direct access.

[4] The President of the Republic of South Africa, the Minister for Safety and Security, now the Minister for Police, and the Minister for Justice and Constitutional Development, the first, second and third respondents respectively (respondents), are resisting both applications. Although the notice to oppose also cited the National Director of Public Prosecutions (NDPP), he did not play an active role in the proceedings.[5] In this Court, the Helen Suzman Foundation (amicus), a non-governmental organisation, applied for and was admitted as amicus curiae. Its objectives are "to defend the values that underpin . . . liberal constitutional democracy and to promote respect for

[4] [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC).

[5] The Government of the Republic of South Africa was cited separately in the notice to oppose as fifth respondent, but was represented in the proceedings by the first, second and third respondents.

human rights." It joins the applicant in challenging the validity of the impugned laws, but did so on their alleged inconsistency with this country's international obligation to establish an independent anti-corruption unit.

[5] The full factual background giving rise to these proceedings is set out in *Glenister I*.[6] It is therefore not necessary to repeat it, save so far as it is relevant to these proceedings.

[6] The DSO was established in 2001 to supplement the efforts of existing law enforcement agencies in tackling organised crime. In due course, concerns were raised within the criminal justice system and the intelligence community relating to the role and functioning of the DSO. To respond to these concerns, on 1 April 2005 the President appointed Judge Khampepe to chair a commission of inquiry (Khampepe Commission) to investigate and report on aspects of the DSO, including the rationale for its establishment, its mandate, its location within the NPA as opposed to the SAPS, and the relationship between the SAPS and the DSO. The resulting Khampepe Commission Report (Khampepe Report), signed on 3 February 2006, recommended that the DSO should continue to be located within the NPA, albeit with certain adjustments. Other recommendations related to the President's power to transfer oversight and responsibility over the law enforcement component of the DSO to the Minister for Safety and Security and the need to tackle the unhealthy relationship between the DSO and the SAPS.

[6] *Glenister I* above n 4 at paras 1-2 and 10-6.

[7] Cabinet appeared to approve the Khampepe Report. A Cabinet statement of 29 June 2006 reveals that it endorsed the National Security Council's decision to accept, in principle, the recommendations of the Khampepe Commission, including the retention of the DSO within the NPA. A further statement of 7 December 2006 stated, among other things, that Cabinet had reviewed progress in implementing the recommendations of the Khampepe Commission.

[8] Meanwhile, the African National Congress (ANC), the ruling party, at its 52nd national conference, held in Polokwane in December 2007, adopted a resolution calling for a single police service and the dissolution of the DSO (Polokwane Resolution).

[9] On 12 February 2008, following the Polokwane Resolution, the Minister for Safety and Security, speaking in the National Assembly, proposed the dissolution of the DSO and the creation of a new unit under the SAPS to deal with organised crime. In the same month, the Director-General of the Department for Justice and Constitutional Development stated during a radio interview that the DSO would be amalgamated with the SAPS. The legislative programme of the Department for Safety and Security for 2008 indicated that laws dealing with the DSO would be placed before Parliament during that year.

[10] Following a Cabinet meeting in April 2008, the Presidency issued a statement to the effect that Cabinet had approved the NPAA Bill and the General Law Amendment Bill, later renamed the SAPSA Bill (the Bills). Among other things, these Bills proposed to dissolve the DSO and replace it with the DPCI. The stated purpose of the Bills was to strengthen the country's capacity to fight organised crime and to give effect to the decision to relocate the DSO from the NPA to the SAPS.

[11] As I have indicated above, the applicant and others challenged the decision to initiate the Bills. The North Gauteng High Court held that it had no jurisdiction to hear the application. By the time the matter reached this Court by way of an application for leave to appeal and an application for direct access, the Bills had not only been approved by Cabinet but were then before Parliament. This Court, in *Glenister I*, dismissed the challenge, holding that it had not been established that it would be appropriate for this Court to intervene in the affairs of Parliament nor that material and irreversible harm would result if the Court did not intervene at that stage.[7]

[12] On or about 23 October 2008, the impugned laws were passed by Parliament, and on 27 January 2009 they were assented to and signed by the President. On 17 April 2009, the applicant challenged the constitutional validity of the impugned laws in the High Court.

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[7] Id at para 57.

Proceedings in the High Court

[13] In the High Court, the applicant based his constitutional challenge on several grounds. The one challenge was based on the absence of a rational basis for the enactment of the impugned laws. The others alleged failure to comply with various constitutional obligations relating to accountability; cultivating the principles of good human resource management practices and good labour relations; upholding international obligations; facilitation of public involvement; protecting values enshrined in the Bill of Rights; and allowing the NPA to properly exercise its functions.

[14] The High Court dismissed all the grounds of attack based on constitutional obligations. It held that, under section 167(4)(e) of the Constitution, only this Court may "decide that Parliament or the President has failed to fulfil a constitutional obligation."[8] It accordingly concluded that it lacked jurisdiction to consider the constitutional challenges based on the alleged failure to fulfil constitutional obligations.

[15] The High Court dismissed the challenge based on rationality. It held that the establishment of the DPCI within the framework of the SAPS "is manifestly designed to enhance the capacity of the SAPS to prevent, combat and investigate national priority

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[8] *Glenister v The President of the Republic of South Africa and Others*, Case No 7798/09, 26 February 2010, Western Cape, Cape Town, unreported at para 5 (High Court Judgment). Section 167(4) of the Constitution provides:

> "Only the Constitutional Court may—
>
> . . . .
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation".

crimes and other crimes";[9] this is a legitimate governmental purpose to pursue; and the means by which this purpose is sought to be achieved "appear to be rational."[10] It accordingly concluded that the decision to disband the DSO and establish the DPCI "is rational and can certainly not be described as arbitrary."[11]

Proceedings in this Court

[16] The application for leave to appeal is directed against these findings and conclusions of the High Court. Direct access is sought in the event we uphold the finding and conclusion of the High Court that it lacked jurisdiction in respect of the challenges based on constitutional obligations.

[17] The gravamen of the applicant's constitutional complaint is the disbandment of the DSO, which, as indicated above, was located within the NPA, and its replacement by the DPCI, which is located within the SAPS. The applicant contended that the scheme of the impugned laws which brought about these changes is unconstitutional. He submitted that it is irrational, unreasonable, unfair and undermines the structural independence of the NPA. He argued that, in enacting the impugned laws, the legislature violated a number of its constitutional obligations. The obligations contended for were to act reasonably and accountably; to cultivate good human resource management; to respect international

[9] High Court Judgment above n 8 at para 13.

[10] Id.

[11] Id.

treaty obligations; to maintain an independent anti-corruption unit; to allow public participation in the legislative process; to allow the NPA properly to exercise its functions; and to respect values enshrined in the Bill of Rights.

[18] The amicus presented a discrete argument based on an international obligation to establish an independent anti-corruption agency. It contended that the impugned laws violate this constitutional obligation. This obligation, the amicus argued, flows from the international treaties that South Africa has ratified which require states parties to establish an independent anti-corruption unit to fight the scourge of corruption. Having regard to the location of the DPCI within the SAPS and the statutory provisions governing it, the amicus maintained that the DPCI is not independent.

[19] For their part, the respondents maintained that the scheme of the impugned laws finds support in the provisions of sections 179 and 205 of the Constitution. Section 179(2) provides for the NPA with "the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings." Section 205 provides for the national police service whose objects "are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law." There is nothing constitutionally wrong therefore in locating an anti-corruption unit within the SAPS, the respondents argued. They further argued that the South African Police Service

Act[12] (SAPS Act), as amended by the SAPSA Act, and understood in the context of the NPA Act, contains sufficient safeguards to ensure the independence of the DPCI.

[20] The respondents contended that the scheme of the impugned laws is rational. They submitted that the scheme was put in place to enhance the capacity of the SAPS to prevent, combat and investigate national priority crimes, including corruption. They argued that this is a legitimate governmental purpose to pursue and that the means by which this purpose is sought to be achieved are logical, rational and consistent with the Constitution. In addition, the respondents submitted that the High Court was correct in dismissing the constitutional challenges based on failure to fulfil constitutional obligations for lack of jurisdiction.

[21] In this Court, however, save for the obligation to facilitate public involvement in the legislative process, I did not understand the applicant to suggest that each of the other obligations constitutes a self-standing cause of action. Indeed, in response to a question by the Court, counsel for the applicant disavowed any claim that the obligation to cultivate good human resource management, based on section 195 of the Constitution, for example, provides an independent cause of action. In addition, he conceded, very properly, that the challenge based on failure to facilitate public involvement is a matter that falls within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution.

[12] 68 of 1995.

[22] Save for the constitutional challenge based on failure to facilitate public involvement, the High Court erred in concluding that it lacked jurisdiction in relation to other challenges based on constitutional obligations. The obligations contended for in these challenges were not of the kind contemplated in section 167(4)(e) of the Constitution.[13] However, the High Court was correct in dismissing the constitutional challenge based on failure to facilitate public involvement for lack of jurisdiction.[14] It is this challenge which now forms the basis of the direct access application by the applicant. It will be convenient to consider this challenge first, for, if the applicant succeeds on this challenge, it may not be necessary to consider the application for leave to appeal.[15]

The application for direct access

[23] The application for direct access relates to the challenge based on the alleged failure by Parliament to facilitate public involvement in the legislative process leading to the enactment of the impugned laws. It is by now settled that sections 59(1)[16] and 72(1)[17]

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[13] See *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at paras 13-30; 2006 (12) BCLR 1399 (CC) at 1411C-1416A (*Doctors for Life*); see also *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC) at paras 11-25 and *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) at para 21 (*Poverty Alleviation*).

[14] *Doctors for Life* above n 13 SA at paras 27-8; BCLR at 1415D-F.

[15] Compare *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) at para 114.

[16] Section 59(1) of the Constitution provides:

> "The National Assembly must—
>
> (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

of the Constitution impose a constitutional obligation on Parliament to facilitate public involvement in its legislative and other processes.[18] It is equally settled that this obligation is of the kind envisaged in section 167(4)(e).[19] Only this Court has the jurisdiction to decide whether Parliament has failed to facilitate public involvement in its legislative process.

[24] Before leaving this topic, it is necessary to comment on the procedure followed by the applicant in raising this challenge. Direct access must be sought with the leave of this Court in those matters where, in addition to this Court, other courts also have jurisdiction. To bypass the other courts and bring those matters directly to this Court, litigants require

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(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the Assembly and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person."

[17] Section 72(1) of the Constitution provides:

"The National Council of Provinces must—

(a) facilitate public involvement in the legislative and other processes of the Council and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the Council and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person."

[18] *Doctors for Life* above n 13 SA at para 14; BCLR at 1411E-G; see also *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 12; SA 2007 (1) BCLR 47 (CC) at para 34 (*Matatiele II*); *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at para 26 (*Merafong*) and *Poverty Alleviation* above n 13 at para 9.

[19] *Doctors for Life* above n 13 SA at para 28; BCLR at 1415F and *Poverty Alleviation* above n 13 at para 21.

an indulgence from this Court in the form of leave of this Court.[20] In matters where this Court has exclusive jurisdiction, that is, in those matters set out in section 167(4) of the Constitution,[21] no indulgence is required as the litigants are obliged to come to this Court.

[25] An application for leave to obtain direct access is therefore not the appropriate vehicle for bringing to this Court matters in which it has original jurisdiction. Unless another rule specifically applies, those applications must be brought to this Court on notice of motion pursuant to CC rule 11.[22] It was therefore not necessary for the applicant to bring an application for direct access in order to raise the challenge based on failure to facilitate public involvement. To the extent that our decision in *Poverty*

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[20] Section 167(6) of the Constitution provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court".

Rule 18 of the Constitutional Court Rules, 2003 sets forth the procedure for direct access.

[21] Section 167(4) of the Constitution provides:

> "Only the Constitutional Court may—
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> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
>
> (c) decide applications envisaged in section 80 or 122;
>
> (d) decide on the constitutionality of any amendment to the Constitution;
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
>
> (f) certify a provincial constitution in terms of section 144."

[22] CC rules 14 to 17 apply to certain matters within the exclusive jurisdiction of this Court. These rules do not, however, apply to an application brought under section 167(4)(e) of the Constitution. Accordingly, CC rule 11, which provides for the default procedure, applies here.

Alleviation may have suggested otherwise,[23] it does not represent the correct procedure. The applicant's application for direct access must therefore be treated as an ordinary application to this Court in terms of rule 11.

[26] That said, the challenge based on failure to facilitate public involvement must fail for three reasons. First, it was not brought timeously. In *Doctors for Life*[24] and *Matatiele II*[25] we emphasised the need to raise a challenge of this nature immediately and without delay. In *Doctors for Life*, we held that "applicants who have not pursued their cause timeously in this Court may well be denied relief."[26] The President signed the impugned laws into law on 27 January 2009. The applicant launched his application for leave to appeal only on 19 May 2010, slightly more than a year and three months later. This delay has not been explained. The explanation tendered by counsel from the bar was that the applicant faced a dilemma whether to conduct litigation in this Court in relation to this challenge and other litigation in the High Court in relation to those matters that do not fall within the exclusive jurisdiction of this Court.

[27] This explanation is not acceptable. The applicant may well have come directly to this Court with this challenge and sought to urge us that, in relation to the other challenges which do not lie within the exclusive jurisdiction of this Court, it was in the

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[23] *Poverty Alleviation* above n 13 at para 21.

[24] *Doctors for Life* above n 13 SA at para 218; BCLR at 1467E.

[25] *Matatiele II* above n 18 at para 100.

[26] *Doctors for Life* above n 13 SA at para 218; BCLR at1467E.

interests of justice that we hear those challenges together with the challenge based on failure to facilitate public involvement.[27]

[28] This delay and the lack of a satisfactory explanation for it would have been sufficient to deny the applicant relief.[28]

[29] Second, this challenge is directed at Parliament, which, it is alleged, failed to comply with its constitutional obligation to facilitate public involvement in its legislative process. Both the National Assembly and the National Council of Provinces have a direct and substantial interest in the outcome of this challenge. They should therefore have been joined in the proceedings. Failure to join the Speaker of the National Assembly and the Chairperson of the National Council of Provinces would also have been fatal to the application.

[30] Ordinarily, these two reasons should be dispositive of this challenge. However, on the merits, the application raises an important question concerning the obligation of Parliament to facilitate public involvement in its legislative process. In addition, we have the affidavit of Mr Yunus Carrim, the Deputy Minister for Cooperative Governance and Traditional Affairs. Mr Carrim dealt with the facilitation of public hearings in the legislative process that led to the enactment of the impugned laws. He was, at the time, a

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[27] Compare *Matatiele II* above n 18 at para 105.

[28] *Doctors for Life* above n 13 SA at para 218; BCLR at 1467E.

Member of Parliament, the Chairperson of the Justice and Constitutional Development Portfolio Committee and the Co-chair of the joint committee that dealt with the impugned laws in Parliament. The joint committee was comprised of the Justice and Constitutional Development Portfolio Committee and the Safety and Security Portfolio Committee (Joint Committee). We therefore have sufficient information on record to deal with the merits of this challenge.

[31] This leads to the third reason why this challenge should fail. The applicant has not made out a case for failure to facilitate public involvement. In *Doctors for Life*, we considered the nature and scope of the obligation to facilitate public involvement in the legislative process and said:

> "Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.
>
> In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what

> Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."[29]

[32] And in *Matatiele II*, we explained that this obligation does not simply entail holding hearings. It must provide the opportunity to influence the decision of the law-maker:

> "While it is true that the people of the province have no right to veto a constitutional amendment that alters provincial boundaries, they are entitled to participate in its consideration in a manner which may influence the decisions of the Legislature. The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning."[30] (Footnote omitted.)

[33] The question is whether, in passing the impugned laws, Parliament took reasonable steps to facilitate public involvement.

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[29] Id SA at paras 145-6; BCLR at 1451A-F.

[30] *Matatiele II* above n 18 at para 97.

[34] The applicant acknowledges that public hearings were held in Parliament during August and September 2008 and that public hearings were also held in the provinces during September and October 2008. He contends, however, that the process was flawed. He complains that there was no justifiable basis for treating the Bills as urgent and that it was unreasonable to have allocated five days for public hearings on the Bills.

[35] Mr Carrim's affidavit resists this challenge. He states that the Bills presented to Parliament were substantially re-written as a result of an exhaustive consultation process. He further alleges that more than 190 hours were spent in full committee and sub-committee meetings discussing the Bills, more than 100 hours on informal exchanges with a variety of stakeholders and over 7 200 people participated in public hearings in the provinces.

[36] In addition, Mr Carrim states that a comprehensive report was prepared on every submission received, and that the Joint Committee which considered the impugned laws went through this report. The Joint Committee met with the DSO and the SAPS organised crime fighting units to advise them on the Bills and to get their input. He states that numerous submissions were received, including that of the applicant, and that the Joint Committee took the submissions into account in finalising the impugned laws. He states that one of the issues raised in the submissions was the operational independence of the DPCI.

[37] There is nothing to gainsay this evidence. Significantly, Mr Carrim states that, at the end of his submission to the Joint Committee, the applicant remarked that he was surprised to have been given "a fair hearing and complimented the Committee for the fair manner in which [he was received]."

[38] In the light of this evidence, I am unable to conclude that Parliament did not fulfil its obligation to facilitate public involvement. On the contrary, the conclusion that Parliament fulfilled its constitutional obligation to facilitate public involvement in relation to the impugned laws is unavoidable.

[39] In the event, the application falls to be dismissed. As this application was heard together with the application for leave to appeal, costs relating to it will be considered later in this judgment.

[40] Before considering the application for leave to appeal, there are preliminary issues that must first be disposed of. These are applications for condonation by: (a) the applicant for the late filing of the application for leave to appeal; (b) the amicus for the late filing of written submissions; and (c) the respondents for the late filing of their response to the written submissions of the amicus.[31]

[31] In addition, there was an application to strike out. The papers relating to this application were never brought to our attention. It is therefore not necessary to make any order on it.

Condonation applications

[41] The test for determining whether condonation should be granted is the interests of justice.[32] Factors that are relevant to this determination include, but are not limited to, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay or defect, the nature and cause of any other defect in respect of which condonation is sought, the importance of the issue to be decided in the intended appeal and the prospects of success.[33]

[42] These applications must be determined in the light of these principles.

Late filing of the application for leave to appeal by the applicant

[43] The order sought to be appealed against was given on 18 June 2009. No reasons were given at the time, but were furnished only on 26 February 2010. This delay was unfortunate. The practice of giving an order immediately and furnishing reasons later is one to be resorted to when a court has made up its mind on the conclusions but requires time to formulate reasons. While there are pressures of other judicial work in the High Court, reasons for an order must receive priority and must be given shortly after the order. Any delay in furnishing the reasons may prejudice a litigant who wishes to appeal

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[32] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20 and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[33] See *Van Wyk* and *Brummer* above n 32.

against the order. That said, the application for leave to appeal was launched on 19 May 2010. This was more than 10 months after the order was made and almost three months after the reasons for the order were furnished. In short, the application was filed more than 15 days after the filing deadline prescribed by CC rule 19.

[44] CC rule 19(2) provides as follows:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."[34]

[45] This rule is clear and admits of no ambiguity. It requires a prospective appellant to lodge an application for leave to appeal "within 15 days of the order against which the appeal is sought." The rule does not contemplate a situation where reasons for the order are given on a later date than that of the order. It provides only for a situation where the order forms part of the judgment. Where reasons for the order are given later, a prospective appellant is therefore confronted with a dilemma: either (a) to lodge an application for leave to appeal against the order without furnishing grounds upon which the intended appeal will be based and provide grounds later; or (b) to wait until the

[34] CC rule 19(2).

reasons are furnished and then lodge the application for leave to appeal and ask for condonation citing the delay in furnishing the reasons as the explanation for the delay.

[46] Rule 49(1)(b) of the Uniform Rules of Court that apply to the High Courts was inserted to address this dilemma.[35] It postpones the commencement of the period within which leave must be sought until reasons have been delivered. There is a need for the rules of this Court to be amended so as to address the dilemma confronting a prospective appellant where the reasons for the order are furnished later than the date of the order. But what is to be done in the meantime?

[47] The question is whether this is an appropriate case in which we should invoke the inherent power of this Court to protect and regulate its process under section 173.[36] This is an extraordinary power which must be exercised sparingly and in exceptional situations.[37] In my view, the present situation, in which there is a vacuum because

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[35] URC 49(1)(b) provides:

> "When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days."

[36] Section 173 of the Constitution provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[37] *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 22; *Parbhoo and Others v Getz and Others* [1997] ZACC 9; 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 4 and *S v Thunzi and Others* [2010] ZACC 12; Case No CCT 81/09, 5 August 2010, as yet unreported at paras 19-22.

neither legislation nor the rules address it, is an extraordinary one in which it would be appropriate to exercise the inherent power under section 173.[38]

[48] Pending the promulgation of the relevant rule, this Court should adopt a procedure which requires that, where reasons for the order are given later than the date of the order, the application for leave to appeal is to be lodged within 15 days of the date when the reasons for the order were delivered. Applying this procedure to the present case, the application for leave to appeal should have been lodged on 19 March 2010. The application was therefore late by 62 days. The application for condonation must be assessed in light of this delay.

[49] The explanation furnished for the delay is utterly unsatisfactory.[39] Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favour of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success. This case concerns the constitutional authority of Parliament to establish an anti-corruption unit, in

[38] *Pennington* above n 37 at para 22; *Parbhoo* above n 37 at para 4.

[39] The applicant says that: he had to undertake business trips and could not communicate with his lawyers effectively whilst he was away; there was a lengthy record to read; and his attorneys and counsel were geographically separated. A diligent litigant, desirous of appealing against the order, and respecting the rules of this Court, would not have conducted himself in the manner in which the applicant did. It is difficult to believe that, having regard to the technological advances in communication, effective communication between the applicant and his attorneys was not possible.

A perusal of the 17-page affidavit in support of the application for leave to appeal belies any explanation given for the delay. It deals with the relief sought, the history of the litigation submissions, interests of justice and condonation. Save for a paragraph dealing with the dismissal of challenges based on alleged constitutional obligations, the submission is a repetition of the submission made in the High Court, and, as if this was not enough, both sets of argument are attached. There are no page references to any part of the record in the affidavit. It is therefore difficult to understand why there was this two-month delay.

particular the nature and the scope of its constitutional obligation, if any, to establish an independent anti-corruption unit. These are constitutional issues of considerable importance. Apart from this, the decision to disband the DSO and its replacement by the DPCI has evoked public interest in the light of the fight against corruption. And the issues urged upon us by the applicant and the amicus are arguable.

[50] It is, therefore in the interests of justice to grant condonation.

The amicus's late filing of written submissions

[51] The amicus seeks condonation for the late filing of its written argument, the cause of which was its failure to comply with the page limit for written argument required by the rules and directions of this Court. While the amicus is the author of its own misfortune, the explanation is understandable and condonation should be granted.

The respondents' late filing of the response to the written submissions of the amicus

[52] The respondents seek condonation for the late filing of their response to the written submissions of the amicus. They received the condensed version of the written submissions of the amicus on 26 August 2010. They contend that they therefore could not respond timeously. I think they may well have worked on the basis of the long version and could have filed their response timeously. I am nevertheless satisfied that condonation should be granted in their case too.

The application for leave to appeal

[53] The question whether the application for leave to appeal should be granted depends upon whether: (a) it raises a constitutional issue; and (b) it is in the interests of justice to grant leave. Both these questions must be answered in the affirmative in the light of the conclusion reached in relation to condonation, namely, that the application raises constitutional issues of considerable importance; it is in the public interest to consider the issues in the intended appeal; and the intended appeal is arguable. These considerations warrant the granting of leave to appeal. Leave to appeal should therefore be granted.

The appeal

[54] The following main issues arise on appeal:

(a) Are the impugned laws irrational?

(b) Do the impugned laws run afoul of constitutional provisions dealing with the powers and the functioning of the NPA?

(c) Does the Constitution require Parliament to establish an independent anti-corruption unit, and, if so, did Parliament comply?

(d) Do the impugned laws otherwise infringe any of the rights in the Bill of Rights?

(e) In the event of the applicant succeeding on any of these grounds, what is the appropriate relief?

Rationality

[55] Under our Constitution, national legislative authority vests in Parliament.[40] However, in the exercise of its legislative authority, "Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution."[41] But like all exercise of public power, there are constitutional constraints that are placed on Parliament. One of these constraints is that "there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose."[42] Nor can Parliament act capriciously or arbitrarily.[43] The onus of establishing the absence of a legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector. To survive rationality review, legislation need not be reasonable or appropriate.[44]

[56] The declared purpose of the SAPSA Act is to enhance the investigative capacity of the South African Police Service in relation to national priority and other crimes by establishing a Directorate for Priority Crime Investigation to combat those crimes.[45]

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[40] Section 44(1) of the Constitution.

[41] Section 44(4) of the Constitution.

[42] *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 19 (*New National Party*).

[43] Id.

[44] *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 86 and 89-90 and *New National Party* above n 42 at para 24.

[45] Preamble of SAPSA Act.

[57] It cannot be gainsaid that this is a legitimate governmental purpose to pursue. Criminals are becoming more sophisticated and nowadays tend to specialise in particular crimes. Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights. Organised crime and drug syndicates also pose a real threat to our democracy. The amount of drugs confiscated inside our borders testifies to this. The sophisticated international network that is responsible for transporting these drugs requires urgent attention.

[58] For our country to win the war against these serious crimes, we need to enhance the capacity of the police to prevent, combat and investigate these crimes and other national priority crimes. Strengthening the ability and the capacity of the SAPS to address the scourge of corruption and other national priority crimes is unquestionably a legitimate governmental purpose. Establishing a separate division in the SAPS, the DPCI, for that purpose is rationally related to the achievement of that purpose. The finding of the High Court in this regard must therefore be upheld.

[59] I did not understand the applicant to suggest otherwise. He contends that the scheme of the impugned laws is irrational. That scheme is the dissolution of the DSO, which was located in the NPA, and replacing it with the DPCI, which is located within the SAPS. What makes this scheme irrational, the applicant maintains, is that: it gives

effect to the Polokwane Resolution; Parliament blindly followed this resolution; and the DSO was dissolved in order to shield high-ranking ANC politicians and their associates from prosecution. The main plank of his argument was that it was irrational for the DSO to be dissolved because it was the most successful crime fighting unit. As he put it, the "dilution of the excellence of the DSO into the unknown and untested DPCI, which will be required to function in a dysfunctional SAPS under political control instead of independently, makes no rational sense at all." It is worth noting here that there is a dispute about the efficacy of the DSO. The Minister for Police refutes the applicant's assertion that the DSO was effective by pointing to comments made by the former head of the DSO to Parliament. These were to the effect that the perception that the DSO was better than the police was misleading, and that the DSO success rate was inflated in part because it was able to select its cases.

[60] The respondents contended that the scheme of the impugned laws is rational. They submitted that the establishment of the DPCI was designed to enhance the capacity of the SAPS to prevent, combat and investigate national priority crimes and other crimes. They argued that this is a legitimate governmental purpose and that the means by which it is sought to be achieved are logical, rational and consistent with the Constitution. They submitted that the creation and the subsequent dissolution of the DSO were policy decisions that were within the power of the executive and Parliament to make.

[61] The respondents submitted that the inference sought to be drawn by the applicant, namely, that the true motive of the impugned laws is to shield high-ranking members of the ANC from prosecution, is untenable. They draw attention to the fact that: (a) the impugned laws make provision for the continuation of investigations and prosecutions that were underway when they were enacted; (b) the majority of those investigations and prosecutions have been finalised; and (c) concerns relating to the operations of the DSO pre-date the Polokwane Resolution as evidenced by the Khampepe Report.

[62] Assume, for the moment, that the impugned laws were in fact motivated by the Polokwane Resolution. This does not render the scheme unconstitutional. As this Court recognised in *Glenister I*, "there is nothing wrong, in our multiparty democracy, with Cabinet seeking to give effect to the policy of the ruling party."[46] Indeed, it may well be the central role of a political party to formulate policy recommendations with the intention that they be implemented, and there is nothing untoward in the Cabinet taking up such recommendations. Under our parliamentary system, these recommendations become law only if the executive embodies them into legislation which it initiates, Parliament passes the legislation, and the President signs the legislation. The origin of the legislation does not negate the fact that at each of these steps, the relevant political actor applied his or her mind to the legislation. And on the record there is no basis to conclude that this was not done.

[46] *Glenister I* above n 4 at para 54.

[63] I now deal with the applicant's main complaint, namely the disbanding of the DSO and its replacement with the DPCI.

[64] The decision to disband the DSO and establish the DPCI and locate it within the SAPS must be understood in the context of the Constitution. Section 179 of the Constitution makes provision for a single national prosecuting authority with "the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."[47] On the other hand, section 205 makes provision for the national police service, whose objects "are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."[48]

[65] It is therefore within the power of Parliament to establish an anti-corruption unit and to locate it within the SAPS. The Constitution does not prescribe to Parliament where to locate the anti-corruption unit. It leaves it up to the executive, which initiates legislation under section 85(2)(d), and ultimately to Parliament to make a policy choice. I agree with the submission of the respondents that the conceptualisation, design and formulation of legislation required by the provisions of sections 179 and 205 of the Constitution, as well as the organisational, financial and political ramifications thereof, involve a range of policy choices and decisions over a broad front. In as much as the

[47] Section 179(2) of the Constitution.

[48] Section 205(3) of the Constitution.

decision of the legislature to establish the DSO was a policy decision, so too is the decision to disband the DSO and establish the DPCI and locate it within the SAPS. As this Court pointed out in *Bel Porto*, "[t]he fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision."[49]

[66] That the decision was one of policy finds support in the record. The memorandum on the objectives for amending the impugned laws sets out a number of reasons for the displacement of the DSO and establishment of the DPCI.[50] In this regard the Khampepe Commission was appointed in order to look into issues such as the lack of coordination between the DSO and the SAPS, the lack of oversight over the DSO, and operations conducted by the DSO outside of its mandate. The memorandum also highlighted the need to address organised crime in a more comprehensive fashion.[51] It is apparent from the record before us that the establishment of the DPCI and the displacement of the DSO stemmed from, among other concerns, the controversy that surrounded the DSO since its inception, in particular, concerns about the level of involvement by the prosecutors into investigations, and the loss of objectivity of prosecutors leading investigations. As a result of this, a policy decision was therefore taken by the government to transfer this investigative component of the NPA to the SAPS.

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[49] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 45 (*Bel Porto*).

[50] Memorandum on the Objects of the General Law Amendment Bill, GN 523 GG 31016, 9 May 2008 at paras 1.2-1.4.

[51] Id at para 1.4.

[67] Under our constitutional scheme it is the responsibility of the executive to develop and implement policy.[52] It is also the responsibility of the executive to initiate legislation in order to implement policy.[53] And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with views of social scientists or other experts.[54] As has been said, "[i]t is not for the court to disturb political judgments, much less to substitute the opinions of experts."[55]

[68] Here we are not concerned with the question as to which of the two units between the DSO and the DPCI is more efficient than the other. We are concerned with whether the establishment of the DPCI is rationally related to a legitimate governmental purpose. As long as there is a rational relationship between the decision to disband the DSO and establish the DPCI and the governmental purpose to enhance the investigative capacity of the SAPS in relation to national priority crimes, it is irrelevant that the governmental purpose could have been achieved by retaining the DSO.[56] The decision by Parliament to disband the DSO and establish the DPCI within the SAPS is entirely consistent with objects of the police service set out in section 205(3) of the Constitution. The decision to

[52] Section 85(2)(b) of the Constitution.

[53] Section 85(2)(d) of the Constitution.

[54] *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 42, quoting with approval Professor Hogg.

[55] Id.

[56] *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 36.

locate the DPCI within the SAPS is manifestly designed to prevent, combat and investigate national priority crimes and other crimes. This is a legitimate governmental purpose and the means by which the impugned laws seek to achieve this purpose are rationally related to the governmental purpose.

[69] In all these circumstances the evidence cannot be said to establish that the purpose of Parliament as reflected in the impugned laws was to protect leaders of the ANC. The respondents' contention that the legislation authorises the continuance of existing investigations and that most of the investigations under the old regime have already been completed has not been refuted.

[70] The challenge based on rationality must therefore be dismissed.

Do the impugned laws violate the provisions of section 179?

[71] The applicant also contended that the impugned laws violate the provisions of section 179 of the Constitution. Three arguments were advanced in this regard. Two of them, made in the written argument, were: first, that the disbanding of the DSO undermines the independence of the NPA which is required by section 179(4); and second, that the DSO could not be disbanded without the concurrence of the NDPP as required by section 179(5). At the hearing, the applicant advanced a third argument based on the provisions of section 179(2) read with section 179(4). As I understand the

argument, it was said that these two provisions, read together, required the DSO to be located within the NPA. Section 179 provides, in relevant part:

> "(2) 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.
>
> . . . .
>
> (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
>
> (5) The National Director of Public Prosecutions—
>
> (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process".

[72] I deal with these arguments in turn.

[73] The first argument is untenable. It is that without the power to investigate crimes that it prosecutes, the NPA cannot function without fear, favour or prejudice. But this cannot be so. Section 205(3) of the Constitution assigns the power to "prevent, combat and investigate crime" to the SAPS. In the course of oral argument, counsel for the applicant was constrained to concede that, but for the prior-existing DSO within the NPA, he could not contend that the impugned laws were unconstitutional. In effect, then, the applicant's claim is one of retrogression. But the issue is not relative; the issue is whether the NPA is able to operate without fear, favour or prejudice without the DSO. If

it is able to do so, it does not matter that a prior scheme existed.[57] There is no suggestion that it cannot. Sections 20 and 32 of the NPA Act, both of which remain unaltered by the impugned laws, ensure the independence of the NPA.[58]

[74] The second argument, based on section 179(5), proceeded along these lines. Section 179(5) requires the NDPP to determine prosecution policy with the concurrence of the Minister for Justice and Constitutional Development. The dissolution of the DSO is the exercise of prosecution policy. The applicant argued that the DSO could not therefore be dissolved without the concurrence of the NDPP. The dissolution of the DSO without the concurrence of the NDPP was therefore fatal to the impugned laws.

[75] The argument fails to distinguish between the power of Parliament to make laws and the authority of the NDPP to determine prosecution policy. The decision whether to

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[57] It bears mention that there was some concern that the DSO under the NPA was perhaps too independent, operating as "a law unto itself." Khampepe Commission of Inquiry, *Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations ("The DSO"), Final Report* (February 2006) at para 21.5.

[58] Section 20 of the NPA Act provides:

> "(1) The power, as contemplated in section 179(2) and all other relevant sections of the *Constitution*, to—
>
> (a) institute and conduct criminal proceedings on behalf of the State;
>
> (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
>
> (c) discontinue criminal proceedings,
>
> vests in the *prosecuting authority* and shall, for all purposes, be exercised on behalf of the *Republic*."

Section 32(1)(a) of the NPA Act provides:

> "A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law."

establish the DSO and where to locate it is manifestly not a decision about a policy to be observed in the prosecution process and is thus not a prosecution policy decision. It is a decision about how best to fight national priority crimes and other crimes. The constitutional authority to make this decision flows from the legislative powers vested in Parliament, in general, and, in particular, by sections 179(1)[59] and 179(7).[60] By contrast, section 179(5) is concerned with the determination of prosecution policy "which must be observed in the prosecution process." The power conferred by this provision is narrowly confined to the conduct of the prosecution process. It is not concerned with the powers of the NPA to investigate national priority crimes. The decision whether to disband the DSO does not therefore require the concurrence of the NDPP.

[76] The third argument was advanced during oral argument. It was based on reading section 179(2) and section 179(4) together. Section 179(4), which requires national legislation to "ensure that the prosecuting authority exercises its functions without fear, favour or prejudice", guarantees the independence of the NPA. This independence is supported by granting the NPA the power to investigate the crimes in respect of which it

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[59] Section 179(1) of the Constitution provides:

> "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."

[60] Section 179(7) of the Constitution provides:

> "All other matters concerning the prosecuting authority must be determined by national legislation."

initiates criminal proceedings, because crime investigation is a necessary function "incidental to instituting criminal proceedings."[61] Locating the DSO in the NPA was intended to guarantee that it would conduct its own investigations. Without the DSO, the NPA loses its independence, and therefore the impugned laws, which brought about this result, are unconstitutional.

[77] The fallacy in this argument is its premise. It rests on the assumption that the Constitution requires the NPA to be given the power to investigate crimes as a "necessary function" that is "incidental to instituting criminal proceedings." But that is not so. The Constitution expressly gives this power to the national police service, whose objects include "to prevent, combat and investigate crime".[62] Whatever the scope of the phrase "the power . . . to carry out any necessary functions incidental to instituting criminal proceedings" in section 179(2), a phrase we need not, in this case, define, it cannot mean that the powers vested in the police service by the Constitution must be assigned to the NPA. Nor does it mean that a specialised crime fighting unit must be established within the NPA.

[78] Given the provisions of sections 179 and 205 of the Constitution, in particular, the assignment of the powers to investigate crime to the police and the power to prosecute crime to the NPA, it is indeed doubtful whether the power to investigate crime can be

[61] Section 179(2) of the Constitution.

[62] Section 205(3) of the Constitution.

said to be incidental to the power to prosecute crime. Happily, in this case we do not have to consider the question of whether Parliament had the power to confer full blown investigating functions and powers on the NPA in the light of the provisions of sections 179 and 205.

[79] What must be stressed here is that the Constitution does not require the creation of a specialised crime unit within the NPA. This is implicit, if not explicit, from the provisions of section 205(3) which assigns to police the power to investigate crime. It leaves the decision to the exercise of political judgment by Parliament, the exercise of which is subject to the Constitution. The Constitution also does not require that once the specialised crime unit is located within the NPA, its location may never be changed without undermining the independence of the NPA. Its location may be changed but this is subject to the Constitution. Nor does the location of the specialised unit within the SAPS in itself violate the Constitution in the light of the provisions of section 205(3).

[80] International law does not support the proposition advanced by the applicant either. For example, the Legislative Guide for the Implementation of the United Nations Convention against Corruption provides:

> "States parties may either establish an entirely new independent body or designate an existing body or department within an existing organization. In some cases, an anti-corruption body may be necessary to start combating corruption with fresh and concentrated energy. In other cases, it is often useful to enlarge the competence of an existing body to specifically include anti-corruption. Corruption is often combined with

> economic offences or organized criminal activities. It is thus a sub-specialization of police, prosecution, judicial and other (for example, administrative) bodies. Implementers are reminded that the creation of new bodies with hyper-specialization may be counterproductive, if it leads to overlapping of competences, a need for additional coordination, etc., that would be hard to resolve."[63]

[81] It is difficult to fathom how the location of the specialised crime fighting unit within the SAPS will render the NPA unable to operate without fear, favour or prejudice merely because it no longer houses the DSO. There is simply no evidence to support the argument that without the DSO the NPA will lose its structural independence. It follows that this argument cannot be upheld.

[82] The arguments based on section 179 cannot stand and must be dismissed. The remaining question is whether to replace the DSO with the DPCI is unconstitutional because it violates the constitutional obligations to: (a) establish an independent crime fighting unit; and (b) respect, protect, promote and fulfil the rights in the Bill of Rights. It is to these issues that I now turn.

The obligation to establish an independent body

[83] Corruption is a scourge that must be rooted out of our society. It has the potential to undermine the ability of the state to deliver on many of its obligations in the Bill of Rights, notably those relating to social and economic rights.

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[63] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2006) at para 463 (Legislative Guide).

[84] As will be discussed later, this judgment recognises an obligation arising out of the Constitution for the government to establish effective mechanisms for battling corruption. The establishment of an anti-corruption unit is one way of meeting the obligation to protect the rights in the Bill of Rights. The Constitution is not prescriptive, however, as to the specific mechanisms through which corruption must be rooted out, and does not explicitly require the establishment of an independent anti-corruption unit. The amicus and the applicant conceded this in the course of the hearing. Nevertheless, they contended that the obligation to establish an independent anti-corruption unit is implicit in the Constitution when viewed in the light of South Africa's international treaty obligations. Lest I be misunderstood, while I am prepared to hold that there is a constitutional obligation for the state to take effective measures to fight corruption, I am not prepared to narrowly construe the options available to the state in discharging that obligation.

[85] The amicus advanced two interrelated submissions in support of the constitutional obligation contended for. First, this obligation arises from the ratification of the United Nations Convention against Corruption[64] (Convention) and the enactment of the

[64] 2004 43 *ILM* 37. The Convention was adopted on 31 October 2003 and entered into force on 14 December 2005. South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004. We have not been able to establish whether the Convention was in fact approved by a resolution of Parliament as required by section 231(2) of the Constitution. Having regard to legislative practice, it appears that once an international agreement has been approved by resolutions of both the National Assembly and the National Council of Provinces, the executive publishes a notice in the Government Gazette for the general information of the public. See, for example, GN 1534 GG 32722, 20 November 2009 (confirming approval, by resolution in both the National Assembly and the National

Prevention and Combating of Corrupt Activities Act[65] (PRECCA); and second, this obligation arises from the positive obligation of the state to protect the rights in the Bill of Rights which is imposed by section 7(2) of the Constitution as informed by South Africa's obligations under the Convention. The applicant advanced an argument similar to the first submission of the amicus. He contended that the obligation derives from the ratification of the Convention which gave it a "constitutionally binding effect" as affirmed by the preamble to PRECCA.

[86] These contentions raise three interrelated issues: (a) whether the ratification of the Convention gives rise to a constitutional obligation to establish an independent anti-corruption unit; (b) whether the domestic incorporation of the Convention gives rise to a constitutional obligation; and (c) whether the obligation to protect and fulfil the rights in the Bill of Rights contemplated in section 7(2) of the Constitution, when viewed in the light of the Convention, establishes a constitutional duty to establish an independent anti-corruption unit.

[87] These contentions must be evaluated in the light of the place of international law in our domestic legal framework, in particular the scheme of section 231 of the

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Council of Provinces, of the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971).

[65] 12 of 2004.

Constitution, which governs international agreements.[66]

Status of international agreements in our law

[88] Section 231 of the Constitution governs international agreements and provides:

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that

[66] After oral argument, this Court issued further directions (dated 29 November 2010) calling for additional written submissions. These directions directed the parties to lodge additional submissions on the following issues:

> "1) Precisely what legislative action is required before an international agreement becomes law in South Africa under section 231(4) of the Constitution?
>
> 2) What legislative action, if any, was taken to incorporate the provisions of the United Nations Convention against Corruption (the Convention) into law under section 231(4) of the Constitution?
>
> 3) If the Convention is part of our law by virtue of the provisions of section 231(4) of the Constitution read with the domestic legislation, and if there is a conflict between the Convention and the domestic legislation on the one hand and the Constitution on the other, is the validity of the impugned legislation to be tested against a provision of the Constitution, or against the provisions of the domestic legislation and the Convention?
>
> 4) If the Convention is not law in the sense contemplated in section 231(4)—
>
> i. what obligations, if any, does it create, and in particular, does it oblige the Republic of South Africa to establish an independent anti-corruption unit? If so;
>
> ii. does the Court have the power to enforce this obligation? And if so; and
>
> iii. what is the source of that power?"

has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[89] The constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements.[67] But an international agreement signed by the executive does not automatically bind the Republic unless it is an agreement of a technical, administrative or executive nature.[68] To produce that result, it requires, second, the approval by resolution of Parliament.[69]

[90] The approval of an agreement by Parliament does not, however, make it law in the Republic unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval unless it is inconsistent with the Constitution or an Act of Parliament. Otherwise, and third, an "international agreement becomes law in the Republic when it is enacted into law by national legislation."[70]

[67] Section 231(1) of the Constitution.

[68] Section 231(3) of the Constitution. We are not concerned with such agreements, here.

[69] Section 231(2) of the Constitution.

[70] Section 231(4) of the Constitution.

[91] The approval of an international agreement, under section 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign state, to be bound at the international level by the provisions of the agreement. As the Vienna Convention on the Law of Treaties provides, the act of approving a convention is an "international act . . . whereby a State establishes on the international plane its consent to be bound by a treaty."[71] The approval of an international agreement under section 231(2), therefore, constitutes an undertaking at the international level, as between South Africa and other states, to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law[72] or taking other steps to bring our laws in line with the agreement to the extent they do not already comply.

[92] An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory states. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not

[71] Vienna Convention on the Law of Treaties, 1969 8 *ILM* 679 at article II para 1(b).

[72] See below [99].

been incorporated in our law cannot be a source of rights and obligations.[73] As this Court held in *AZAPO*:

> "International conventions do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment."[74]

[93] There is support for this approach to the relationship between international agreements and domestic law in other common law jurisdictions.[75] Dealing with the status of the United Nations Convention on the Rights of the Child under Australian law, the High Court of Australia said:

> "It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law."[76] (Footnotes omitted.)

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[73] *Pan American World Airways Incorporated v S.A. Fire and Accident Insurance Co. Ltd.* 1965 (3) SA 150 (A.D.) at 161C-D. Compare *R v Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 1 AC 696 (HL) at 762A-B (legislative incorporation in the United Kingdom) and *Capital Cities Communication Inc. v Canadian Radio-Television & Telecommunications Commission* [1978] 2 S.C.R. 141 at para 54 (legislative incorporation in Canada).

[74] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 26.

[75] See *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at paras 69 (per L'Heureux-Dubé J) and 79 (per Iacobucci J); *Ashby v Minister of Immigration* [1981] 1 NZLR 222 at 224 and *Kavanagh v Governor of Mountjoy Prison* [2002] 3 I.R. 97 at 129.

[76] *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273 at 286-7.

[94] In jurisdictions that require legislative incorporation of an international agreement in order for the agreement to create rights and obligations under domestic law, the legislative act which incorporates the international agreement into domestic law has the effect of transforming an international obligation that binds the sovereign at the international level into domestic legislation that binds the state and citizens as a matter of domestic law.

[95] To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.

[96] This is not to suggest that the ratification of an international agreement by a resolution of Parliament is to be dismissed "as a merely platitudinous or ineffectual act."[77] The ratification of an international agreement by Parliament is a positive statement by Parliament to the signatories of that agreement that Parliament, subject to

[77] Id at 291.

the provisions of the Constitution, will act in accordance with the ratified agreement. International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in the domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights.[78]

[97] Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law. Firstly, section 233 requires legislation to be interpreted in compliance with international law; secondly, section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, section 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be "consistent with the Republic's obligations under international law applicable to states of emergency." These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.

[98] But treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to "incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door."[79]

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[78] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 35.

[79] *Teoh* above n 76 at 291 and *Ex parte Brind* above n 73 at 718E-F.

[99] For an international agreement to be incorporated into our domestic law under section 231(4), our Constitution requires, in addition to the resolution of Parliament approving the agreement, further national legislation incorporating it into domestic law. There are three main methods that the legislature appears to follow in incorporating international agreements into domestic law:[80] (a) the provisions of the agreement may be embodied in the text of an Act;[81] (b) the agreement may be included as a schedule to a statute;[82] and (c) the enabling legislation may authorise the executive to bring the agreement into effect as domestic law by way of a proclamation or notice in the Government Gazette.[83]

[100] The consequence of incorporation of an international agreement into our domestic law under section 231(4) is that the agreement "becomes law in the Republic". It is implicit, if not explicit, from the scheme of section 231, that an international agreement that becomes law in our country enjoys the same status as any other legislation.[84] This is

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[80] Dugard *International Law: A South African Perspective* 3 ed (Juta, Cape Town 2005) at 61.

[81] Examples of this approach include the Civil Aviation Offences Act 10 of 1972 (giving effect to the provisions of the Convention on Offences and certain other Acts committed on board Aircraft of 1963; the Convention for the Suppression of unlawful Seizure of Aircraft of 1970; and the Convention for the Suppression of unlawful Acts against the Safety of Civil Aviation of 1971) and the Children's Act 38 of 2005 (giving effect to the provisions of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993, also known as the Hague Convention on Inter-country Adoption).

[82] Examples of this approach include the Civil Aviation Act 13 of 2009 (incorporating the Convention on International Civil Aviation of 1944 and its governing protocols, as well as the International Air Services Transit Agreement of 1944, as schedules) and the Diplomatic Immunities and Privileges Act 37 of 2001 (incorporating, among other things, the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 as schedules).

[83] An example of this approach includes section 2(3)(a) of the Extradition Act 67 of 1962.

[84] See [88] above.

so because it is enacted into law by national legislation, and can only be elevated to a status superior to that of other national legislation if Parliament expressly indicates its intent that the enacting legislation should have such status. On certain occasions, Parliament has done this by providing that, in the event of a conflict between the international convention that has been incorporated and ordinary domestic law, the international agreement would prevail.[85]

[101] The amicus therefore properly accepted that, upon incorporation under section 231(4), an international agreement assumes the status of ordinary legislation in our law. In addition, the amicus also accepted, quite properly, that if there is a conflict between an international agreement that has been incorporated into our law and another piece of legislation, that conflict must be resolved by the application of the principles relating to statutory interpretation and superseding of legislation.

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[85] See for example the Children's Act 38 of 2005, giving effect to the Hague Convention on Inter-country Adoption and noting, in section 256(2), that "where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails." In some countries, international agreements are given a status superior to other legislation. In the Netherlands, article 94 of the Constitution provides that in a conflict between international and domestic law, international law prevails:

> "Within the Kingdom, legal regulations in force shall not be applicable if such application is incompatible with provisions of treaties that are binding on all persons or of resolutions by international organizations."

Translation in Flanz (ed) *Constitutions of the Countries of the World* (Oceana Publications, Inc, New York 2003) at 18. Similarly, in France, article 55 of the Constitution provides that "[t]reaties or agreements duly ratified or approved, upon publication, prevail over Acts of Parliament", translation in Flanz (ed) *Constitutions of the Countries of the World* (Oceana Publications, Inc, New York 2000) at 17, and in Argentina, article 75(22) of the Constitution provides that "[t]reaties and concordats have a higher standing than laws." Translation in Flanz (ed) *Constitutions of the Countries of the World* (Oceana Publications, Inc, New York 1999) at 14.

[102] Once it is accepted, as it must be, that incorporation of an international agreement under section 231(4) gives the international agreement the status of ordinary legislation, two consequences flow from this. Firstly, insofar as provisions in the international agreement give rise to rights and obligations under domestic law, these rights and obligations flow from, and are limited by, the extent to which the domestic legislation incorporating the agreement includes those provisions.[86] Secondly, it can hardly be contended that the incorporation of an international agreement gives rise to constitutional rights and obligations. The incorporation of an international agreement does not transform the rights and obligations embodied in the international agreement into constitutional rights and obligations.[87] It only transforms them into statutory rights and obligations that are enforceable in our law under the national legislation incorporating the agreement.

[103] Neither the approval of the Convention under section 231(2) nor its incorporation under 231(4) would have the effect of transforming the rights and obligations embodied

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[86] In the United Kingdom, for example, which follows a similar legislative incorporation process to South Africa, the European Convention on Human Rights (ECHR) was given domestic effect via the passage of the Human Rights Act 1998 (Human Rights Act). The Human Rights Act did not give effect to every article of the ECHR, however, so the effect of legislative incorporation of the ECHR into domestic UK law was that certain rights embodied in the convention were given substantive domestic effect, and the interpretation of such rights under English law is guided by ECHR jurisprudence, but only those rights enumerated in the Human Rights Act give rise to domestic claims rooted in English law. See Ewing "The Human Rights Act and Parliamentary Democracy" (1999) 62 *MLR* 79 at 84-8.

[87] The provisions of section 37(4)(b)(i) of the Constitution, which provides that legislation that derogates from the Bill of Rights must be "consistent with the Republic's obligations under international law applicable to states of emergency", arguably transforms the rights and obligations embodied in international agreements into constitutional rights and obligations, but only in the limited context of states of emergency. We are not concerned with legislation that has been enacted in consequence of a declaration of a state of emergency. It is therefore not necessary to express any firm views on this issue.

in the Convention into constitutional rights and obligations. In the light of this conclusion, it is not necessary to consider whether PRECCA in fact incorporated the Convention into domestic law under section 231(4). Even if the provision in the Convention that creates the international obligation to establish an independent anti-corruption unit is a self-executing provision, as the applicant argued somewhat faintly, its status would be no different from any other provision in a statute and it would not create constitutional obligations.[88]

[104] I now turn to the argument based on section 7(2).

The argument based on section 7(2) of the Constitution

[105] As I understand it, the argument of the amicus that there is a constitutional obligation to establish an independent anti-corruption unit rooted in section 7(2) of the Constitution proceeded along the following lines. Section 7(2) of the Constitution creates an obligation on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." This obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights. As corruption and organised crime have a deleterious impact on any

[88] It is at least arguable that, to the extent Parliament passes legislation later in time that conflicts with the provisions of PRECCA and the Convention, PRECCA is superseded by the subsequent passage of the impugned legislation absent a provision in PRECCA providing that the provisions of the Convention prevail in a conflict between PRECCA and other legislation passed by Parliament. It is not necessary, however, to express a firm view on this issue as it is not before us.

number of these rights, the amicus contended that among the state's positive duties under section 7(2) is an obligation to prevent and combat these specific social ills. The obligations contained in the Convention, the amicus argued, give content to the state's duty to protect and fulfil its obligations in terms of section 7(2).

[106] I accept that corruption has a deleterious impact on a number of rights in the Bill of Rights and that the state has a positive duty under section 7(2) to prevent and combat corruption and organised crime. I also accept that, in giving content to the obligations of the state in section 7(2), a court must consider international law as an interpretive tool as required by section 39(1)(b).

[107] Under section 7(2), there are a number of ways in which the state can fulfil its obligations to protect the rights in the Bill of Rights. The Constitution leaves the choice of the means to the state. How this obligation is fulfilled and the rate at which it must be fulfilled must necessarily depend upon the nature of the right involved, the availability of government resources and whether there are other provisions of the Constitution that spell out how the right in question must be protected or given effect. Thus, in relation to social and economic rights, in particular those in sections 26 and 27, the obligation of the state is to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights."[89]

[89] Section 26(2) (right of access to adequate housing) and section 27(2) (right of access to health care, food, water and social security) of the Constitution.

[108] The amicus has sought support for its argument in section 39(1)(b) of the Constitution. That provision requires courts, when interpreting the Bill of Rights, to "consider international law". A distinction must be drawn between using international law as an interpretive aid, on the one hand, and relying on international law as a source of rights and obligations, on the other. The purpose of section 39(1)(b), as its heading, "Interpretation of Bill of Rights", makes clear, is to provide courts with an interpretive tool when interpreting the Bill of Rights. It does not purport to incorporate international agreements into our Constitution. Nor can it be used to create constitutional obligations that do not exist in our Constitution.

[109] The argument based on section 7(2) raises the question whether it is permissible, through a process of interpretation, to read into our Constitution a constitutional obligation that the Constitution does not expressly create. This question must be determined in the light of section 39(1)(b) of the Constitution, which, as I have already indicated, requires courts, when interpreting the Bill of Rights, to consider international law.

[110] None of the international agreements cited by the applicant and amicus provides interpretive guidance as to the rights with which they are concerned. A court such as this Court is not provided with meaningful assistance in interpreting the right to equality under section 9 of the Constitution, or dignity under section 10, by reading the text of the

Convention. It does not follow from the fact that corruption can have a deleterious impact on the enjoyment of certain rights that the conventions addressing corruption and organised crime create a constitutional obligation on the state, through the operation of section 7(2), to establish an independent anti-corruption unit in the mirror image of those envisioned in the conventions.

[111] The obligation of the state, under section 7(2) to prevent and combat corruption must be informed by the provisions of section 205. Section 205 of the Constitution requires the state to establish a national police service whose objects include preventing, combating and investigating crime, which would include corruption, and protecting and securing the person and property of the inhabitants of the Republic.[90] There is no requirement that the state must use the best method possible or the most effective methods to combat crime including corruption. While this is an ideal to strive for, it is not a constitutional requirement. The state must "enable the police service to discharge its responsibilities effectively".[91] That is all that the obligation entails.

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[90] Section 205 of the Constitution states:

> "(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
>
> (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.
>
> (3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[91] Section 205(2) of the Constitution.

[112] To read the obligation to consider international law as creating, in conjunction with the obligation to protect the rights in the Bill of Rights, a constitutional obligation to establish an independent anti-corruption unit, as the amicus invites us to do, inevitably would result in incorporating the provisions of the Convention into our Constitution by the back door. This would, in effect, amount to giving the Convention a status equal to the provisions of the Constitution, contrary to the express provisions of section 231 of the Constitution, which determine the legal status of an international agreement. In addition, this would go against the express provisions of section 205 of the Constitution, which do not require an independent anti-corruption unit. In my view, the invitation by the amicus cannot be accepted. Sections 39(1)(b) and 7(2) cannot be used to achieve the result contended for.

[113] In the result, I conclude that there is no constitutional obligation to establish an independent anti-corruption unit as contended by the applicant and the amicus. It follows, therefore, that the argument based on a constitutional obligation to establish an independent anti-corruption unit must fail.

[114] The point to be stressed, however, is that which is made later in this judgment. It is this: international law, in particular the Convention, does not dictate to states parties the particular form of independence that must be granted to an anti-corruption unit. This is a recognition of the complexity and context-specific nature of the issues involved in the fight against corruption. Significantly, international law also recognises that states

parties have constitutions that are the supreme law in their respective countries and to which the establishment of an anti-corruption unit is subject. Thus, article 6(1) of the Convention requires each state party to establish an anti-corruption unit "in accordance with the fundamental principles of its legal system". Article 6(2) underscores the need to have regard to a country's constitution, by requiring each state party to grant its anti-corruption unit "the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence."

[115] It is in this context that the role of international law, in particular the Convention, must be understood. The Convention may be used as an interpretive aide in understanding the nature and scope of the constitutional obligation to effectively combat corruption and organised crime, but such obligation is not a matter that is governed directly by the Convention.[92] As the Convention explicitly states, an anti-corruption unit must be established "in accordance with the fundamental principles of [our] legal system". As an interpretive tool, therefore, the Convention is at all times subject to the requirements of the Constitution, in particular those provisions of the Constitution that specifically deal with the powers of the legislature to establish a police service in order to prevent, combat and investigate crime.

[92] *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 26.

[116] Section 205(3) of the Constitution requires the establishment of a national police service in order to "prevent, combat and investigate crime".[93] Section 205(2) requires that the legislature "establish the powers and functions of the police service" in order to "enable the police service to discharge its responsibilities effectively".[94] I accept that for the police service to effectively discharge its responsibilities under the Constitution, it must not be subject to undue influence. That is the extent of the obligation imposed by the Constitution, and it is in this context that the obligation imposed by section 7(2) must be understood. The question for determination, therefore, is whether the impugned laws establish an anti-corruption unit that has the capacity to "discharge its responsibilities effectively", as required by the Constitution. As I will demonstrate in the next section, a careful analysis of the provisions of the impugned laws makes plain that the legislature has established an anti-corruption unit which has the capacity to "discharge its responsibilities effectively".

Meaning of independence

[117] The amicus submitted that for an anti-corruption agency or body to be independent, it must: have the power to initiate its own investigations; allow investigators and prosecutors autonomous decision-making powers in handling cases; not be subject to undue influence from any of the branches of government or any third party; and have structural and operational autonomy. Save to point out that the second criterion must not

[93] Section 205(3) of the Constitution.

[94] Section 205(2) of the Constitution.

be understood to suggest that an anti-corruption unit must be located within the NPA, there is support for these broad criteria for independence.[95] I did not understand counsel for the amicus to suggest otherwise. On the contrary, he very properly conceded that the legislature has a choice either to establish the anti-corruption agency as an independent agency or locate it either within the SAPS or the NPA. That choice, however, must be governed, and indeed is limited, by the Constitution.

[118] What is apparent from international instruments is that the requirement of independence is intended to protect members of the agency from undue influence. This is necessary to ensure that the anti-corruption unit can "discharge its responsibilities effectively". The independence of anti-corruption agencies is "a fundamental requirement for a proper and effective exercise of [their] functions."[96] This is so because corruption largely involves the abuse of power. In corruption cases involving the public sector, at least one perpetrator comes from the ranks of persons holding a public office.[97] Hence the need to shield anti-corruption units from undue influence. This is a theme that recurs in the international and regional instruments cited by the amicus. Independence in this context therefore means the ability to function effectively without any undue influence. It is this autonomy that is an important factor which will affect the performance of the anti-corruption agency.

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[95] See [119] below.

[96] Organisation for Economic Co-operation and Development (OECD), *Specialised Anti-Corruption Institutions: Review of Models* (2008) at 17 (OECD report).

[97] Id.

[119] Based on its review of models of specialised anti-corruption agencies, the OECD has offered the following broad criteria for determining independence:

> "Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, *genuine political will* to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive *anti-corruption strategy*. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the *structural and operational autonomy* that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for *appointment and removal of the director* together with proper human resources management and internal controls are important elements to prevent undue interference. Independence should not amount to a lack of *accountability*; specialised services should adhere to the principles of the rule of law and human rights, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work."[98]

[120] It is therefore permissible to locate anti-corruption agencies within existing structures such as the NPA and the SAPS.[99] However, the independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. The centralised and the hierarchical nature of their structures and the fact that they report at the final level to a Cabinet minister, as in the case of the police and the NPA, presents a risk of interference. The risk of undue interference is even higher when members of the unit lack autonomous

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[98] Id at 6.

[99] See [79]-[81] above.

decision-making powers and where their superiors have discretion to interfere in a particular case. What is required are legal mechanisms that will limit the possibility of abuse of the chain of command and hierarchical structure or interference in the operational decisions involving commencement, continuation and termination of criminal investigations and prosecutions. All of this, however, is subject to the state party's "fundamental principles of its legal system"[100] as embodied in its constitution.

[121] Ultimately therefore, the question is whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as to shield it from undue political influence. I do not understand these instruments to require absolute or complete independence. Indeed, the OECD has defined independence to primarily mean that "the anti-corruption bodies should be shielded from undue political interference."[101] It concludes that—

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[100] Article 6 of the Convention provides:

> "1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
>
> (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
>
> (b) Increasing and disseminating knowledge about the prevention of corruption.
>
> 2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided."

[101] OECD report above n 96 at 6.

> "in light of international standards, one of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of *structural and operational autonomy* secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting 'pre-emptive obedience'. In short, 'independence' first of all entails de-politicisation of anti-corruption institutions."[102] (Underlining added.) (Footnote omitted.)

[122] The qualification that "full independence" is not a mandatory feature of an anti-corruption agency is a significant one. It recognises that there are different fundamental principles within each legal system. There are those legal systems, like ours, where the executive is assigned final responsibility over the functioning of police or the prosecution, as the case may be. Even with the administration of justice, the Minister for Justice and Constitutional Development bears political responsibility for the administration of justice. This is a special feature of our constitutional democracy. The Cabinet Minister responsible for the police is required by our Constitution to take final responsibility for the functioning of the police, including all crime fighting units located within the police. The same is true of the Minister for Justice with regard to the NPA.

[123] This qualification is therefore intended to accommodate these constitutional requirements. But it also recognises the functional realities of these bodies and the need for accountability. These bodies should not be a law unto themselves. They should, as the passage cited earlier makes plain, "submit regular performance reports to executive

[102] Id at 17.

and legislative bodies, and enable public access to information on their work."[103] All of this presupposes that the legislature, the executive and the judiciary have a role to play in the exercise by these bodies of their powers, consistently with the country's constitution. Indeed, the international agreements themselves explicitly require a state to establish an anti-corruption agency "in accordance with the fundamental principles of its legal system."[104]

[124] Thus understood, the independence of an anti-corruption unit in the context of international agreements must not be confused with the independence of the judiciary, for example. Nor does independence in the context of anti-corruption international agreements require that the executive should play no part in the functioning of anti-corruption agencies. Were this to be the case, this would run afoul of the fundamental principles of our legal system as contained in our Constitution, in particular, sections 206(1) and 179(6). Indeed, it is doubtful whether, if that had been the requirement, states like ours would have ratified the conventions. What is crucial, therefore, is whether the anti-corruption agency enjoys an adequate level of structural and operational autonomy, secured through institutional and other legal mechanisms aimed at preventing undue influence.

[103] See [119] above.

[104] Article 6(2) of the Convention.

[125] The question, therefore, is not whether the DPCI is fully independent, but whether it enjoys an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it "discharges its responsibilities effectively", as required by the Constitution. The provisions of the SAPSA Act, one of the impugned laws, have since been incorporated into the SAPS Act and are contained in chapter 6A, which deals with the DPCI. It will therefore be convenient to consider the relevant provisions of the impugned laws as they appear in the SAPS Act. This is the approach that was adopted by the parties. The question presented here must therefore be answered by examining the provisions of the SAPS Act, in particular, those dealing with the application of chapter 6A, the appointment of the head of the DPCI, its functioning, financial support, parliamentary oversight and legal mechanisms for dealing with undue political interference.[105]

[126] Before turning to the specific provisions of the SAPS Act, however, it is important to emphasise the particular context within which these provisions must be assessed. The Convention dictates that states parties must establish an independent anti-corruption unit, but it remains sensitive to the need that the establishment of this unit accord with the fundamental principles of a particular state's legal system.[106] This is a crucial consideration. What it means is that the starting point of the analysis, and the ultimate test of the appropriateness and adequacy of the structure and location of a South African

[105] Section 3 of the SAPSA Act inserted the provisions of chapter 6A into the SAPS Act.

[106] Article 6(2) of the Convention.

anti-corruption unit, is the Constitution. If the structure and location of the unit accord with the fundamental principles embodied in our Constitution, it cannot be found wanting.

[127] In challenging the independence of the DPCI, much weight was placed by the amicus and the applicant on the assertion that the unit would be exposed to political influence. This is indeed a valid concern, as undue influence could well undermine the effectiveness of an anti-corruption unit. However, the argument that an anti-corruption unit in South Africa must be insulated from political actors is simply inconsistent with the fundamental principles of our Constitution.

[128] Our Constitution assigns to the police the role of preventing, combating and investigating crime.[107] The placement of an anti-corruption unit that is dedicated to preventing, combating and investigating particular forms of criminal conduct within the SAPS is therefore entirely consistent with the Constitution. Once this is recognised, it follows that the constitutional provisions related to the functioning of the police, in particular those related to political oversight over the police, are instructive in assessing the degree of political exposure appropriate for an anti-corruption unit in South Africa given our particular legal system.

[107] Section 205(3) of the Constitution.

[129] It is apparent from the provisions of the Constitution that, far from requiring insulation from the political sphere, it is a fundamental principle of our legal system that there is political oversight over the police. To this end, section 206(1) requires that a member of the Cabinet be responsible for policing and determining national policing policy. Section 206(8) requires the establishment of a committee composed of the Cabinet member and members of the Executive Councils responsible for policing in the provinces to "ensure effective co-ordination of the police service and effective co-operation among the spheres of government." To the extent then that oversight over a South African anti-corruption unit located within the police is subject to Cabinet-level oversight, such oversight is not only consistent with the Constitution, but expressly contemplated.

[130] A similar conclusion must be drawn with regard to the political appointment of, and control over, the head of the anti-corruption unit. Section 207(1) of the Constitution bestows upon the President the responsibility to appoint the National Commissioner of the police service, and section 207(2) requires the National Commissioner to exercise control over the police in accordance with the national policing policy and directions of the Cabinet member responsible for policing. Political involvement in the leadership selection and direction of the police is therefore a constitutional imperative. It follows that a similar level of involvement in a specialised unit within the police would therefore not be inconsistent with the Constitution.

[131] Yet more insight is gained by comparing the relative level of political insularity called for by the Constitution with respect to different governmental institutions. The courts, for example, are required to be "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."[108] The prosecuting authority, on the other hand, must exercise its functions "without fear, favour or prejudice."[109] By contrast, the constitutional provisions related to the police service are silent as to the need for the service to operate either independently or without fear, favour or prejudice.[110] This distinction is drawn not to support a conclusion that the police, or a specialised unit within the police, may lawfully operate with fear, favour and prejudice. Far from it. The distinction is significant merely because it reflects the Constitution's determination as to the appropriate level of independence from the political system of particular governmental institutions. These determinations must be kept in mind in assessing the specific provisions of the SAPS Act. And it is to that task that I now turn.

[132] The starting point in determining the sufficiency of the independence of the DPCI is the commitment to address the scourge of corruption and other national priority offences, and to establish an independent anti-corruption unit that is apparent from the

[108] Section 165(2) of the Constitution.

[109] Section 179(4) of the Constitution. This does not mean that the national prosecuting authority must be cut-off from the political sphere. Indeed, section 179(6) provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

[110] See sections 205-7 of the Constitution.

provisions of chapter 6A of the SAPS Act.[111] The core provision in this regard is section 17B. It provides that among the factors that must be taken into account in the application of the provisions of this chapter, is the "need to ensure that the Directorate . . . has the necessary independence to perform its functions . . . [and] is equipped with the appropriate human and financial resources to perform its functions". Thus, chapter 6A is premised on the independence of the DPCI. To this extent, it provides an interpretive injunction for the application and implementation of its provisions. Those who are charged with the application and implementation of the provisions of this chapter are bound by this injunction. It is an injunction that is deeply rooted in the need for an anti-corruption unit, free from any undue political influence or otherwise. The submissions of the applicant and the amicus do not take sufficient account of this important provision.

[133] Section 17B provides the framework within which the provisions of the impugned laws must be understood and applied. But more importantly, it sets the standard against which the proper implementation and application of the provisions of chapter 6A must be assessed. It requires the provisions of chapter 6A to be applied in a manner that promotes, rather than undermines, the independence of the DPCI. Thus, for example, the policy guidelines that must be determined by a Ministerial Committee for the functioning of the DPCI must be designed to ensure that the DPCI is not subject to any undue influence in performing its functions. Similarly, the appointment of the head of the DPCI

[111] Indeed, the OECD emphasises that "[i]t is genuine political commitment, coupled with adequate resources, powers and staff, which are as crucial as formal independence, if not more so, to the success of an anti-corruption institution." OECD report above n 96 at 17.

as well as his or her removal, the structure and operation of the DPCI and the oversight functions must be designed to promote the independence of the DPCI.

[134] If the implementation or the application of chapter 6A falls short of the standard prescribed by section 17B, namely, the "need to ensure that the [DPCI] . . . has the necessary independence to perform its functions", it is open to challenge as a breach of this provision. Section 17B provides a significant guarantee for the independence of the DPCI. Therefore the remaining provisions of chapter 6A must be understood in the light of this guarantee that sets the standard for their application and implementation. Apart from the provisions of section 17B, the other provisions of chapter 6A provide important safeguards against undue interference with the functioning of the DPCI.

[135] First, the commitment to the independence of the DPCI is evidenced by ensuring the financial autonomy of the DPCI. Thus, under section 17H, the administration and functioning of the DPCI must be paid from monies appropriated by Parliament for this purpose to the department in terms of the Public Finance Management Act.[112]

[136] Second, there are important safeguards in the manner in which the head of the DPCI is appointed and its structural and operational autonomy are designed to prevent undue influence. The head of the DPCI holds the rank of a Deputy National Commissioner and is appointed by the Minister for Police with the concurrence of the

[112] 1 of 1999.

Cabinet. The appointment of the head of the DPCI therefore is not left in the hands of the Minister, alone, but must be a combined effort of the executive. Thus instead of leaving the appointment of the head of the DPCI to the Minister for Police as would have been competent under the Constitution, the impugned laws place this responsibility in the hands of the entire Cabinet. And to ensure that Parliament effectively performs its oversight functions, the Minister is required to report to Parliament on the appointment of the head of the DPCI. Other members of the Directorate are appointed by the National Commissioner who does so on the recommendation of the head of the DPCI.

[137] Operationally, there are important safeguards to ensure the independence of the DPCI. The primary function of the DPCI is to prevent, combat and investigate national priority offences. The head of the DPCI decides which priority offences must be investigated.[113] In doing so he or she acts in accordance with policy guidelines for the selection of national priority offences that are determined by a Ministerial Committee. These policy guidelines must be approved by Parliament in terms of section 17K(4). While the National Commissioner of Police also has the power to refer to the head of the Directorate offences that may be investigated, he or she too is guided by the policy guidelines determined by the Ministerial Committee.[114] Thus, far from leaving it to the Minister for Police to determine the policy guidelines, this is the responsibility of the Ministerial Committee which must do so in a manner that ensures that the DPCI has the

[113] Section 17D(1)(a) of the SAPS Act.

[114] Section 17D(1)(b) of the SAPS Act.

necessary independence to perform its functions, coupled with Parliamentary oversight as a counterbalance.

[138] These policy guidelines, which include guidelines on the functioning of the DPCI, must ensure that they limit the possibility of abuse of the chain of command and hierarchical structure or any interference in the operational decisions involving the conduct of investigations and prosecutions. This must be so because the provisions of chapter 6A must be applied in a manner that will "ensure that the [DPCI] . . . has the necessary independence to perform its functions", as required by section 17B of the SAPS Act and as required by the Constitution to "discharge its responsibilities effectively". There is no reason to believe that the policy guidelines will not comply with this requirement, but if they do not, Parliament, in the exercise of its power to approve the policy guidelines, will no doubt not approve them under section 17K. And if they should pass through Parliament unchallenged, they may well be challenged in court as being inconsistent with the provisions of the impugned laws, in particular, section 17B.

[139] Third, the involvement of the NPA and the NDPP in the investigations conducted by the DPCI strengthens the structural and operational autonomy of the DPCI and provides yet another important safeguard to prevent undue influence with the investigation and the prosecution of corruption. Under section 17D(3), the head of the Directorate may request the NDPP to designate a Director of Public Prosecutions to investigate a national priority offence. The Director of Public Prosecutions is then

required to invoke the extensive powers of investigation accorded to the NPA by section 28 of the NPA Act. The involvement of the Director of Public Prosecutions in the investigation is significant because the investigators under the NPA Act do not report to the National Commissioner of Police or the head of the Directorate. In addition, section 17F(4) requires the NDPP to "ensure that a dedicated component of prosecutors is available to assist and co-operate with members of the [DPCI] in conducting its investigations."

[140] The involvement of the Director of Public Prosecutions and a dedicated component of prosecutors to assist in the investigations is especially significant. While the OECD warns that the independence of law enforcement agencies that are institutionally placed within existing structures, such as the police, requires special attention, it suggests as one of the ways to address the risk of abusing the chain of command and hierarchical structures that the "police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor."[115] And this is precisely what sections 17F(4) and 17D(3) do. Bringing together the police and the prosecutors to work on investigations, in my view, strengthens the independence of the DPCI. This is an important structural and operational mechanism to ensure the effectiveness of the DPCI in the performance of its duties.

[115] OECD report above n 96 at 17.

[141] Fourth, the autonomy of the DPCI is further strengthened by parliamentary oversight. Section 17K of the SAPS Act makes provision for parliamentary oversight. Subsection (1) provides that "Parliament shall effectively oversee the functioning of the Directorate and the committees established [under the Act]." Parliament, for example, has the power to request a report from the head of the Directorate on the activities of the DPCI.[116] In addition, Parliament must approve all policy guidelines in connection with the functioning of the DPCI.[117] It was suggested, in the course of oral argument, albeit in a faint tone, that if the rules for the functioning of the Directorate, the selection of national priority offences and the referral of offences to the Directorate by the National Commissioner are not approved within three months, they are deemed to have been approved. This does not detract from the fact that Parliament has a final responsibility to approve these rules. And this is an important measure to ensure that the policy guidelines that are determined by the Ministerial Committee do not interfere with the functioning of the Directorate.

[142] It is appropriate to respond to the suggestion that the Ministerial Committee is a political body likely to undermine the effectiveness of the DPCI. This suggestion is highly speculative and has no factual basis. The scheme of the impugned laws finds support in our Constitution. The Ministerial Committee comprises of the Ministers for Police, Finance, Home Affairs, Intelligence and Justice. The composition of the

[116] Section 17K(3) of the SAPS Act.

[117] Section 17K(4) of the SAPS Act.

Ministerial Committee is understandable. Under the Constitution, the Minister for Justice and Constitutional Development "must exercise final responsibility over the prosecuting authority."[118] The Minister for Police is responsible for policing.[119] The Ministers for Finance, Home Affairs and Intelligence have a role to play in the administration and functioning of the police and the fight against corruption and organised crime. Each of these Ministers has a role to play in the functioning and administration of the DPCI. This is the way our constitutional democracy is structured.

[143] What must be emphasised here is that in creating these agencies, member states are not required to ignore their constitutions. As pointed out earlier, the Convention requires states to establish anti-corruption agencies "in accordance with the fundamental principles of [their] legal system."[120] Indeed, the Legislative Guide for the implementation of the Convention emphasises this. Thus, in terms of implementation of article 6 of the Convention, the Legislative Guide provides:

> "Article 6 is not intended to refer to the establishment of a specific agency at a specific level. What is needed is the capacity to perform the functions enumerated by the article.
>
> . . . .
>
> Article 6, paragraph 2, requires that States endow the body in charge of preventive policies and measures with:

[118] Section 179(6) of the Constitution.

[119] Section 206(1) of the Constitution.

[120] See [114] above.

(a) The 'independence' to ensure it can do its job unimpeded by 'undue influence', in accordance with *the fundamental principles of their legal system*;

(b) Adequate material resources and specialized staff and the training necessary for them to discharge their responsibilities.

The Convention does not mandate the creation or maintenance of more than one body or organization for the above tasks. It recognizes that, given the range of responsibilities and functions, it may be that these are already assigned to different existing agencies."[121] (Emphasis added.)

And the guidance for implementation of article 36 is to similar effect:

"Article 36 requires that States parties, in accordance with *the fundamental principles of their legal system*, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement.

. . . .

Such a body or bodies or persons must be granted the necessary independence, in accordance with *the fundamental principles of the legal system* of the State party, to be able to carry out their functions effectively and without any undue influence and should have the appropriate training and resources to carry out their tasks. An interpretive note states that the body or bodies may be the same as those referred to in article 6".[122] (Emphasis added.)

[144] The question therefore is whether the creation of the Ministerial Committee and giving it the responsibility to oversee the functioning of the DPCI is consistent with "the fundamental principles of [our] legal system." In my view, it is. This is in accordance with the fundamental principles of our Constitution, as evidenced by section 179(6)

[121] Legislative Guide above n 63 at paras 43 and 53-4.

[122] Id at paras 462 and 464.

which requires the Minister for Justice and Constitutional Development to "exercise final responsibility over the prosecuting authority", and section 206(1) which provides that the Minister for Police "must be responsible for policing and must determine national policing policy". The inclusion of these Ministers in the Ministerial Committee is therefore required by the Constitution. The other Ministers are included because of the role they play in the administration and the functioning of the DPCI. What must be stressed here is that while the Ministerial Committee has the responsibility for the functioning of the DPCI, this is subject to parliamentary oversight, which provides a counter-balance.

[145] The Ministerial Committee addresses the concern that may arise from the fact that the Minister for Police is constitutionally responsible for the functioning of the police, and thus the DPCI. The impugned laws address this concern by: first, requiring policy guidelines that deal with the functioning of the Directorate, the selection of national priority offences, the referral of cases to the Directorate by the National Commissioner, and procedures to coordinate the activities of the DPCI and other government departments and institutions; second, requiring that these policy guidelines must be determined not just by the Minister for Police but a Ministerial Committee; third, requiring that these policy guidelines must be approved by another arm of government, namely, the legislature; and finally, ensuring that the guidelines are designed to ensure that the DPCI has the necessary independence to effectively perform its functions. Thus although the DPCI is within the police, it is subject to separate policy guidelines

determined by a Ministerial Committee which oversees the functioning of the DPCI and ultimately, at the final level, by Parliament.

[146] It may well be that another structure could have been established. That, however, is not the issue. The question is whether these safeguards, together with the others already referred to, provide adequate structural and operational autonomy secured through institutional and legal mechanisms to prevent undue political interference. What must be stressed here is that it is not the judicial role to dictate to other branches what is the most appropriate way to secure the independence of an anti-corruption agency. The judicial role is limited to determining whether the agency under consideration complies with the Constitution. Indeed the legislature here had to exercise a political judgment. That there is more than one permissible way of securing the structural and operational autonomy of the DPCI does not make the choice of one rather than the other unconstitutional.[123]

[147] Finally, there is judicial oversight to prevent undue interference, which may result in criminal sanctions. In order to address any undue political influence with the functioning of the DPCI, section 17L(1) makes provision for the appointment of a retired judge to investigate complaints. These complaints include complaints "of any improper influence or interference, whether of a political or any other nature, exerted upon [a

[123] *Bel Porto* above n 49 at para 45.

member of the Directorate] regarding the conducting of an investigation."[124] In addition, the head of the Directorate may, of his or her own accord, request the retired judge to investigate complaints or allegations relating to investigations by the Directorate or alleged interference with such investigations.[125] This is an important legal mechanism to address undue political interference in the investigation.

[148] Apart from this, section 67 of the SAPS Act makes it a criminal offence to resist or willfully hinder or obstruct a member of the police force in the exercise of his or her functions.[126] Similarly it is a criminal offence to induce or attempt to induce any member not to perform his or her duties or to act in conflict with his or her duties.[127] Members of the DPCI are members of the police force and are therefore protected by the provisions of section 67 from interference with their work.

[149] In structuring the DPCI as it did, Parliament in effect assured that all three branches of government play an active role in the functioning of the anti-corruption unit. The executive, in the form of the Ministerial Committee, sets the policy guidelines; the legislature, in the form of Parliament, approves or rejects these policy guidelines and otherwise exercises oversight over the unit; and the judiciary, in the form of a retired judge, assures that complaints of interference with the unit are investigated. The

[124] Section 17L(4)(b) of the SAPS Act.

[125] Section 17L(10) of the SAPS Act.

[126] Section 67(1)(a) of the SAPS Act.

[127] Section 67(2)(a) of the SAPS Act.

judiciary also plays a crucial role in ensuring that the application and the implementation of the provisions of chapter 6A, in particular, policy guidelines for the functioning of the DPCI, ensures that the DPCI has the necessary independence to perform its functions effectively and consistently with section 17B.

[150] The inclusion of each branch of government and the designation to each of a specified role follows from the importance of the fight against corruption to all aspects of government. It also serves as an important safeguard against encroachment by any single branch into the independent operation of the DPCI. These are adequate checks and balances to ensure the independence of the DPCI. Ultimately, therefore, the provisions of chapter 6A contain sufficient safeguards to prevent undue interference in the functioning of the DPCI, backed by the injunction to apply and implement the provisions of this chapter, in a manner that ensures that the DPCI has the necessary independence to perform its functions effectively.

[151] It is true that the investigative capacity once held by the DSO within the NPA now lies with the DPCI within the SAPS and that no prosecutors are placed within the DPCI. Both the applicant and the amicus make much of this. They argued that this detracts from the independence of the anti-corruption agency, the DPCI. As I understand the argument, this is so because the prosecutors are independent and are required by law to be such. But the same is true of the DPCI, which, in terms of section 17B(b)(ii), must have "the necessary independence to perform its functions."

[152] But significantly, this argument overlooks section 17F(4) which provides that the NDPP must ensure that a dedicated component of prosecutors is available to assist and co-operate with the DPCI in conducting its investigations. This must be understood in the light of the provisions of section 17D(3), which empower the head of the DPCI to request the NDPP to designate a Director of Public Prosecutions to exercise the investigative powers in section 28 of the NPA Act. It is therefore apparent that the NDPP is still very much involved in the DPCI.

[153] In sum, the impugned laws provide the DPCI with adequate independence to deter the exertion of inappropriate influence by:

(a) guaranteeing the DPCI the necessary independence to perform its functions;

(b) ensuring that the DPCI has an adequate level of structural and operational autonomy secured through legal mechanisms to prevent undue influence;

(c) involving the NPA and the NDPP in the investigations conducted by the DPCI;

(d) providing parliamentary oversight over the functioning of the DPCI and the Ministerial Committee that makes policy guidelines relating to the functioning of the DPCI;

(e) providing judicial oversight to deal with complaints of undue influence;

(f) providing criminal sanctions to deal with undue influence; and finally,

(g) ensuring that the provisions of the impugned laws are applied and implemented in a manner that ensures that the DPCI has the necessary independence to perform its functions effectively and consistently with section 17B.

[154] Above all, a significant safeguard which appears to elude both the applicant and the amicus is section 17B which contains an explicit injunction on the application of the impugned laws. It expressly requires that the need to ensure that the DPCI has the necessary independence must be taken into consideration in applying the provisions of the impugned laws. What this means, in effect, is that in determining and approving the policy guidelines relating to the functioning of the DPCI, overseeing the functioning of the DPCI, exercising the powers of oversight over the Ministerial Committee, and in dealing with complaints relating to undue influence, all branches of government, including the officials who administer the provisions of the impugned laws, must apply the provisions of the impugned laws in a manner that will promote the independence of the DPCI. And if this is not done, it violates not only the provisions of the impugned laws, but the Constitution itself.

[155] This, in my view, is an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms that are designed to prevent undue interference in the effective functioning of the DPCI. There is no suggestion in the

papers that the injunction in section 17B has not been complied with. Instead, the applicant was content with launching a facial challenge to the impugned laws. To the extent that this challenge is a facial challenge to the impugned laws, it must therefore fail.

[156] For all these reasons, I hold that the DPCI enjoys an adequate level of structural and operational autonomy which is secured through institutional and legal mechanisms aimed at preventing undue political interference. I am therefore satisfied that the impugned legislation complies with the obligation in section 205(2) of the Constitution that requires national legislation to "enable the police service to discharge its responsibilities effectively".

Violation of the rights in the Bill of Rights

[157] As I understand the argument, it proceeds from section 7(2) of the Constitution, which requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." It was submitted that taking measures that are retrogressive, as in locating the anti-corruption unit within the SAPS, which is not independent, as opposed to the NPA, which is, detracts from the duty to protect the rights in the Bill of Rights. This proposition must stand or fall by the further submission that the present anti-corruption unit is not independent. Once it is found, as I have above, that there are adequate safeguards to prevent undue political interference, I do not think it can be suggested that the measures are retrogressive. I would, therefore, reject the challenge based on the violation of constitutional rights.

Costs

[158] The litigation initiated by the applicant in these proceedings cannot be described as vexatious. The issues that the applicant has urged on us are constitutional matters of considerable importance. In the event, I am not persuaded that we should depart from the general rule that where a private litigant is unsuccessful in vindicating his or her constitutional rights he or she should not be mulcted with costs. The argument by the respondents that the applicant is bringing the same challenge that he brought under *Glenister I* misconstrues our decision in *Glenister I*. In *Glenister I* we did not consider the merits of the challenge. We were concerned only with the timing of the challenge. The applicant therefore was entitled to raise his constitutional challenges in the manner in which he did. There should, accordingly, be no order for costs.

Order

[159] In the event, I would have granted the applications for condonation and leave to appeal. I would have dismissed the appeal and the constitutional challenge to the National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008 for failure to facilitate public involvement in the legislative process.

Brand AJ, Mogoeng J and Yacoob J concur in the judgment of Ngcobo CJ.

MOSENEKE DCJ AND CAMERON J:

Introduction

[160] The sharp issue in this case is the constitutional validity of national legislation that brought into being the Directorate for Priority Crime Investigation (popularly known as the Hawks) (DPCI)[1] and disbanded the Directorate of Special Operations (popularly known as the Scorpions) (DSO).[2]

[161] We have had the distinct benefit of reading the meticulously crafted judgment of Ngcobo CJ (main judgment). We are indebted to it for its comprehensive exposition of the background, the contentions of the parties and the issues. We agree with the manner in which it disposes of the applications for direct access, condonation and for leave to appeal.

[162] We gratefully adopt the manner in which the main judgment disposes of certain grounds advanced by the applicant to invalidate the impugned legislation. Like it, we conclude that the impugned legislation, which created the DPCI, cannot be invalidated on the grounds that it is irrational or that Parliament had failed to facilitate public

[1] South African Police Service Act 68 of 1995 (SAPS Act) as amended by the South African Police Service Amendment Act 57 of 2008 (SAPS Amendment Act).

[2] National Prosecuting Authority Act 32 of 1998 (NPA Act) as amended by the National Prosecuting Authority Amendment Act 56 of 2008 (NPA Amendment Act).

involvement in the legislative process that led to its enactment. We further agree that section 179 of the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (NPA) and nowhere else. The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not in itself unconstitutional and thus the DPCI legislation cannot be invalidated on that ground alone. Similarly, the legislative choice to abolish the DSO and to create the DPCI did not in itself offend the Constitution.

[163] However, two crucial questions remain for determination. The first is whether the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. And if it does, the second is whether the specialised unit which the impugned legislation has established, the DPCI, meets the requirement of independence. In answer to the first question, unlike the main judgment, we conclude unequivocally that the Constitution itself imposes that obligation on the state. To the second question, we hold, unlike the main judgment, that the requirement of independence has not been met and consequently that the impugned legislation does not pass constitutional muster.

[164] The sequel to these conclusions is that they lead us to an outcome that diverges from the main judgment. We uphold the appeal, find the offending legislative provisions establishing the DPCI constitutionally invalid and suspend the declaration of

constitutional invalidity in order to give Parliament the opportunity to remedy the constitutional defect within 18 months.

[165] What follow are the reasons that underpin the conclusion we reach. First, we describe the need for combating corruption and organised crime related to it; thereafter we identify the source of the obligation to establish an independent anti-corruption unit; and third, we examine the content of the obligation. In the end, we assess whether the structural and operational attributes of the DPCI satisfy the requirement of independence.

The need and rationale for combating corruption

[166] There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.

[167] This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our own

legislation,[3] in regional[4] and international[5] conventions and in academic research.[6] In a statement preceding the text of the United Nations Convention against Corruption[7] (UN Convention), Kofi Annan[8] observed:

> "This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development."

[168] These sentiments were echoed on behalf of South Africa when it signed the UN Convention. Minister Fraser-Moleketi said:

> "Corruption is a common feature in all political systems, despite the differences that may exist in their governing philosophies or their geography. Nation-states are increasingly

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[3] Prevention and Combating of Corrupt Activities Act 12 of 2004 and Prevention of Organised Crime Act 121 of 1998.

[4] Southern African Development Community Protocol against Corruption (SADC Corruption Protocol) adopted on 14 August 2001 and Southern African Development Community Protocol on Combating Illicit Drugs (SADC Drugs Protocol) adopted on 24 August 1996, http://www.sadc.int, accessed on 16 March 2011.

[5] United Nations Convention against Corruption (2004) 43 *ILM* 37 (UN Convention); United Nations Convention against Transnational Organized Crime (2001) 40 *ILM* 353; and African Union Convention on Preventing and Combating Corruption (2004) 43 *ILM* 5 (AU Convention).

[6] Goudie & Stasavage "Corruption: The Issues" (1997) OECD Development Centre Working Paper No 122; Hussman et al "Institutional Arrangements for Corruption Prevention: Considerations for the Implementation of the United Nations Convention against Corruption Article 6" (2009) U4 Anti-Corruption Resource Centre; Pilapitiya "The Impact of Corruption on the Human Rights Based Approach to Development" (2004) United Nations Development Programme, Oslo Governance Centre; Lash "Corruption and Economic Development" (2003) U4 Anti-Corruption Resource Centre; and Van Vuuren "National Integrity Systems – Transparency International Country Study Report (Final Draft): South Africa 2005" (2005) Transparency International.

[7] http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, accessed on 16 March 2011. UN Convention was adopted on 31 October 2003 and entered into force on 14 December 2005. South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004.

[8] Then Secretary-General of the United Nations.

> aware that corruption presents a serious threat to their core principles and values, and hinders social and economic development. As a result, there has been a growing acceptance of the need to address the problem in a coordinated, comprehensive and sustainable way."[9]

[169] The preamble to the African Union Convention[10] (AU Convention) readily acknowledges that "corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent". In a similar vein, the preamble to the Southern African Development Community Protocol against Corruption[11] (SADC Corruption Protocol) refers to "the adverse and destabilising effects of corruption throughout the world on the culture, economic, social and political foundations of society", and recognises that "corruption undermines good governance which includes the principles of accountability and transparency".

[170] Perhaps the fullest recital of the insidious scourge of corruption on society and the need to prevent and eliminate it is to be found in our own domestic legislation. The preamble to the Prevention and Combating of Corrupt Activities Act[12] (PRECCA)

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[9] Opening statement by Ms Geraldine J Fraser-Moleketi, the then Minister for the Public Service and Administration, South Africa, on the occasion of the signing ceremony of the UN Convention (9 December 2003), http://www.info.gov.za/speeches/2003/03122912461005.htm, accessed on 16 March 2011.

[10] The AU Convention was adopted on 11 July 2003. South Africa signed the Convention on 16 March 2004, ratified the Convention on 11 November 2005 and it entered into force on 5 August 2006.

[11] The SADC Corruption Protocol was signed by the Heads of State of all 14 SADC member states on 14 August 2001. South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.

[12] 12 of 2004. The preamble states:

> "WHEREAS the Constitution enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;

records that corruption and related corrupt activities undermine rights; the credibility of governments; the institutions and values of democracy; and ethical values and morality; and jeopardises the rule of law. It endangers the stability and security of societies; jeopardises sustainable development; and provides a breeding ground for organised

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AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil all the rights as enshrined in the Bill of Rights;

AND WHEREAS corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime;

AND WHEREAS the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law;

AND WHEREAS there are links between corrupt activities and other forms of crime, in particular organised crime and economic crime, including money-laundering;

AND WHEREAS corruption is a transnational phenomenon that crosses national borders and affects all societies and economies, and is equally destructive and reprehensible within both the public and private spheres of life, so that regional and international cooperation is essential to prevent and control corruption and related corrupt activities;

AND WHEREAS a comprehensive, integrated and multidisciplinary approach is required to prevent and combat corruption and related corrupt activities efficiently and effectively;

AND WHEREAS the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption and related corrupt activities efficiently and effectively;

AND WHEREAS the prevention and combating of corruption and related corrupt activities is a responsibility of all States requiring mutual cooperation, with the support and involvement of individuals and groups outside the public sector, such as organs of civil society and non-governmental and community-based organizations, if their efforts in this area are to be efficient and effective;

AND WHEREAS the United Nations has adopted various resolutions condemning all corrupt practices, and urged member states to take effective and concrete action to combat all forms of corruption and related corrupt practices;

AND WHEREAS the *Southern African Development Community Protocol against Corruption*, adopted on 14 August 2001 in Malawi, reaffirmed the need to eliminate the scourges of corruption through the adoption of effective preventive and deterrent measures and by strictly enforcing legislation against all types of corruption;

AND WHEREAS the Republic of South Africa desires to be in compliance with and to become Party to the *United Nations Convention against Corruption* adopted by the General Assembly of the United Nations on 31 October 2003;

AND WHEREAS it is desirable to unbundle the crime of corruption in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific corrupt activities are criminalized,

BE IT THEREFORE ENACTED . . . ."

crime. The preamble notes that corruption is a transnational phenomenon that crosses national borders and affects all societies and economies; that it is equally destructive within both the public and private spheres of life; and that regional and international co-operation is essential to prevent and control corruption and related crimes.

[171] The preamble goes on to recognise that various United Nations resolutions and the SADC Corruption Protocol condemn corruption and related corrupt practices and underscores "the need to eliminate the scourges of corruption through the adoption of effective preventative and deterrent measures and by strictly enforcing legislation against all types of corruption". It makes plain that the Republic enacts the legislation in order "to be in compliance with and to become Party to" the UN Convention.[13]

[172] Expectedly, our courts too have warned of the pernicious threat corruption poses to our collective enterprise to entrench a just and democratic society. In *S v Shaik and Others*,[14] this Court warned that corruption is "antithetical to the founding values of our constitutional order."[15] Similarly, in *South African Association of Personal Injury Lawyers v Heath and Others*,[16] this Court held that—

> "[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment

[13] Id.

[14] [2008] ZACC 7; 2008 (5) SA 354 (CC); 2008 (8) BCLR 834 (CC).

[15] Id at para 72.

[16] [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC).

> to *human dignity, the achievement of equality and the advancement of human rights and freedoms*. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."[17] (Emphasis added.)

[173] In *S v Shaik and Others*,[18] the Supreme Court of Appeal pointed out that—

> "[t]he seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and *negatively affects development and the promotion of human rights*. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe."[19] (Emphasis added.)

[174] We have noted the resolve of Parliament to battle corruption. That provokes the question: which "effective preventative and deterrent measures" are needed for "strictly enforcing legislation against all types of corruption"?[20] For the narrow purpose of this case, it must be asked what is the source of the obligation to establish and maintain a corruption-fighting unit, and which structural and operational attributes must it have? To this question we now turn.

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[17] Id at para 4.

[18] 2007 (1) SA 240 (SCA).

[19] Id at para 223. See also *S v Kwatsha* 2004 (2) SACR 564 (ECD) at 569-70; *S v Salcedo* 2003 (1) SACR 324 (SCA) at para 3; and *S v Sadler* 2000 (1) SACR 331 (SCA) at para 13.

[20] See above n 12.

The obligation to establish and maintain a corruption-fighting unit

[175] The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms. It disenables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution.

[176] Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public.[21] In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy.[22] Similar requirements apply to public procurement, when organs of state contract for goods and services.[23] It is equally

[21] See section 195 of the Constitution.

[22] Section 215.

[23] Section 217.

clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.[24] In turn the national prosecuting authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices.[25]

[177] The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights, subject to limitation. Section 7(2) casts an especial duty upon the state. It requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The state's obligation to "respect, protect, promote and fulfil" the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms. Parliament itself has recognised this in the preamble to PRECCA.[26] All this constitutes uncontested public and legislative policy in South Africa. For it has been expressly articulated and enacted by Parliament. That, however, is not the end of the matter.

[24] Section 205(3).

[25] Section 179(2).

[26] See above n 12.

[178] The core ground advanced in order to invalidate the legislation that established the DPCI is that it lacks the necessary structural and operational independence to be an effective corruption-fighting mechanism. And that, for that reason, the impugned legislation is inconsistent with international obligations of the Republic and therefore the Constitution. It must be said that the Minister did not, nor could he, contend that independence is not a necessary attribute of a corruption-fighting mechanism. The impugned legislation provides in circuitous words that when applying its terms, the need to ensure that the Directorate has the necessary independence to perform its function should be recognised and taken into account.[27] The "necessary independence" is not defined. In order to understand the content of the constitutionally-imposed requirement of independence we have to resort to international agreements that bind the Republic.[28] As we now show, our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the state's conduct in fulfilling its obligations in relation to the Bill of Rights.

Independence, international obligations and our Constitution

[179] The Constitution contains four provisions that regulate the impact of international law on the Republic. One concerns the impact of international law on the interpretation

[27] Section 17B(b)(ii) of the SAPS Act provides that "[i]n the application of this Chapter the following should be recognised and taken into account . . . [t]he need to ensure that the Directorate . . . has the necessary independence to perform its functions".

[28] In *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 34-5, this Court made it plain that it is entitled to consider both binding and non-binding instruments of international law.

of the Bill of Rights.[29] A second concerns the status of international agreements.[30] A third concerns customary international law. The Constitution provides that it "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[31] A fourth concerns the application of international law. It provides that when interpreting any legislation, "every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[32] In this judgment we are concerned primarily with section 39(1)(b) and with section 231, and it is to the latter provision that we turn first.

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[29] Section 39(1)(b) provides that, when interpreting the Bill of Rights, a court, tribunal or forum "must consider international law".

[30] Section 231 provides:

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[31] Section 232.

[32] Section 233.

[180] The negotiating and signing of all international agreements "is the responsibility of the national executive."[33] An agreement that the executive has concluded does not without more bind the Republic. For that to happen, the agreement must be approved by resolution in both the National Assembly and the National Council of Provinces (NCOP).[34] However, agreements "of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession" need not be so approved. They bind the Republic once the national executive has properly entered into them, but must be tabled in the National Assembly and the NCOP within a reasonable time.[35]

[181] In our view, the main force of section 231(2) is directed at the Republic's legal obligations under international law,[36] rather than transforming the rights and obligations contained in international agreements into home-grown constitutional rights and obligations. Even though the section provides that the agreement "binds the Republic" and Parliament exercises the Republic's legislative power, which it must do in accordance with and within the limits of the Constitution,[37] the provision must be read in conjunction with the other provisions within section 231. Here, section 231(4) is of particular significance. It provides that an international agreement "becomes law in the

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[33] Section 231(1).

[34] Section 231(2).

[35] Section 231(3).

[36] See Dugard *International Law: A South African Perspective* (3 ed) (Juta, Cape Town 2005) 59-62.

[37] Section 44(4) of the Constitution provides: "When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution."

Republic when it is enacted into law by national legislation". The fact that section 231(4) expressly creates a path for the domestication of international agreements may be an indication that section 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them.[38] It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.

[182] As noted earlier, the main force of section 231(2) is in the international sphere. An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved "binds the Republic". That important fact, as we shortly show, has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights.

[183] A number of international agreements on combating corruption currently bind the Republic. The UN Convention imposes an obligation on each state party to ensure the

[38] For an academic discussion on the legal positions under the interim Constitution and the final Constitution see Dugard "Kaleidoscope: International Law and the South African Constitution" (1997) 8 *European Journal of International Law* 77 at 81-3; Keightley "Public International Law and the Final Constitution" (1996) 12 *South African Journal on Human Rights* 405 at 408-14; and Devine "The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1993" (1995) 44 *International and Comparative Law Quarterly* 1 at 6-11.

existence of a body or bodies tasked with the prevention of corruption.[39] Moreover, Article 6(2) provides that—

> "[e]ach State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided."

[184] Under Article 8(1) of the Southern African Development Community Protocol on Combating Illicit Drugs (SADC Drugs Protocol) member states are required to institute appropriate and effective measures to curb corruption. Under Article 8(2) these measures include the following—

> "(a) Establishment of adequately resourced anti-corruption agencies or units that are:
>
> (i) independent from undue intervention, through appointment and recruiting mechanisms that guarantee the designation of persons of high professional quality and integrity;
>
> (ii) free to initiate and conduct investigations".

[185] Under the SADC Corruption Protocol, states parties must "adopt measures, which will create, maintain and strengthen . . . institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption".[40]

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[39] Article 6(1) above n 5.

[40] Article 4(1)(g).

[186] The AU Convention provides in Article 5(3) that states parties undertake to "[e]stablish, maintain and strengthen independent national anti-corruption authorities or agencies". Article 20(4) reinforces the importance of independence in more direct terms: "The national authorities or agencies shall be allowed the necessary independence and autonomy, to be able to carry out their duties effectively."

[187] The amicus helpfully referred us to a report prepared in 2007 by the Organisation for Economic Co-operation and Development (OECD): *Specialised Anti-corruption Institutions: Review of Models* (OECD Report).[41] It reports on a review of models of specialised anti-corruption institutions internationally. The OECD Report identified the main criteria for effective anti-corruption agencies to be independence, specialisation, adequate training and resources.[42] The OECD Report is not in itself binding in international law, but can be used to interpret and give content to the obligations in the Conventions we have described.[43]

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[41] http://www.oecd.org/dataoecd/7/4/39971975.pdf, accessed on 16 March 2011.

[42] The OECD drew these criteria from the provisions of UN Convention as well as the Council of Europe Criminal Law Convention on Corruption. Id at 6.

[43] In terms of Article 31(3)(b) of the Vienna Convention on the Law of Treaties 1969 (1969) 8 *ILM* 679, the subsequent practice of states in applying a treaty can be used to indicate how the states have interpreted the treaty and thus give content to treaty obligations. Article 31 of the Convention reads:

> *"General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

[188] The OECD Report defined independence as follows:

> "Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference."[44] (Emphasis removed.)

The OECD Report also found that—

> "one of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting 'pre-emptive obedience'. In short, 'independence' first

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(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

Although South Africa has neither signed nor ratified this Convention, commentators observe that South Africa employs the Convention in formulating its practice regarding treaties: see Schlemmer "Die Grondwetlike Hof en die Ooreenkoms ter Vestiging van die Wêreldhandelsorganisasie" (2010) 4 *TSAR* 749 at 753.

[44] Above n 41 at 6.

> of all entails de-politicisation of anti-corruption institutions. The adequate level of independence or autonomy depends on the type and mandate of an anti-corruption institution. Institutions in charge of investigation and prosecution of corruption normally require a higher level of independence than those in charge with preventive functions. . . .
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> . . . .
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> The question of independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. Police and other investigative bodies are in most countries highly centralised, hierarchical structures reporting at the final level to the Minister of Interior or Justice. Similarly, but to a lesser extent, this is true for prosecutors in systems where the prosecution service is part of the government and not the judiciary. In such systems the risks of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case. Accordingly, the independence of such bodies requires careful consideration in order to limit the possibility of individuals' abusing the chain of command and hierarchical structure, either to discredit the confidentiality of investigations or to interfere in the crucial operational decisions such as commencement, continuation and termination of criminal investigations and prosecutions. There are many ways to address this risk. For instance, special anti-corruption departments or units within the police or the prosecution service can be subject to separate hierarchical rules and appointment procedures; police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor."[45] (Footnotes omitted.)

[189] The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and

[45] Id at 17.

draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the state and its organs "to provide appropriate protection to everyone through laws and structures designed to afford such protection."[46] Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective.

[190] And since in terms of section 8(1), the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state", it follows that the executive, when exercising the powers granted to it under the Constitution, including the power to prepare and initiate legislation,[47] and in some circumstances Parliament, when enacting legislation, must give effect to the obligations section 7(2) imposes on the state.[48]

[191] Now plainly there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the state takes, as long as they fall

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[46] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 44.

[47] Section 85(2)(d) provides that the President exercises the executive authority, together with the other members of the Cabinet, by "preparing and initiating legislation".

[48] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 69.

within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt.[49] A range of possible measures is therefore open to the state, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable.

[192] And it is here where the courts' obligation to consider international law when interpreting the Bill of Rights is of pivotal importance. Section 39(1)(b) states that when interpreting the Bill of Rights a court "must consider international law". The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law. And international law, through the inter-locking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence.

[193] That is a duty this country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them, more especially the UN Convention.

[49] Id at para 86.

[194] That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires. Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies "binds the Republic" is of prime significance. It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anti-corruption entity that lacks sufficient independence.

[195] This is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.

[196] More specifically, we emphasise that the form and structure of the entity in question lie within the reasonable power of the state, provided only that whatever form and structure are chosen do indeed endow the entity in its operation with sufficient independence. Differently put, the requirement of independence does not answer the

question, what form and structure must the entity take? It merely asks, does the form and structure given to the entity, ensure that it is sufficiently independent?

[197] We therefore find that to fulfil its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the state must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable. It is not an extraneous obligation, derived from international law and imported as an alien element into our Constitution: it is sourced from our legislation and from our domesticated international obligations and is therefore an intrinsic part of the Constitution itself and the rights and duties it creates.

[198] More specifically, the amicus contended, and we agree, that failure on the part of the state to create a sufficiently independent anti-corruption entity infringes a number of rights. These include the rights to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.

[199] Having reached this conclusion, we pause to step back for a moment. We do so to reflect more broadly on the suggestion in the main judgment that our constitutional law does not require the state to create an independent anti-corruption entity. We consider this erroneous, not only for the reasons we have set out so far, but for a deeper reason arising from the architecture of our Constitution.

[200] As we have already pointed out, corruption in the polity corrodes the rights to equality, human dignity, freedom, security of the person and various socio-economic rights. That corrosion necessarily triggers the duties section 7(2) imposes on the state. We have also noted that it is open to the state in fulfilling those duties to choose how best to combat corruption. That choice must withstand constitutional scrutiny. And, even leaving to one side for a moment the Republic's international law obligations, we consider that the scheme of our Constitution points to the cardinal need for an independent entity to combat corruption.[50] Even without international law, these legal institutions and provisions point to a manifest conclusion. It is that, on a common sense approach, our law demands a body outside executive control to deal effectively with corruption.

[201] The point we make is this. It is possible to determine the content of the obligation section 7(2) imposes on the state without taking international law into account. But section 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision, as the main judgment suggests, to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact.

[50] See Chapter 9 "State Institutions Supporting Constitutional Democracy".

[202] A further provision of the Constitution that integrates international law into our law reinforces this conclusion. It is section 233, which, as we have already noted, demands any reasonable interpretation that is consistent with international law when legislation is interpreted. There is, thus, no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.

Limitation

[203] Any right in the Bill of Rights may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors, including the nature of the right, the importance of the limitation, and its nature and extent.[51] The respondents offered no attempt to justify any limitation of the duty to create an independent anti-corruption unit; their argument was that the unit was indeed sufficiently independent. The absence of any attempt to justify limitation is not surprising since it would, in our view, be hard to advance. The need for a sufficiently independent anti-corruption unit is so patent, and the beneficent potential of its operation so incontestable, and the disadvantages of its creation so hard to conceive, that justification would be hard to muster.

[51] Section 36(1) of the Constitution.

[204] The provisions of the South African Police Service Amendment Act[52] (SAPS Amendment Act) must therefore be measured for compliance with the state's obligation to invest the agency with the necessary independence.

[205] We add that any obligation binding upon the Republic under international law must not conflict with express provisions of the Constitution, including those in the Bill of Rights. Here, there is no conflict. Far from containing any provision at odds with the obligation to create an independent corruption-fighting entity, the very structure of our Constitution – in which the rule of law is a founding value,[53] which distributes power by separating it between the legislature,[54] the executive[55] and the judiciary,[56] and which creates various institutions supporting constitutional democracy, which it expressly decrees must be independent and impartial[57] – affords the obligation a homely and emphatic welcome.

[206] The main judgment notes that independence requires that the anti-corruption agency must be able to function effectively without undue influence. It finds that legal

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[52] 57 of 2008.

[53] Section 1(c) of the Constitution provides: "The Republic of South Africa is one, sovereign, democratic state founded on the following values . . . [s]upremacy of the constitution and the rule of law."

[54] Chapters 4 "Parliament" and 6 "Provinces".

[55] Chapter 5 "The President and National Executive".

[56] Chapter 8 "Courts and Administration of Justice".

[57] Chapter 9 "State Institutions Supporting Constitutional Democracy". The institutions are the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. Section 181(2) provides that these institutions are "independent" and must be "impartial".

mechanisms must be established that limit the possibility of abuse of the chain of command and that will protect the agency against interference in operational decisions about starting, continuing and ending criminal investigations and prosecutions involving corruption. It then asks whether the DPCI has sufficient structural and operational autonomy to protect it from political influence. Here the question is not whether the DPCI has full independence, but whether it has an adequate level of structural and operational autonomy, secured through institutional and legal mechanisms, to prevent undue political interference.

[207] To these formulations we add a further consideration. This Court has indicated that "the appearance or perception of independence plays an important role" in evaluating whether independence in fact exists.[58] This was said in connection with the appointment procedures and security of tenure of magistrates. By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to

[58] *S v Van Rooyen* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 32, endorsing the finding in *Valente v The Queen* (1986) 24 DLR (4th) 161 (SCC) at 172 that the test for independence should include public perception.

meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.

Does the DPCI have the operational and structural attributes of independence?

[208] We consider that the provisions creating the DPCI, while succeeding in creating some hedge around it, fail to afford it an adequate measure of autonomy. Hence it lacks the degree of independence arising from the constitutional duty on the state to protect and fulfil the rights in the Bill of Rights. Our main reason for this conclusion is that the DPCI is insufficiently insulated from political influence in its structure and functioning. But we rest our conclusion also on the conditions of service that pertain to its members and in particular its head. These make it vulnerable to an undue measure of political influence.

[209] In considering the statutory provisions that create the DPCI, we make comparative reference to the provisions that regulated the structure and functioning of the DSO that preceded it. By doing so we do not suggest that the DSO constitutes a "gold standard" from which Parliament cannot deviate. We nevertheless consider that the fact that Parliament has created an entity that in signal ways is less independent than the DSO is relevant to the inquiry, in two ways.

[210] First, it impacts on the public perception of independence. A reasonable and informed member of the public may have misgivings about the DPCI's independence,

given that the features protecting it are so markedly more tenuous than those of the DSO. Second, we find it hard to conclude that the creation of an entity that is markedly less independent than the DSO can fulfil the state's duty to respect, protect, promote and fulfil the rights in the Bill of Rights. This is because, as we now show, independence is assessed on the basis of factors such as security of tenure and remuneration, and mechanisms for accountability and oversight. These factors must be analysed to determine whether, on the whole, the body satisfies the threshold of adequate independence. The now-defunct DSO was independent. While it does not represent an inviolable standard, comparison with it shows how markedly short of independence the DPCI falls.

[211] There is a further point. As the main judgment observes, the international instruments require independence within our legal conceptions. Hence it is necessary to look at how our own constitutionally-created institutions manifest independence. To understand our native conception of institutional independence, we must look to the courts, to Chapter 9 institutions, to the NDPP, and in this context also to the now-defunct DSO. All these institutions adequately embody or embodied the degree of independence appropriate to their constitutional role and functioning. Without applying a requirement of full judicial independence, all these institutions indicate how far the DPCI structure falls short in failing to attain adequate independence.

[212] We therefore find reference to the now-repealed provisions that invested the DSO with its powers and created protections for their exercise illuminating.

[213] The lack of independence is reflected in our view most signally in the absence of secure tenure protecting the employment of the members of the entity and in the provisions for direct political oversight of the entity's functioning. We deal first with security of tenure, and then with political oversight.

[214] The Constitution requires the creation of an adequately independent anti-corruption unit. It also requires that a member of the Cabinet must be "responsible for policing".[59] These constitutional duties can productively co-exist, and will do so, provided only that the anti-corruption unit, whether placed within the police force (as is the DPCI) or in the NPA (as was the DSO), has sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights. The member of Cabinet responsible for policing must fulfil that responsibility under section 206(1) with due regard to the state's constitutional obligations under section 7(2) of the Constitution.

[215] Differently stated, we do not consider that the Constitution's requirement that a politician "must be responsible for policing" requires either that the anti-corruption unit must itself function under political oversight, or that the particular oversight arrangements in the legislation now impugned are constitutionally acceptable. On the

[59] Section 206(1).

contrary, as we now show, we consider the political oversight the legislation requires incompatible with adequate independence.

[216] The second general point we make is that adequate independence does not require insulation from political accountability. In the modern polis, that would be impossible. And it would be averse to our uniquely South African constitutional structure. What is required is not insulation from political accountability, but only insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit.

Security of tenure and remuneration

[217] As we turn to the conditions of employment of the DPCI, we make the initial observation that under the provisions that applied to the now-defunct DSO, the head of the DSO, the directors, deputy directors and prosecutors all had to swear an oath of office or make an affirmation before commencing duty.[60] That oath was to—

> "uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the *Republic* without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law."[61]

There appears to be no comparable requirement in the provisions constituting the DPCI.

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[60] Section 32(2)(a) read with section 4 of the NPA Act before amendment by the NPA Amendment Act.

[61] Section 32(2)(a) of the NPA Act before amendment by the NPA Amendment Act.

[218] We do not say that an oath or affirmation of this kind ensures independence. Nor do we say that it is essential to it. We make a different point. We note that the absence of any solemn undertaking, before commencing service and exercising powers, indicates the sharply diminished standing the legislation accords the DPCI and its members. No longer are they regarded as independently bound by oath to uphold the Constitution and to perform their duties without fear, favour or prejudice. They are ordinary police officials, required to perform their duty,[62] no doubt, but not enjoined or bound to do so by oath or affirmation.

[219] What is more, the head of the DPCI and the persons appointed to it enjoy little if any special job security. The provisions at issue provide that the head of the DPCI shall be a Deputy National Commissioner of the SAPS, and shall be "appointed by the Minister in concurrence with the Cabinet".[63] In addition to the head, the Directorate comprises persons appointed by the National Commissioner of the SAPS "on the recommendation" of the head,[64] plus "an adequate number of legal officers"[65] and

[62] Under the South African Police Service's Code of Conduct, promulgated by regulation in terms of section 24(1)(h) of the SAPS Act, members of the SAPS commit themselves to, amongst other things, upholding the Constitution and the law. See Regulations for the South African Police Service relating to the Code of Conduct for Members of the Service, GN R529 GG 27642, 10 June 2005.

[63] Section 17C(2)(a) of the SAPS Act.

[64] Section 17C(2)(b) of the SAPS Act.

[65] Section 17C(2)(c) of the SAPS Act.

seconded officials.[66] The Minister is required to report to Parliament on the appointment of the head of the DPCI.[67]

[220] The members of the DPCI are, like other members of the SAPS, subject to inquiries into their "fitness . . . to remain in the Service on account of indisposition, ill-health, disease or injury"[68] and on various other grounds.[69] Under prescribed conditions, an inquiry may be converted into a disciplinary inquiry.[70] Under the South African Police Service Act (SAPS Act), the National Commissioner may "discharge" any member of the DPCI from the SAPS on account of redundancy or the interests of the SAPS.[71] The Commissioner is empowered to discharge a member of the service if, for reasons other than unfitness or incapacity, the discharge "will promote efficiency or economy" in the SAPS, or will "otherwise be in the interest of" the SAPS.[72] The reach of this provision appears to include the head of the Directorate.

[221] The grounds for dismissal under the SAPS Act are broad. The DPCI's members enjoy the same security of tenure as other members of the police force – no more and no less. Their dismissal is subject to no special inhibitions, and can occur at a threshold

[66] Section 17C(2)(d) of the SAPS Act.

[67] Section 17C(3) of the SAPS Act.

[68] Section 34(1)(a) of the SAPS Act.

[69] Section 34(1)(b)-(h) of the SAPS Act.

[70] Section 34(3) read with section 40 of the SAPS Act.

[71] Section 35(a)-(b) of the SAPS Act.

[72] Section 35 of the SAPS Act.

lower than dismissal on an objectively verifiable ground like misconduct or continued ill-health.

[222] In short, the members of the new Directorate enjoy no specially entrenched employment security. They, like other members of the SAPS, have employment rights under the SAPS Act and under other labour and employment law statutes, but no special provisions secure their employment. While it is not to be assumed, and we do not assume, that powers under the SAPS Act will be abused, at the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.

[223] This is exacerbated by the fact that the appointment of the National Commissioner of the SAPS is itself renewable.[73] By contrast, the appointment of the National Director Public Prosecutions (NDPP) – who selected the head of the DSO from amongst the Deputy NDPPs – is not.[74] A renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures.

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[73] Section 7(2) of the SAPS Act.

[74] Section 12(1) of the NPA Act.

[224] The lack of specially entrenched employment security bears on the protection afforded the members of DPCI by the complaints mechanism headed by a retired judge.[75] In our view, the absence of specially secured employment may well disincline members of the Directorate from reporting undue interference in investigations for fear of retribution. In the result, the mechanism the new provisions create to protect any member of the Directorate "who can provide evidence of any improper influence or interference" exerted upon him or her regarding an investigation[76] necessarily diminishes in efficacy.

[225] The contrast with the position under the now-defunct DSO is signal. Previously, under the NPA Act, the DSO was established in the office of the NDPP, and fell within the NPA.[77] In terms of section 179(1) of the Constitution, the NDPP is appointed by the President as head of the national executive. The head of the DSO was a deputy NDPP, assigned from the ranks of deputy NDPPs by the NDPP,[78] and reporting to the NDPP. The NPA Act provides that a deputy NDPP may be removed from office only by the President, on grounds of misconduct, continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office.[79] And Parliament holds a veto over the removal of a deputy NDPP. The reason for the removal, and the representations of

[75] The main judgment at [147] relies in part on the complaints mechanism for the conclusion that the independence requirement is satisfied.

[76] Section 17L(4)(b) of the SAPS Act.

[77] Section 7(1)(a) of the NPA Act before amendment by the NPA Amendment Act.

[78] Section 7(3)(a) of the NPA Act before amendment by the NPA Amendment Act.

[79] Section 12 of the NPA Act.

the deputy NDPP, must be communicated to Parliament, which may resolve to restore the deputy NDPP to office.[80]

[226] These protections applied also to investigating directors within the DSO.[81] The special protection afforded the members of the DSO served to reduce the possibility that an individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution.

[227] In addition, before the statutory amendments now at issue, the head of the DSO, as a deputy NDPP, enjoyed a minimum rate of remuneration which was determined by reference to the salary of a judge of the High Court.[82] By contrast, the new provisions stipulate that the conditions of service for all members (including the grading of posts, remuneration and dismissal) are governed by regulations,[83] which the Minister for Police determines.[84] The absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of secure employment tenure. Not only do the members not benefit from any special provisions securing their emoluments, but the absence of secured remuneration levels is indicative of the lower status of the new entity.

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[80] Section 12(6)(c)-(d) of the NPA Act.

[81] Section 17 of the NPA Act applies to the NDPP, deputy NDPPs and directors.

[82] Section 17(1) of the NPA Act before amendment by the NPA Amendment Act.

[83] Sections 17G and 24 of the SAPS Act.

[84] Section 24 of the SAPS Act.

Accountability and oversight by the Ministerial Committee

[228] Our gravest disquiet with the impugned provisions arises from the fact that the new entity's activities must be coordinated by Cabinet.[85] The statute provides that a Ministerial Committee, which must include at least the Ministers for Police, Finance, Home Affairs, Intelligence and Justice,[86] and may include any other Minister designated from time to time by the President,[87] may determine policy guidelines in respect of the functioning of the DPCI,[88] as well as for the selection of national priority offences.[89] Indeed, the power the statute grants the head of the DPCI to combat and investigate national priority offences which in the opinion of the head need to be addressed, is expressly subordinated to policy guidelines issued by the Ministerial Committee, as is the power of the National Commissioner to refer offences or categories of offences to the DPCI.[90]

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[85] Section 17I of the SAPS Act is headed "Coordination by Cabinet".

[86] Section 17I(1)(a) of the SAPS Act.

[87] Section 17I(1)(b) of the SAPS Act.

[88] Section 17I(2)(a) of the SAPS Act.

[89] Section 17I(2)(b) of the SAPS Act.

[90] Section 17D(1) of the SAPS Act provides:

> "The functions of the [DPCI] are to prevent, combat and investigate—
>
> (a) national priority offences, which in the opinion of the Head of the Directorate need to be addressed by the [DPCI], subject to any policy guidelines issued by the Ministerial Committee; and
>
> (b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Ministerial Committee."

[229] The head of the DPCI, as a Deputy National Commissioner and a member of the SAPS,[91] is accountable to the National Commissioner, whose post, as we have pointed out, lacks sufficient security of tenure,[92] thus inevitably creating vulnerability to political pressure. In addition to this, the power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI creates in our view a plain risk of executive and political influence on investigations and on the entity's functioning.

[230] It is true that the policy guidelines the Ministerial Committee may issue could be broad and thus harmless. But they might not be broad and harmless. Nothing in the statute requires that they be. Indeed, the power of the Ministerial Committee to determine guidelines appears to be untrammelled. The guidelines could, thus, specify categories of offences that it is not appropriate for the DPCI to investigate – or, conceivably, categories of political office-bearers whom the DPCI is prohibited from investigating.

[231] This may be far-fetched.[93] Perhaps. The Minister for Police must submit any policy guidelines the committee determines to Parliament for approval.[94] This is a

[91] Section 17C(2)(a) of the SAPS Act.

[92] See above [222] and [223].

[93] We have not been able to establish that the Ministerial Committee has in fact issued any guidelines. By GN R783 GG 33524, 7 September 2010, the Minister for Police issued regulations in terms of section 24(1)(eeA) of the SAPS Act dealing with disclosure of financial and other interests; measures for integrity testing of members of the DPCI and for protection of confidentiality of information, and the form and manner in which complaints may be made to the retired judge provided for in section 17L.

[94] Section 17K(4) of the SAPS Act.

safeguard against far-fetched conduct. But if Parliament does nothing, the guidelines are deemed to be approved.[95] The point is that the legislation does not rule out far-fetched inhibitions on effective anti-corruption activities. On the contrary, it leaves them open. This is in our view plainly at odds with a structure designed to secure effective independence. It underscores our conclusion that the legislation does too little – indeed, far too little – to secure the DPCI from interference.

[232] The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They "oversee" an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function. Their power over it is unavoidably inhibitory.

[233] We point out in this regard that the DPCI is not, in itself, a dedicated anti-corruption entity. It is in express terms a directorate for the investigation of "priority offences". What those crimes might be depends on the opinion of the head of the Directorate as to national priority offences – and this is in turn subject to the Ministerial Committee's policy guidelines.[96] The very anti-corruption nature of the Directorate therefore depends on a political say-so, which must be given, in the exercise of a

[95] Section 17K(5) of the SAPS Act.

[96] Section 17D(1)(a) of the SAPS Act.

discretion, outside the confines of the legislation itself. This cannot be conducive to independence, or to efficacy.[97]

[234] Again, we should not assume, and we do not assume, that the power will be abused. Our point is different. It is that senior politicians are given competence to determine the limits, outlines and contents of the new entity's work. That in our view is inimical to independence. What is more, the new provisions go further than mere competence to determine guidelines. They also make provision for hands-on supervision. They provide:

> "(a) The Ministerial Committee shall oversee the functioning of the Directorate and shall meet as regularly as necessary, but not less than four times annually.
>
> (b) The National Commissioner and the Head of the Directorate shall, upon request of the Ministerial Committee, provide performance and implementation reports to the Ministerial Committee."[98]

[235] These provisions afford the political executive the power directly to manage the decision-making and policy-making of the DPCI. As with the power to formulate policy guidelines, the statute places no limit on the power of the Ministerial Committee in overseeing the functioning of the DPCI. On the contrary – the requirement that the Ministerial Committee must meet regularly, and that on request performance and

[97] As indicated in n 93, two years after the legislation was passed, we have been unable to find any guidelines published in terms of section 17I(2) of the SAPS Act.

[98] Section 17I(3) of the SAPS Act.

implementation reports must be provided to it, in our view creates the possibility of hands-on management, hands-on supervision, and hands-on interference.

[236] We find this impossible to square with the requirement of independence. We accept that financial and political accountability of executive and administrative functions requires ultimate oversight by the executive. But the power given to senior political executives to determine policy guidelines, and to oversee the functioning of the DPCI, goes far further than ultimate oversight. It lays the ground for an almost inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence.

[237] The new provisions contain an interpretive injunction: in their application "the need to ensure" that the DPCI "has the necessary independence to perform its functions"[99] must be recognised and taken into account. But this injunction operates essentially as an exhortation. It is an admonition in general terms, containing no specific details. It therefore runs the risk of being but obliquely regarded, or when inconvenient, disregarded altogether. This is because the interpretive rule enjoins political executives to take the need to ensure independence into account. At the same time other provisions place power in their hands without any express qualification – power to determine policy guidelines and to oversee the functioning of the DPCI.

[99] Section 17B(b)(ii) of the SAPS Act.

[238] It is the structure of the DPCI that brings its capacity to be adequately independent into question, and it is its structure that renders the interpretive injunction potentially feeble. What independence requires is freedom from the risk of political oversight and trammelling, and it is this very risk that the statutory provisions at issue create.

[239] The new provisions require parliamentary oversight of the DPCI.[100] In addition, the National Commissioner must submit an annual report to Parliament.[101] And the head of the DPCI must at any time when requested by Parliament submit a report on the DPCI's activities.[102] These are beneficial provisions. Under our constitutional scheme, Parliament operates as a counter-weight to the executive, and its committee system,[103] in which diverse voices and views are represented across the spectrum of political views, assists in ensuring that questions are asked, that conduct is scrutinised and that motives are questioned.

[240] We note, in considering how far parliamentary oversight counter-weighs these limitations of structure, that the phrase "oversee the functioning of the Directorate"

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[100] Section 17K(1) of the SAPS Act provides: "Parliament shall effectively oversee the functioning of the Directorate and the committees established in terms of this Chapter."

[101] Section 17K(2) of the SAPS Act.

[102] Section 17K(3) of the SAPS Act.

[103] See National Assembly Rules (as of June 1999) Chapter 12 Rule 125(1) ("Parties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in the Assembly".); Rules of the National Council of Provinces (issued March 1999) Chapter 9 Rule 89(1) ("Provinces are entitled to be equally represented in committees"), http://www.pmg.org.za/parlinfo/narules and http://www.pmg.org.za/parlinfo/ncoprules, accessed on 16 March 2011.

occurs in relation to the duties of both the Ministerial Committee[104] and Parliament,[105] except that in the latter case it is preceded by the word "effectively". While the Ministerial Committee must "oversee the functioning" of the DPCI, Parliament must "effectively oversee" its functioning. Despite this verbal emphasis on Parliament's oversight, no timelines or minimum standards are set for what it does in this regard. By contrast, the statute requires that the Ministerial Committee meet "as regularly as necessary, but not less than four times annually."[106] It is plain, as we indicated earlier, that it is the Ministerial Committee's oversight that is intended to be hands-on.

[241] We thus make two points. First, the parliamentary oversight the new provision requires is more benign and less intrusive than that of the Ministerial Committee. Second, Parliament's powers are insufficient to allow it to rectify the deficiencies of independence that flow from the extensive powers of the Ministerial Committee. This diluted level of oversight, in contrast to the high degree of involvement permitted to the Ministerial Committee in the functioning of the Directorate, cannot restore the level of independence taken at source.

[242] We appreciate that Parliament is unlikely to ignore its oversight role. But the provisions are nowhere designed to afford it as active an involvement in the functioning

[104] Section 17I(3)(a) of the SAPS Act.

[105] Section 17K(1) of the SAPS Act.

[106] Section 17I(3)(a) of the SAPS Act.

of the DPCI as that of the Ministerial Committee. In addition, the Ministerial Committee and the head of the DPCI have power to determine what the reports to Parliament contain. This is a significant power, which may weaken the capacity of Parliament to ensure a vigorously independent functioning DPCI.

[243] We consider that it is not unrealistic to conclude that the Ministerial Committee will be actively involved in overseeing the functioning of the DPCI. By contrast, parliamentary committees comprise members of a diversity of political parties and views. No consolidated or hegemonic view, or interest, is likely to preponderate to the exclusion of other views. As importantly, parliamentary committees function in public.[107] The questions they ask of those reporting to them aim at achieving public accountability. The Ministerial Committee by contrast comprises political executives who function out of the public gaze. The accountability they seek to exact is political accountability. It is inimical to an adequately independent functioning of the DPCI.

[244] We appreciate that the international agreements at issue require the Republic to establish an anti-corruption agency "in accordance with the fundamental principles of its legal system".[108] We also accept that our legal system requires some level of executive involvement in any area of executive functioning. We do not cavil with some measure of executive involvement. It is its extent, and the largeness with which its shadow looms in

[107] Section 59 of the Constitution.

[108] Article 6(1) of the UN Convention.

the absence of other safeguards, that is inimical to the independent functioning of the DPCI.

[245] A beneficial feature of the new provisions is that that the National Commissioner may request that prosecutors from the NPA assist the DPCI in conducting investigations.[109] But the arrangement does little to remedy the concern of politically intrusive oversight. A weakness inherent in it is that it is the National Commissioner who must exercise the power to request that prosecutors join an investigation. Whether the Commissioner will exercise this power in politically fraught investigations must be open to question. It will depend on the Commissioner, and on the terms of his or her appointment. We accept that, where such requests are made, the prosecutors will not be subject to the same chain of command as the investigators in the Directorate, but will continue to report to the NPA. This will help secure some measure of independence and serve as a warrant against undue political influence in investigations. But it is a limping and partial mechanism, which underscores the inadequacy of the arrangements to secure the overall independence of the DPCI.

[246] The other safeguards the provisions create are in our respectful view inadequate to save the new entity from a significant risk of political influence and interference. The complaints mechanism, headed by a retired judge,[110] and backed up by power to refer a

[109] Section 17F(2) and (4) of the SAPS Act.

[110] Section 17L of the SAPS Act.

complaint for prosecution,[111] operates after the fact. It permits complaints to be made, but does not constitute a hedge in advance against their causes. It also permits a member of the public to complain about infringement of rights caused by an investigation, and permits "any member of the Directorate who can provide evidence of any improper influence or interference, whether of a political or any other nature, exerted upon him or her regarding the conducting of an investigation" to complain.[112]

[247] This in our respectful view deals with history. It does not constitute an effective hedge against interference. What is more, section 17L(7) is clear that in the course of this investigation the retired judge may request information from the NDPP in so far as it may be necessary, but the NDPP may on "reasonable grounds" refuse to accede to such request. That may place a considerable hurdle in the way of the retired judge's investigation. In short, an *ex post facto* review, rather than insisting on a structure that *ab initio* prevents interference, has in our view serious and obvious limitations. In some cases, irreparable harm may have been caused which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. Only adequate

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[111] Section 17L(5) of the SAPS Act provides:

> "The retired judge may upon receipt of a complaint investigate such complaint or refer it to be dealt with by, amongst others, the Secretariat, the Independent Complaints Directorate, the National Commissioner, the Head of the Directorate, the relevant Provincial Commissioner, the National Director of Public Prosecutions, the Inspector-General of Intelligence, or any institution mentioned in chapter 9 of the Constitution of the Republic of South Africa, 1996."

[112] Section 17L(4)(b) of the SAPS Act.

mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking.

[248] For these reasons we conclude that the statutory structure creating the DPCI offends the constitutional obligation resting on Parliament to create an independent anti-corruption entity, which is both intrinsic to the Constitution itself and which Parliament assumed when it approved the relevant international instruments, including the UN Convention. We do not prescribe to Parliament what that obligation requires. In summary, however, we have concluded that the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, and the subordination of the DPCI's power to investigate at the hands of members of the executive, who control the DPCI's policy guidelines, are inimical to the degree of independence that is required. We have also found that the interpretive admonition in section 17B(b)(ii) of the SAPS Act is not sufficient to secure independence.

[249] Regarding the entity's conditions of service, we have found that the lack of employment security, including the existence of renewable terms of office and of flexible grounds for dismissal that do not rest on objectively verifiable grounds like misconduct or ill-health, are incompatible with adequate independence. So too is the absence of statutorily secured remuneration levels. We have further found that the appointment of its members is not sufficiently shielded from political influence.

[250] Regarding oversight, we have concluded that the untrammelled power of the Ministerial Committee to determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences, is incompatible with the necessary independence. We have found that the power to request prosecutors to join an investigation has limited impact, given that the National Commissioner is the functionary who has the power to request it. We have also found that the mechanisms to protect against interference are inadequate, in that Parliament's oversight function is undermined by the level of involvement of the Ministerial Committee, and in that the complaints system involving a retired judge regarding past incidents does not afford sufficient protection against future interference.

Order

[251] In the event, the following order is made:

1. The applications for condonation by the applicant, the first, second and third respondents and the amicus are granted.
2. The application for leave to appeal is granted.
3. The constitutional challenge to the National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008, for failure to facilitate public involvement in the legislative process, is dismissed.
4. The appeal succeeds to the extent indicated in paragraph 5.
5. It is declared that Chapter 6A of the South African Police Service Act 68 of

1995 is inconsistent with Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation.

6. The declaration of constitutional invalidity is suspended for 18 months in order to give Parliament the opportunity to remedy the defect.

7. The respondents are ordered to pay the costs of the applicant, including the costs of two counsel, in the High Court and in this Court.

Froneman J, Nkabinde J and Skweyiya J concur in the judgment of Moseneke DCJ and Cameron J.

6

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
11/08/2009
DATE
SIGNATURE

Case No: 8550/09

Date heard: 06/08/2009

Date of judgment: 11/08/2009

In the matter between:

Pikoli, Vusumzi Patrick	Applicant
and	
The President	1st Respondent
The Speaker of the National Assembly	2nd Respondent
The Chair of the National Council of Provinces	3rd Respondent
and	
Freedom Under Law	as *amicus curiae*

JUDGMENT

DU PLESSIS J:

In terms of section 179(1)(a) of the **Constitution of the Republic of South Africa, 1996** the head of the national prosecuting authority is the National Director of Public Prosecutions (NDPP). In terms of the same subsection the NDPP is appointed by the President, as head of the national executive. The relevant provision of the Constitution is mirrored by section 10 of the **National Prosecuting Authority Act, 32 of 1998** ("the Act") in the following terms: "The President must, in accordance with section 179 of the Constitution, appoint the National Director."

In February 2005 President Mbeki, who was then the President of the Republic, appointed the applicant as NDPP. Section 12(1) of the Act provides that the NDPP shall, subject to a presently irrelevant age restriction, "hold office for a non-renewable term of 10 years". It follows that the applicant's term of office was to expire in 2015. On 8 December 2008, however, President Motlanthe, who had by then succeeded President Mbeki, purported to remove the applicant from office. I say purported because the applicant disputes the lawfulness and the validity of the President's decision to remove him.

As is required by section 12(6)(b) of the Act, the President referred his decision to remove the applicant from office to Parliament. The National Assembly resolved on 12 February 2009 and the National Council of Provinces resolved on 17 February 2009 not to recommend the applicant's restoration to office.[1]

On 18 February 2009 the applicant launched an application in this court seeking an order to review and set aside the President's decision to remove him from office. That application, in which the lawfulness and validity of the applicant's purported removal from office is at issue, is scheduled to be heard by this court in November of this year. I shall refer to it as "the main application".

On 15 July 2009 President Zuma, who succeeded President Motlanthe, notified the applicant that he intends to appoint a new NDPP. Before this court now is an urgent application for an interim interdict to restrain the President, pending the main application, from making a permanent appointment of a new NDPP.

The requirements for an interim interdict are well established[2] and I shall in due course deal with each of them. More in general, one of the aims of an interim interdict is to preserve the *status quo* pending the final determination of the rights of the parties to pending litigation. The interim interdict does not involve a final determination of the parties' rights and it does not affect such final

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[1] See section 12(6)(b) of the Act.
[2] **The Law of South Africa** (2nd edition) Vol. 11, p. 419, para. 403.

determination.[3] When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief.[4] The court itself has an interest to ensure that it will ultimately be in a position to grant effective relief to the successful party. For reasons that will appear in due course, the issues in the main application and also in this application are constitutional issues. In such cases the court considering whether to grant or refuse an interim interdict must also bear in mind that the courts have a constitutional obligation to uphold the Constitution and to "declare that any ... conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".[5] The court must also bear in mind that not only the parties but society as a whole have an interest in upholding the Constitution and that relief in cases of constitutional breaches must vindicate the Constitution.[6]

As a first requirement, the applicant had to show that he has at least a *prima facie* right, though it might be open to some doubt, to the relief he seeks in the main application, that is, to review and set aside the decision to remove him from office. In other words, the applicant had on a *prima facie* basis to prove facts that establish that his removal from office was unlawful and therefore subject to be reviewed and set aside.

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[3] **Harms: Civil Procedure in the Supreme Court**, A5.6 with the authorities at footnote 1.
[4] See **V & A Waterfront Properties v Helicopter & Marine Services 2006 (1) SA 252 (SCA)** where, in para. 23, where the court held that a litigant is entitled not to be forced to seek alternative relief. The judgment dealt with final relief but the principle applies here.
[5] Section 172(1) of the Constitution.
[6] ***Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA)** at para. 17, 27 and 28 with the authorities there.

In the main application the applicant relies on a number of grounds for the review of the President's decision. Some of those grounds are predicated thereon that the President's decision constituted administrative action as defined in the **Promotion of Administrative Justice Act, 3 of 2000** (PAJA). Consequently, there was some debate before me as to whether the President's decision constituted administrative action as defined in PAJA or whether it constituted the exercise of executive power. The court that deals with the main application will probably have to decide that issue. For the moment I assume without finding that the decision to remove the applicant from office constituted the exercise of executive power.

In the main application the applicant contends, among other grounds, that the President's decision constituted a breach of the legality principle in that it was not authorised by law[7]. Our Constitutional Court has held, and has repeatedly reaffirmed, that "(i)t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[8] "Lawfulness is relevant to the exercise of all public power, whether or not the exercise of the power constitutes administrative

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[7] The rule of law, and thus the principle of legality, is a founding principles of our Constitution, see section 1(c).

[8] **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Metropolitan Council and Others 1999 (SA) 374 (CC)** at para. 58. See also **Pharmaceutical Mnfrs of SA: *in re ex parte* President of the RSA 2000 (2) SA 674 (CC)** at para. 17 to 20.

action."[9] Therefore, it is necessary first to consider the legal provisions that empower the President to remove the NDPP from office.

In section 12(5) thereof the Act provides: "The National Director .... shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8)." I shall return to the facts in some more detail later. It suffices now to point out that when President Motlanthe took the decision, he expressly relied on section 12(6)(a)(iv) of the Act. It is also the President's case in the main application that the decision was taken in terms of section 12(6)(a)(iv). It is on the empowering provision of that subsection that I shall now concentrate.

Section 12(6)(a)(iv) of the Act provides that the President may remove a NDPP from office "on account thereof that he or she is no longer a fit and proper person to hold the office concerned". The applicant contends that the President had no factual basis for holding that he is no longer fit and proper to hold office and therefore that his removal was not authorised by law. The question is whether the applicant has established on a *prima facie* basis that the President acted without a factual basis.

Before I turn to the facts, it is necessary to give content to the concept "a fit and proper person" when one is dealing with the NDPP. Section 9 of the Act deals with the qualifications for appointment as NDPP. Section 9(1)(b) provides that he or she must "be a fit and proper person, with due regard to his or her

[9] **Minister of Health v New Clicks SA (Pty) Ltd and Others 2006 (2) SA 311 (CC)** at para. 144.

experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned". But it goes further. Section 179(4) of the Constitution provides that "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice." This necessarily implies that the Constitution requires an independent prosecuting authority. Section 32 of the Act embodies that constitutional principle. I quote section 32(1):

> "(1) (a) A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.
>
> (b) 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."

Section 179(4) of the Constitution and section 32 of the Act entrenches a principle of prosecutorial independence that has long been part of our law. Prosecutors "have always owed a duty to carry out their public functions independently and in the interests of the public".[10] In R v Riekert[11] the principle was stated thus: "The public prosecutor has a

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[10] **Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)** para.72.

[11] **1954 (4) SA 254 (SWA)** at 2610 to G. See also **S v Yengeni 2006 (1) SACR 405 (T)** at para. 51.

wider task than counsel or attorney for a client. He represents the state, the community at large and the interests of justice generally... ". Mr Budlender for the *amicus curiae* referred to a number of foreign law authorities from which it appears that similar principles of prosecutorial independence apply in Canada, in the United States of America, in the United Kingdom and in Namibia. "The rule of law requires that, subject to any immunity and exemption provided by law, the criminal law of the land should apply to all alike. ... The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed."[12]

As the head of the national prosecuting authority the NDPP has a duty to ensure that this prosecutorial independence is maintained. It follows that a person who is fit and proper to be the NDPP will be able to live out, and will live out in practice, the requirements of prosecutorial independence. That he or she must do without fear, favour or prejudice.

The facts giving rise to the decision to remove the applicant from office briefly are the following. It is common cause that President Mbeki suspended the applicant from office in September 2007. He did that on two grounds that purportedly rendered the applicant not fit and proper to hold office. After the suspension, acting in terms of section 12(6)(a) of the Act, President Mbeki

[12] The quotation is from the main judgment of the Privy Council in **Sharma v Brown-Antoine and Others [2007] 1 WLR 780 (PC)**.

appointed Dr F Ginwala as chairperson of an inquiry to determine whether the applicant is a fit and proper person to continue in the office of NDPP. At the instance of government representatives the inquiry went much wider than the two original grounds. After a lengthy inquiry, Dr Ginwala prepared a report that she submitted to President Motlanthe on 4 November 2008. According to Dr Ginwala's report, the government had failed to substantiate any of the grounds upon which they had contended that the applicant was no longer fit and proper to hold office. Dr Ginwala recommended that the applicant "be restored to the office of NDPP".

Despite her positive recommendation, Dr Ginwala in her report made certain adverse findings against the applicant. Evidently based on these findings, President Motlanthe concluded, according to the written reasons he gave, that the applicant's conduct in relation to national security issues indicates "a clear lack of insight, which by further necessary implication rendered him a person not fit and proper to hold the office of NDPP". It is the latter inference and also its factual basis that are at issue. The applicant's qualifications, his experience, his conscientiousness and his integrity are not in question.

As to Dr Ginwala's adverse findings against him, the applicant disputes the factual correctness thereof. He also contends that he was not afforded an adequate opportunity to deal with the allegations that gave rise to the findings.

To sum up, the Ginwala-inquiry found the allegations giving rise to the applicant's original suspension to be unsubstantiated. The inquiry found the applicant to be a fit and proper person to hold office and recommended his reinstatement. Yet, based on factual findings that are in dispute, President Motlanthe removed him from office because of a lack of insight into matters of national security.

If Dr Ginwala's adverse findings were incorrect, the basis for the President's conclusion that the applicant is not a fit and proper person falls away. I have pointed out that the applicant has put forward facts that, on a *prima facie* basis show that the factual findings were not correct. On that basis, the applicant has made out a *prima facie* case that the decision to remove him from office was not authorised by the law and therefore is invalid.

Despite her adverse findings, Dr Ginwala recommended the applicant's reinstatement. President Motlanthe held a different view. Having regard thereto that it was the purpose of Dr Ginwala's inquiry to determine whether the applicant is fit and proper to hold office, the facts establish on a *prima facie* basis that President Motlanthe might have misconstrued the term "a fit and proper person" as a requirement for the office of NDPP. It is possible that the court might in the main application hold that, in view of the constitutional requirement of prosecutorial independence, the President's reasons for removing the applicant from office do not show that he was in fact not a fit and proper person to hold the office of NDPP. On that basis too the applicant has established a *prima facie*

right the relief in the main application on the basis that the decision to remove him breached the legality principle.

I conclude that, based on the legality principle, the applicant has established on a *prima facie* basis facts that, if proved finally, will entitle him to the relief sought in the main application. The applicant has at least put forward "a serious question to be tried" which is the test for interim relief that has been used when constitutional issues are at stake.[13]

For the President Mr Buchanan submitted that the President has a constitutional duty to appoint the NDPP. For the court now to interdict him from doing so, will be an unnecessary breach of the principle of the separation of powers.

In order properly to consider Mr Buchanan's submission, it is necessary to deal with a number of relevant legal principles. Those principles will also inform the proper consideration of the other requirements for an interim interdict.

The purported exercise of public power that is not authorised by law is invalid from the outset.[14] A declaration that executive action is invalid "is merely descriptive of a pre-existing state of affairs".[15] In the interest of an orderly society, however, such action is treated as if it were valid until it is declared

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[13] **Ferreira v Levin NO; Vryenhoek v Powell NO 1995 (2) SA 813 (W)** at 825C.
[14] See sections 1(c) and 2 of the Constitution.
[15] *Per* Kriegler J in **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)** at p. 94.

invalid.[16] The court that finds executive action not authorised by law, must declare it invalid. Such a court, however, has the discretion to limit the retrospective effect of the declaration of invalidity.[17] If the latter power is exercised, the court does not, it cannot, declare the action valid. In the exercise of its discretion the court may merely recognise the practical consequences of action that was invalid, but was treated as if it were valid until declared invalid and thus limit the retrospective effect of its declaration of invalidity.[18]

When there is a serious challenge to the validity of the purported exercise of public power, a state of uncertainty necessarily follows. On the one hand the action is treated as if it were valid until declared invalid. On the other hand the practical consequences of the action may turn out to be invalid as well. For that reason the law requires of all concerned to respect the pending legal process and, as far as is reasonably possible, to limit the practical consequences of the challenged action. "in appropriate circumstances ... an authority should ... halt its actions when it is aware that review proceedings are to be instituted against it. Failure to do so may render the official concerned liable for contempt of court".[19]

Because the decision to remove the applicant from office is at the moment still treated as valid and because it might in the end turn out to be valid, counsel is correct that, strictly speaking, the President has the power to appoint a new NDPP. I cannot agree, however, that interdicting the President from exercising

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[16] **Hoexter: Administrative Law in South Africa**, p. 486.
[17] Section 172(1)(b)(i) of the Constitution.
[18] See **Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)**. See also the discussion by **Hoexter: Administrative Law in South Africa** at p. 486.
[19] **De Ville: Judicial Review of Administrative Action in South Africa** at pp. 332 and 333.

that power would amount to a breach of the separation of powers. The very power to appoint a new NDPP is the subject matter of court proceedings and, apart from the considerations set out above, the law affords the court the discretion to issue the interim interdict.

I now turn to the further requirements for an interim interdict.

The second requirement is that the applicant has a reasonable apprehension that he will suffer irreparable harm if the interdict is not granted. I have made reference to section 172(1)(a) of the Constitution in terms whereof the court must declare conduct that is inconsistent with the constitution invalid. The effect of such a declaration in the present case will be that the President's decision to remove the applicant from office will be void from its inception and that it will have no legal force or effect.[20] The court can, in terms of section 172 make an order limiting the retrospective effect of the declaration of invalidity.

Assuming that the applicant will be successful in the main application, an appointment now of a new NDPP will severely limit his remedies. In view of the fact that there will then be another NDPP in the post, the court will be more inclined to limit the retrospective effect of its declaration of invalidity. The applicant's rights to be reinstated will also be adversely affected. In my view there is a reasonable apprehension that the applicant will suffer irreparable harm if the interim interdict is not granted.

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[20] See **Hoexter** at pp 484 – 485.

In this regard, the interests of the public as a whole must also be taken into consideration. The public has an interest in the President and the courts upholding the Constitution. I have pointed out that if a breach of the Constitution occurs, the public as a whole has an interest in an effective remedy. If, for the reasons that I have set out, the applicant's remedies are limited, then the public interest is also affected adversely. Allowing the President now to appoint a new NDPP might ultimately turn out, if the applicant is successful, to have countenanced the unlawful exercise of public power. That is not in the interests of society as a whole.

The third requirement for an interim interdict is that the balance of convenience must favour the grant of the interim interdict. It is common cause that, since the applicant's suspension in 2007 there has been an acting NDPP. There is no evidence that he did not duly and properly perform the duties of the NDPP.

For the President Mr Buchanan submitted that it is not desirable to continue to have an acting NDPP performing the important functions in question. It may be accepted, as a general proposition, that it is not desirable for a lengthy period of time to have an acting NDPP. That undesirability must be weighed against the alternative that the appointment of a new NDPP offers.

I have pointed out that the very lawfulness of the appointment of a new NDPP will from the outset be at issue. Decisions of a person who was unlawfully

appointed as NDPP might be subject to attack. It is not now necessary to consider whether such attacks would be successful. The mere fact of such attacks and the attendant uncertainty are undesirable. Moreover, the appointment of a new NDPP might turn out to be temporary. While the fact of the appointment might well influence the court's exercise of its discretion, it remains possible that a court might remove the newly appointed NDPP so as to reinstate the applicant. Such a state of affairs is undesirable not only because it renders the new appointment possibly temporary, but also because the appointment itself creates uncertainty.

In my view the balance of convenience clearly favours the applicant, especially in view thereof that there is no evidence that the acting appointment that has been in place for nearly two years has caused any practical difficulties.

The fourth requirement for an interim interdict is that the applicant must show that he has no alternative remedy. Mr Buchanan submitted that if the applicant is successful, it does not necessarily follow that he will be reinstated. He could also claim damages for his unlawful dismissal.

I have pointed out that conduct inconsistent with the Constitution is void from its inception. From that it follows that the applicant will automatically be reinstated if the main application succeeds, unless the court makes an order to limit the retrospective effect of its declaration. If the court makes such an order the applicant might be constrained to claim damages. All of that is speculation,

however. The only effective way to protect the applicant's right to reinstatement if he succeeds is to grant the interim interdict. I have already pointed out the society as a whole also has an interest in an effective remedy. To award damages to the applicant might countenance the invalid exercise of public power.

According to its notice of motion, the applicant seeks the interim order pending the final determination of the main application or, in the alternative, until this court has given judgment in the main application. The court that deals with the main application will be in a much better position than this court to decide whether an interim order should be made pending a possible appeal against its decision. In the circumstances I am of the view that the order must be made pending judgment in the main application.

Mr Bruinders submitted that costs should follow the event. There is something to be said for the view that the President should have been advised not to oppose this application. I have, however, no basis to doubt his assertion that he is acting in the interests of orderly government. In my view the equitable order will be to order that costs be costs in the main application. In that way, the party who is ultimately successful will in effect have a costs order relating to these proceedings in his favour.

In the result the following order is made:

1. The first respondent is interdicted from making a permanent appointment of a new National Director of Public Prosecutions until this court has given judgment in the main application in case no. 8550/09.
2. The costs of this application shall be costs in the main application.

B.R. du Plessis

Judge of the High Court

On behalf of the Applicant:	Deneys Reitz C/O Mothle Jooma Sabdia Inc 1st Floor, West Wing, Duncan Manor Cnr Duncan/Brooks Streets Brooklyn PRETORIA
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On behalf of Freedom under law:	Webber Wentzel C/O Friedland & Hart 4-301 Monument Park PRETORIA

7

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 122/11
[2012] ZACC 24

In the matter between:

DEMOCRATIC ALLIANCE — Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — First Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — Third Respondent

MENZI SIMELANE — Fourth Respondent

Heard on : 8 May 2012

Decided on : 5 October 2012

JUDGMENT

YACOOB ADCJ (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J concurring):

Introduction

[1] This case requires a decision on whether the appointment of Mr Menzi Simelane[1] as the National Director of Public Prosecutions (National Director) of our country by the President of the Republic of South Africa[2] is within the bounds of the Constitution. The Minister for Justice and Constitutional Development[3] (Minister) and Mr Simelane appeal against a judgment and order of the Supreme Court of Appeal,[4] which concluded that the appointment of the National Director was constitutionally wanting in that the process for appointment and, consequently, the appointment itself was irrational and invalid. The High Court[5] held that, while the appointment of Mr Simelane as the National Director raised some concerns, it could not be said that the conduct of the President fell foul of the Constitution.

[2] The order of the Supreme Court of Appeal reads:

> "1. The appeal succeeds and the first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellant's costs, including the costs of three counsel.
>
> 2. The order of the court below is set aside and substituted as follows:
>
> '(a) It is declared that the decision of the President of the Republic of South Africa, the first respondent, taken on or about Wednesday 25 November 2009, purportedly in terms of s 179 of the Constitution of the Republic of South Africa (the Constitution), read with ss 9 and 10 of the National Prosecuting Authority Act 32 of 1998, to appoint

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[1] The fourth respondent.

[2] The first respondent.

[3] The second respondent.

[4] *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) (SCA judgment).

[5] *Democratic Alliance v President of the Republic of South Africa and Others* [2010] ZAGPPHC 194.

> Mr Menzi Simelane, the fourth respondent, as the National Director of Public Prosecutions (the appointment), is inconsistent with the Constitution and invalid.
>
> (b) The appointment is reviewed and set aside.
>
> (c) The first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellants costs, including the costs of two counsel'."

[3] The Constitution provides that an order of constitutional invalidity of any conduct of the President has no force unless it is confirmed by this Court.[6] The order of the Supreme Court of Appeal declared invalid the conduct of the President. The Democratic Alliance[7] applies for confirmation of the order of the Supreme Court of Appeal. The Minister opposes the application. The President opposed the application in the High Court and in the Supreme Court of Appeal but has decided not to participate in these proceedings.[8]

The facts broadly

[4] The facts and circumstances that form the basis upon which the Democratic Alliance contends for the unconstitutionality of the appointment of the National Director are separately set out in detail later, in relation to each argument advanced. A broad outline of the facts will suffice at this stage.

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[6] Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court 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."

[7] The applicant.

[8] The President initially opposed confirmation but withdrew shortly afterwards.

a. Mr Simelane, in his capacity as the Director-General of the Department for Justice and Constitutional Development (Director-General),[9] was intimately involved in a dispute concerning the proper role of the then National Director, Mr Vusi Pikoli. The dispute related to the powers and duties of the Minister for Justice and Constitutional Development and the National Director.

b. Mr Pikoli was suspended by the then President[10] on 23 September 2007.

c. Shortly after that, on 3 October 2007, Mr Mbeki appointed a commission of enquiry[11] headed by a former Speaker of Parliament, Dr Frene Ginwala (Ginwala Commission) to inquire into Mr Pikoli's fitness to hold office as the National Director.

d. Mr Simelane presented the government's submissions to, and gave evidence under oath before, the Ginwala Commission.

e. The report of the Ginwala Commission criticised with some severity the approach by Mr Simelane in making government's submissions as well as the credibility of his evidence.

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[9] A position he occupied from June 2005 to October 2009.

[10] Mr Thabo Mbeki.

[11] Section 12(6)(a) of the National Prosecuting Authority Act 32 of 1998 (Act) provides:

> "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—
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> (i) for misconduct;
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> (ii) on account of continued ill-health;
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> (iii) on account of incapacity to carry out his or her duties of office efficiently; or
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> (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned."

f. The then Minister for Justice and Constitutional Development,[12] Mr Enver Surty, requested the Public Service Commission[13] to investigate Mr Simelane's conduct during the Ginwala Commission.[14]

g. The Public Service Commission, in a detailed report, recommended disciplinary proceedings against Mr Simelane arising out of his conduct and evidence before the Ginwala Commission.[15]

h. The Minister[16] rejected the recommendations of the Public Service Commission.[17]

i. The President appointed Mr Simelane as the National Director two days after the Minister rejected the Public Service Commission recommendations.

j. Mr Simelane had been appointed as the Deputy National Director of Public Prosecutions a month and a half earlier.[18]

k. This appointment took place in the wake of Mr Pikoli's dismissal[19] by the then President[20] and the settlement of a case brought by Mr Pikoli to challenge his dismissal in terms of which Mr Pikoli agreed to be relieved of his position.

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[12] The predecessor of the present Minister.

[13] A constitutional institution created by section 196 of the Constitution.

[14] The request was made on 10 December 2008.

[15] The Report of the Public Service Commission is dated April 2009.

[16] Mr Jeff Radebe, who had succeeded Minister Surty as Minister for Justice and Constitutional Development.

[17] On 23 November 2009.

[18] On 6 October 2009.

[19] On 8 December 2008.

[20] Mr Kgalema Motlanthe.

l. The General Council of the Bar subsequently[21] began an investigation into Mr Simelane's fitness as an advocate arising at least out of Mr Simelane's conduct during the Ginwala Commission.

[5] The constitutional setting will be discussed in more detail later. But to understand the judgment of the Supreme Court of Appeal, it is enough to say that the appointment was made by the President as head of the National Executive in terms of the Constitution,[22] which requires national legislation to ensure that the National Director is appropriately qualified. That national legislation is the Act and provides that the National Director must be a person fit and proper for the job.[23]

The Supreme Court of Appeal

[6] The Supreme Court of Appeal considered that the President erred in four respects and that these mistakes rendered the process by which the decision to appoint Mr Simelane had been taken and, consequently, the decision itself irrational and invalid. The first was that, according to the President, he had firm views about Mr Simelane being the right person to be appointed the National Director even before he had considered whether Mr Simelane was a fit and proper person for the job. Second, the President incorrectly reasoned that the absence of evidence contradicting the idea that Mr Simelane was a fit and proper person for appointment justified the conclusion that he was indeed a fit and proper person. The correct approach,

[21] In December 2009.

[22] Section 179(1)(a).

[23] Section 9(1)(b) of the Act.

according to the Supreme Court of Appeal, was for the President to determine positively whether Mr Simelane was a fit and proper person. This the President did not do. Third, the President disregarded the criticisms of Mr Simelane made by the Ginwala Commission, on the tenuous basis that the Commission had not been appointed to investigate Mr Simelane, but Mr Pikoli. Last, the recommendations of the Public Service Commission that the Ginwala Commission's criticisms merited a disciplinary enquiry against Mr Simelane were too lightly brushed aside.[24]

[7] The Supreme Court of Appeal was of the view that the fact that the Ginwala Commission's comments were not taken into account was in itself enough to set aside the appointment as irrational.

Submissions in this Court

[8] The Minister reiterates the argument advanced in the Supreme Court of Appeal that neither the Constitution nor the Act prescribes any procedure for the appointment of the National Director. This being so, it was for the President to determine the process. This he did, so it is submitted. That process was described in the Minister's written argument as including an "*assessment and evaluation of the qualities, strengths and weakness of the person whom the President had identified for appointment.*" (Emphasis added.) The Minister stresses that the rationality requirement is not onerous, and submits that the test employed by the Supreme Court of Appeal went beyond rationality, and amounted to an unauthorised intrusion into

[24] The Supreme Court of Appeal in fact said that the President and the Minister "were too easily dismissive" of the attitude of the Public Service Commission.

presidential and executive territory. The Supreme Court of Appeal, says the Minister, applied the reasonableness standard appropriate for administrative action cases under PAJA,[25] instead of testing presidential executive action by reference to rationality alone. According to the Minister a court would, on the application of the proper test, be entitled to set aside the appointment only if it concluded that Mr Simelane was not a fit and proper person to have been appointed. Reliance is also placed on the separation of powers requiring a more deferential approach. It is contended that the President has a wide, subjective discretion in making the appointment and that it should be understood that the National Director is a political appointee who has a substantial policy-related role as distinct from other Directors of Public Prosecutions.

[9] The Minister addresses directly only one of the findings of the Supreme Court of Appeal set out earlier:[26] that the finding of the Court that the President had firm views about the appointment of Mr Simelane before he considered whether Mr Simelane should be appointed is incorrect. It is contended that the President said this after having considered the provisions of section 9(1)(b) in the process of Mr Simelane's appointment as Deputy National Director of Public Prosecutions. The

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[25] In terms of section 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in order to give effect to procedurally fair administrative action, the administrator must fulfil certain requirements. In terms of section 4(4)(a) an administrator may depart from the requirements if it is reasonable and justifiable to do so. In determining whether the departure is reasonable and justifiable the administrator must take into account the factors mentioned in section 4(4)(b). These factors are:

"i) the objects of the empowering provision;

ii) the nature and purpose of, and the need to take, the administrative action;

iii) the likely effect of the administrative action;

iv) the urgency of taking the administrative action or the urgency of the matter; and

v) the need to promote an efficient administration and good governance."

[26] See [6] and [7] above.

only response by the Minister to the other findings of the Supreme Court of Appeal is that the Court glossed over other indications that Mr Simelane was fit and proper of which the Minister was aware. It is also asserted that the Ginwala Commission was not a court and that the Minister was right that Mr Simelane should have had the opportunity to respond to these matters before adverse inferences were drawn against him.

[10] Mr Simelane broadly aligns himself with the Minister, clarifying however that he was not a party to the process of his appointment.

[11] The Democratic Alliance supports the reasoning and conclusion of the Supreme Court of Appeal concerning rationality. It contends in addition that the evidence showed that Mr Simelane was not a fit and proper person to be appointed National Director, which it argues is an objective jurisdictional fact antecedent to appointment, and that the President had an ulterior purpose in appointing him. The Minister and Mr Simelane take issue with these submissions too.

The issues

[12] It is common cause, and rightly so, that the decision of the President was an executive decision and that the decision had to be rational. The Democratic Alliance is of the view that it is unnecessary to decide the question whether the decision by the President constituted executive or administrative action, because even in terms of the former, rationality is a requirement under the principle of legality. The issues this

Court must traverse, after setting out the constitutional and statutory provisions that bear on the President's decision, are now defined:

a. The question whether the requirement that the National Director must be a fit and proper person to be appointed to that position is an objective jurisdictional fact antecedent to appointment.

b. The requirements of rationality concerned in particular with—

    i. the distinction between reasonableness and rationality and the relationship between means and ends;

    ii. whether the process as well as the ultimate decision must be rational;

    iii. the consequences for rationality if relevant factors are ignored; and

    iv. rationality and the separation of powers.

c. An investigation into whether the decision of the President to appoint Mr Simelane was rational and, in particular, whether the President's failure to take into account the finding in relation to and evidence of Mr Simelane in the Ginwala Commission was rationally related to the purpose for which the power to appoint a National Director was conferred.

d. If the decision is found to be rational in this sense then we must evaluate whether—

    i. the evidence shows that Mr Simelane is a fit and proper person to be appointed the National Director; and

    ii. the President had an ulterior purpose in making the appointment.

A conclusion that the appointment by the President of Mr Simelane as National Director was irrational, in the sense that the means employed to make the appointment were not rationally connected to the purpose for which the power had been conferred upon the President, would render it unnecessary to decide the issues in sub-paragraph (d) above.

The Constitution and the Act

[13] The appointment of the National Director is governed by section 179 of the Constitution and certain provisions of the Act. I set out those features that, in my view, are material to our decision:

a. The Constitution demands a single national prosecuting authority headed by a National Director of Public Prosecutions appointed by the President and Directors of Public Prosecutions appointed in terms of an Act of Parliament.[27] Section 10 of the Act requires the President to appoint the National Director according to section 179 of the Constitution.[28]

[27] Section 179(1) provides:

> "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
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> (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament."

[28] Section 10 provides:

> "The President must, in accordance with section 179 of the *Constitution*, appoint the National Director."

b. Section 179 obliges national legislation to ensure that Directors of Public Prosecutions are appropriately qualified.[29] There was some suggestion, on the basis that section 179 makes a continuous distinction between National Directors and other Directors, that the Constitution does not require the National Director to be appropriately qualified. I am prepared to accept that the reference to Directors being appropriately qualified may be construed as a reference to Directors of Public Prosecutions and not the National Director. All this means is that the requirement that the National Director must be appropriately qualified is not expressly stated in section 179. This cannot mean that the Constitution does not require the National Director to be appropriately qualified. That proposition, in my view, simply has to be stated to be rejected. The Constitution by necessary implication requires the National Director to be appropriately qualified.

c. Section 9 of the Act determines these qualifications.[30] For present purposes, the only relevant prescribed qualification is that a person

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[29] Section 179(3) provides:

"National legislation must ensure that the Directors of Public Prosecutions—

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5)."

[30] Section 9 provides:

"(1) Any person to be appointed as *National Director*, *Deputy National Director* or *Director* must—

(a) possess legal qualifications that would entitle him or her to practise in all courts in the *Republic*; and

(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.

(2) Any person to be appointed as the *National Director* must be a South African citizen."

appointed as a Director of Public Prosecutions, including the National Director, "must . . . be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned."

d. National legislation is required to ensure that the prosecuting authority, and this includes the National Director, performs its functions without fear, favour or prejudice.[31] The Act does this.[32]

e. The National Director has the power to institute criminal proceedings on behalf of the State[33] and must determine prosecution policy after consultation with the Directors of Public Prosecutions and with the concurrence of the Minister.[34] The National Director is also obliged to issue[35] and enforce[36] policy directives to be observed in the prosecution

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[31] Section 179(4) provides:

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

[32] Section 32(1)(a) provides:

"A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law."

[33] Section 179(2) provides:

"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."

[34] Section 179(5)(a) provides:

"The National Director of Public Prosecutions must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process".

[35] Section 179(5)(b) provides:

"The National Director of Public Prosecutions must issue policy directives which must be observed in the prosecution process".

[36] Section 179(5)(c) provides:

"The National Director of Public Prosecutions may intervene in the prosecution process when policy directives are not complied with".

process and has the power to review a decision whether to prosecute or not.[37] These powers and duties are extensive and their proper exercise and performance is crucial to the attainment of criminal justice in our country. And the attainment of an effective criminal justice system is in turn vital to our democracy.

f. The Constitution and the Act oblige the Minister to exercise final responsibility over the prosecuting authority.[38] The Act also obliges the National Director to provide certain information concerning prosecutions if the Minister requests it.[39]

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[37] Section 179(5)(d) provides:

> "The National Director of Public Prosecutions may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
>
> (i) The accused person.
>
> (ii) The complainant.
>
> (iii) Any other person or party whom the National Director considers to be relevant."

[38] Section 179(6) provides:

> "The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority."

Section 33(1) of the Act provides:

> "The *Minister* shall, for purposes of section 179 of the *Constitution*, *this Act* or any other law concerning the *prosecuting authority*, exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act*."

[39] Section 33(2) of the Act provides:

> "To enable the *Minister* to exercise his or her final responsibility over the prosecuting authority, as contemplated in section 179 of the *Constitution*, the *National Director* shall, at the request of the *Minister*—
>
> (a) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;
>
> (b) provide the *Minister* with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;
>
> (c) furnish the *Minister* with information with regard to the prosecution policy referred to in section 21(1)(a);

g. The President, the Minister and all other organs of state are not to interfere improperly with, hinder or obstruct the prosecuting authority.[40]

Is fitness and propriety an objective requirement?

[14] The Supreme Court of Appeal concluded that the President's decision was irrational irrespective of whether the decision taken by the President was subjective or whether the criteria for appointment of the National Director were objective. It nevertheless concluded, for the purpose of giving guidance, that the requirement that the National Director must be a fit and proper person constituted a jurisdictional fact capable of objective ascertainment. My approach is somewhat different. Questions as to whether and how the rationality requirement would apply if the criteria were merely subjective are, to my mind, complex. I therefore think it is appropriate to determine first whether the Supreme Court of Appeal was correct in concluding that the requirements represented objective jurisdictional facts.

[15] The Minister and Mr Simelane contend that the President has a wide discretion in the appointment of the National Director. It follows, so they submit, that it is for the President to make the decision – which involves a value judgment – and the

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(d) furnish the *Minister* with information with regard to the policy directives referred to in section 21(1)(b);

(e) submit the reports contemplated in section 34 to the *Minister*; and

(f) arrange meetings between the *Minister* and members of the *prosecuting authority*."

[40] Section 32(1)(b) of the Act 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."

requirement that the person appointed "must be a fit and proper person with due regard to his experience, conscientiousness and integrity" is thus not an objective one.

[16] In developing the point, the Minister places considerable emphasis on the fact that the role of the prosecuting authority was policy driven and that the National Director was what was referred to in argument as "a political appointee". It is true that the National Director is appointed by the President. It does not follow that this renders the incumbent of that office "a political appointee". I endorse the statement in *Legal Soldier*,[41] describing the office of the National Director as a "non-political chief executive officer directly appointed by the President":

> "The most important change brought about by s 179 . . . is that a single national prosecuting post was created. Previously there was a direct link between the Minister of Justice and the various Attorneys-General, whose activities such Minister coordinated and to whom they reported. What s 179 did was to slot the NDPP in between the political head of the Department of Justice and the officers at the head of the provincial prosecutorial divisions. The effect of the change was to gather the strands of the country's prosecutorial services in the hands of one non-political chief executive officer directly appointed by the President."[42]

[17] The Minister also relied on the following statement in *Geuking*:[43]

> "The President in deciding whether to consent to the surrender of a person under s 3(2) must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs. It is not for the courts to determine what

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[41] *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* [2001] ZACC 12; 2002 (1) SA 1 (CC); 2001 (11) BCLR 1137 (CC) (*Legal Soldier*).

[42] Id at para 19.

[43] *Geuking v President of the Republic of South Africa and Others* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC).

> matters are appropriate or relevant for that purpose. The courts could intervene only if the President were to abuse the power vested in him or use it in a manner contrary to the provisions of the Constitution."[44] (Footnote omitted.)

[18] *Geuking* is not on point. It was concerned with a provision of the Extradition Act[45] to the effect that the President has to consent to extradition before it can validly take place. The Extradition Act lays down no criteria for the granting of the consent of the President.

[19] The present case is comparable with that part of *SARFU*[46] in which this Court held, drawing on the Appellate Division,[47] that the requirement that a matter must be one of "public concern" before the Commissions Act[48] applies to it, is an objective one:

> "In determining whether the subject-matter of the commission's investigation is indeed a 'matter of public concern', the test to be applied is an objective one. The legally relevant question is not whether the President thought that the subject-matter of the inquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion. In this context, the Constitution requires that the notion of 'public concern' be interpreted so as to promote the spirit, purport and objects of the

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[44] Id at para 27.

[45] 67 of 1962. Section 3(2) of the Extradition Act provides:

> "Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered."

[46] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*).

[47] *Garment Workers' Union v Schoeman, NO and Others* 1949 (2) SA 455 (A) at 463.

[48] Commissions Act 8 of 1947. See Section 1(1).

> Bill of Rights and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern."[49] (Footnotes omitted.)

[20] For the reasons stated above and for the reasons that follow, I agree with the Supreme Court of Appeal that the requirement is an objective jurisdictional fact.

[21] The starting point is the Constitution itself. It requires that the National Director must be appropriately qualified and leaves it to an Act of Parliament to determine the qualification in detail. The Constitution does not, in its terms, leave the determination of appropriate qualification to the President. It obliges the Legislature to ensure that the National Director is appropriately qualified. The Legislature, in my view, had the obligation to determine qualifications that must be present before an appointment could be made.

[22] Second, and as the Supreme Court of Appeal correctly points out,[50] the Act itself does not say that the candidate for appointment as National Director should be fit and proper "in the President's view". The Legislature could easily have done so if the purpose was to leave it in the complete discretion of the President. Crucially, as

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[49] *SARFU* above n 46 at para 171.

[50] SCA judgment above n 4 at para 116.

the Supreme Court of Appeal again pointed out, the section "is couched in imperative terms. The appointee 'must' be a fit and proper person."[51]

[23] Third, it is correct that the determination whether a candidate does fulfil the fit and proper requirement stipulated by the Act involves a value judgment. But it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the President. Value judgments are involved in virtually every decision any member of the Executive might make where objective requirements are stipulated. It is true that there may be differences of opinion in relation to whether or not objective criteria have been established or are present. This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny.

[24] Another factor that points to the criteria being objective is the statement of this Court concerning the constitutional provision that the national prosecuting authority must perform its functions without fear, favour or prejudice:

> "NT 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts."[52]

A construction that renders the determination of the qualification criteria to the President's subjective opinion is not in keeping with the constitutional guarantee of

[51] Id. See also section 9(1)(b) of the Act.

[52] *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.

prosecutorial independence. The interpretation that these requirements are objective jurisdictional facts that must exist before the appointment is made is more consistent with the constitutional guarantee.

[25] The fifth relevant consideration is that the National Director can be suspended by the President on the basis, amongst other things, that the person appointed is not a fit and proper person, and can be removed from office by the President after a commission of enquiry. The President's decision stands unless Parliament takes another view.[53] If the President is the sole determinant of fitness and propriety, then

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[53] Section 12(5)-(7) of the Act provides:

> "(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).
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> (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—
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> (i) for misconduct;
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> (ii) on account of continued ill-health;
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> (iii) on account of incapacity to carry out his or her duties of office efficiently; or
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> (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 Parliament is not then in session, within 14 days after the commencement of its next ensuing session.
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> (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.
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> (d) The President shall restore the *National Director* or *Deputy National Director* to his or her office if Parliament so resolves.
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> (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.
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> (7) The President shall also remove the *National Director* or a *Deputy National Director* from office if an address from each of the respective Houses of Parliament in the

the spectre is raised of President A appointing someone as National Director on the subjective belief that the person concerned is indeed fit and proper and President B suspending or removing that person from office in the subjective belief, equally genuine, that the incumbent is neither fit nor proper. Neither the Constitution nor the Act could have contemplated that the position of the National Director would be so vulnerable to opinion.

[26] The final reason revolves around the importance of this portfolio in the context of our democracy. It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that prosecution policy is complied with are, as I have said earlier, fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice.[54]

Rationality

[27] The Minister and Mr Simelane accept that the "executive" is "constrained by the principle that [it] may exercise no power and perform no function beyond that conferred . . . by law"[55] and that the power must not be misconstrued.[56] It is also

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same session praying for such removal on any of the grounds referred to in subsection (6)(a), is presented to the President."

[54] Section 209(2) of the Constitution.

[55] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[56] *SARFU* above n 46 at para 148. This case was concerned with the President's decision as Head of State and not as head of the National Executive but the principle remains valid. The proposition is also to be found in

accepted that the decision must be rationally related to the purpose for which the power was conferred.[57] Otherwise the exercise of the power would be arbitrary and at odds with the Constitution.[58] I agree.

[28] The four issues concerning rationality mentioned earlier[59] nevertheless require brief exploration.

Reasonableness and rationality

[29] It must be emphasised that it is useful to keep the reasonableness test and that of rationality conceptually distinct. Reasonableness is generally concerned with the decision itself. In the constitutional era reasonableness in the administrative law context has been authoritatively stated in *Bato Star*:[60]

> "In determining the proper meaning of section 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act 'reasonably', the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of section 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then

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Masetlha v President of the Republic of South Africa and Another [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 81.

[57] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 85. See also *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 75 and *Masetlha* above n 56.

[58] *Masetlha* id.

[59] See [12 b] above.

[60] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*).

be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."[61] (Footnotes omitted.)

[30] While there may be some overlap between the reasonableness and rationality evaluations, these tools are best understood as being conceptually different. As was said in *Albutt*:[62]

"The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."[63]

[31] It was held in that case that the means employed in the process of determining whether the President should pardon people who had been convicted of certain offences, namely not to give victims or their families an opportunity to be heard, was not rationally related to the purpose of determining whether pardons should be granted.[64] On the other hand, it was held in *Poverty Alleviation*[65] that the test laid

[61] Id at para 44.

[62] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[63] Id at para 51.

[64] Id at paras 70-4.

down in *Merafong*[66] should be applied, and that the legislation aimed at transferring a part of Matatiele from the province of KwaZulu-Natal to the province of the Eastern Cape was "rationally connected to a legitimate governmental end."[67] In other words, the means employed, namely the transfer of a part of Matatiele from one province to another, was rationally related to the purpose of improving conditions for the residents of that part of Matatiele on the basis that the governmental purpose could be achieved in more than one way and that it was not for the Court to decide which way was better. The decision in *Albutt* was not concerned with the evaluation of two different methods of achieving the purpose but with whether not giving the victims or their families the opportunity to be heard was rationally concerned with the governmental purpose in issue in that case.[68]

[32] The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to

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[65] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (*Poverty Alleviation*) at para 66.

[66] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) (*Merafong*) at para 114:

> "What is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved. It is common cause that doing away with cross-boundary municipalities is desirable for improved service delivery and governance. This is the purpose of the Twelfth Amendment. More ways than one of achieving the objective are, however, available, namely to locate Merafong either wholly in Gauteng or wholly in North West. From economic, geographical and other perspectives the choice can be debated, but it is one for the legislature to make. It is not for this court to decide in which province people must live or to second-guess the option chosen by the Gauteng Provincial Legislature to achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment is."

[67] Above n 65 at para 76.

[68] Compare Price "Rationality Review of Legislation and Executive Decisions: *Poverty Alleviation Network* and *Albutt*" (2010) 127 *SALJ* 580.

achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.

Decision or process?

[33] The Democratic Alliance submitted that the irrationality ground covers irrationality in process as well as on the merits. The Minister and Mr Simelane did not appear fervently to embrace this proposition but did not advance any cogent alternative submission against it. *Chonco 1*,[69] concerned with the power of the President, as Head of State, to grant pardons under the Constitution,[70] elucidated the rationality requirement in the process of granting pardons:

> "In *SARFU*, this court, affirming *Hugo*, held that the powers s 84(2) confers on the President as Head of State originate historically from the royal prerogative and were exercised by the Head of State rather than the head of the national executive. The powers granted by sj 84(2) are now clearly original constitutional powers. Section 84(2)(j) is the source of the power, function and obligation to decide upon applications for pardon. Though there is no right to be pardoned, the function conferred on the President to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in

[69] *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25; 2010 (4) SA 82 (CC); 2010 (2) BCLR 140 (CC) (*Chonco 1*). This case is referred to as *Chonco 1* because of the two decisions concerning consequential cases that involved the same parties.

[70] In terms of section 84(2)(j).

accordance with the principle of legality, diligently and without delay. That decision rests solely with the President."[71] (Footnotes omitted.)

[34] It follows that both the process by which the decision is made and the decision itself must be rational. *Albutt* is authority for the same proposition.[72] The means there were found not to be rationally related to the purpose because the procedure by which the decision was taken did not provide an opportunity for victims or their family members to be heard.

[35] Mr Simelane points out that this case is not concerned with pardons. He argues further that cases involving pardons are distinguishable from the present case.[73] While I agree that this case is not concerned with pardons, there is no basis for the suggestion that the proposition in *Albutt* that decisions by the President as Head of State should be rational both in process and in the final decision should not apply here. It is true that the decision by the President in this case was made as head of the National Executive. It is illogical to suggest that while decisions by the President as Head of State must be rational in process and outcome, decisions of the President as head of the National Executive should be rational only in outcome and not in so far as they relate to the process.

[71] Above n 69 at para 30.

[72] Above n 62.

[73] The Democratic Alliance relies on the case of *Albutt* above n 62, which was also concerned with pardons but the argument applies equally to the case of *Chonco I* above n 69, which in my view is on point.

[36] The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.

[37] This conclusion addresses the differences that emerged in argument on whether the decision needs to be rational or whether the process resulting in the decision should also have been rational for an executive decision to stand. A related question, if the process is to be rationally related to the purpose for which the power has been conferred, is whether each step in the process must be so rationally related. The parties were ultimately in agreement that, while each and every step in the process resulting in the decision need not be rationally viewed in isolation, the rationality of the steps taken have implications for whether the ultimate executive decision is rational. In my view, the decision of the President as Head of the National Executive can be successfully challenged only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality. We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the

absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.

Rationality and ignoring relevant factors

[38] The Supreme Court of Appeal held that the President, by not taking into account the findings of the Ginwala Commission, ignored a relevant factor. This formulation takes us to the question of whether the seminal statement in *Johannesburg Stock Exchange*[74] concerning administrative action in the pre-constitutional era is at all relevant to the rationality evaluation:

> "Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735F–G; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895B–C; *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14F–G). Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."[75]

[39] This Court in *SARFU* said that "the exercise of the President's constitutional power to appoint a commission of enquiry is not directly governed by the principle in

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[74] *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A).

[75] Id at 152A-D.

the *Johannesburg Stock Exchange* case."[76] It follows that this principle would not directly govern the President's power to appoint the National Director either. That is not to say that ignoring relevant factors can have nothing to do with rationality. If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.

[40] I must explain here that there may rarely be circumstances in which the facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is

[76] *SARFU* above n 46 at para 224.

inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose.

Rationality and the separation of powers

[41] I must next address a contention that this Court's upholding of the decision of the Supreme Court of Appeal that the decision of the President was irrational would amount to a violation of the principle of the separation of powers. The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect.[77] If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large. As O'Regan J helpfully explained:

> "A central principle of the United States jurisprudence has been to impose different levels of scrutiny on different categories of legislative classification. The most stringent level of scrutiny is reserved for classifications based on race or nationality, or those that invade fundamental rights. Such classifications are almost inevitably considered to be a breach of the Fourteenth Amendment. An intermediate level of scrutiny is applied to classifications concerning gender or socio-economic rights. The third level of scrutiny requires merely that a classification be shown to have a rational relationship to the legislative purpose."[78]

[42] It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this

[77] See *Albutt* above n 62 at para 51; *Affordable Medicines* above n 57 at para 73; *Bato Star* above n 60 at para 48 and *Pharmaceutical Manufacturers* above n 57 at para 90.

[78] *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 35.

Court as the "minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries".[79] And the rationale for this test is "to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other."[80]

[43] And *Affordable Medicines* said:

> "The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society."[81]

This applies equally to executive decisions.

[44] It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an

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[79] *Pharmaceutical Manufacturers* above n 57 at para 78.

[80] *Affordable Medicines* above n 57 at para 83. See also *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 44.

[81] *Affordable Medicines* id at para 86.

administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not.

[45] It is now possible to consider the crux of this case to decide whether the President acted rationally in appointing Mr Simelane as the National Director and whether the President's failure to take into account the findings in relation to, and the evidence of, Mr Simelane in the Ginwala Commission was rationally related to the purpose for which the power was conferred.

Did the President act rationally?

[46] The Democratic Alliance relied mainly on the findings of the Ginwala Commission and the evidence given by Mr Simelane at that enquiry as the basis for the submission that the President did not act rationally. The conclusions of the Ginwala Commission on Mr Simelane's evidence and the evidence itself raised questions that threw so much doubt on Mr Simelane's credibility and integrity, so the argument went, that it rendered the appointment irrational.

[47] The President relied on Mr Simelane's curriculum vitae, which indicated broadly that he had been the Competition Commissioner for a period of a little more

than 5 years[82] and that he had been Director-General for a period of a little more than 4 years.[83] He also relied on his personal knowledge of Mr Simelane's personal and professional qualities, though we do not have much detail about the precise contours of this knowledge. The President also relied on the advice of the Minister to the effect that from the Minister's personal knowledge of Mr Simelane he was a fit and proper person to be appointed National Director. The Minister, who was familiar with both the Ginwala Commission and the Public Service Commission recommendations, advised the President, in effect, that there was no need for him to interrogate these documents and that he would advise that Mr Simelane be appointed, despite the recommendations made by the Ginwala Commission and the Public Service Commission. The basis on which the advice was given will be evaluated later in this judgment.

[48] The report of Mr Simelane's evidence in the Ginwala Commission and the question of whether the President was right in not taking it into account can properly be considered if we have in mind the purpose for which the power was conferred.

The purpose of the power

[49] The provisions of the Constitution and the Act must be taken together to determine the purpose for which the power was conferred. It is evident that the purpose of the conferral of the power upon the President was to ensure that the person appointed as National Director is sufficiently conscientious and has the integrity

[82] From February 2000 to May 2005.

[83] From June 2005 to October 2009.

required to be entrusted with the responsibilities of the office. In particular, to ensure that—

a. the prosecuting authority performs its functions honestly and without fear, favour or prejudice;
b. decisions to institute criminal prosecution are taken honestly, fairly and without fear, favour or prejudice;
c. prosecution policy is determined honestly and is appropriate to the needs of our country;
d. the criminal justice system in so far as it concerns prosecutions is fairly administered;
e. any improper interference, hindrance or obstruction of the prosecuting authority by any organ of state is not tolerated; and
f. all Directors of Public Prosecutions carry out their functions honestly and fairly.[84]

It is obvious that dishonesty is inconsistent with the hallmarks of conscientiousness and integrity that are essential prerequisites to the proper execution of the responsibilities of a National Director.

The Ginwala Commission findings

[50] In the executive summary of the Ginwala report,[85] Dr Ginwala said of Mr Simelane:

[84] See [13] above.

"I need to draw attention to the conduct of the DG: Justice in this Enquiry. In general his conduct left much to be desired. His testimony was contradictory and without basis in fact or in law. The DG: Justice was responsible for preparing Government's original submission to the Enquiry in which the allegations against Adv Pikoli's fitness to hold office were first amplified. Several of the allegations levelled against Adv Pikoli were shown to be baseless, and the DG: Justice was forced to retract several allegations against Adv Pikoli during his cross-examination."[86]

[51] In the report of the Ginwala Commission itself, Dr Ginwala said of Mr Simelane:

"I must express my displeasure at the conduct of the DG: Justice in the preparation of Government's submissions and in his oral testimony which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Adv Pikoli were without foundation. These complaints related to matters such as the performance agreement between the DG: Justice and the CEO of the NPA; the NPA's plans to expand its corporate services division; the DSO dealing with its own labour relations issues; reporting on the misappropriation of funds from the Confidential Fund of the DSO; the acquisition of new office accommodation for NPA prosecutors; and the rationalisation of the NPA.

All these complaints against Adv Pikoli were spurious, and are rejected [as being] without substance, and may have been motivated by personal issues.

With regard to the original Government submission, many complaints were included that were far removed in fact and time from the reasons advanced in the letter of suspension, as well as the terms of reference. This further reflects the DG: Justice's

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[85] Ginwala "Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions" (November 2008), http://www.info.gov.za/view/DownloadFileAction?id=93423, accessed on 27 September 2012.

[86] Id at para 15.

> disregard and lack of appreciation and respect for the import for an Enquiry established by the President."[87]

[52] These extracts from the report of the Ginwala Commission ought to have been cause for great concern. Indeed, these comments represented brightly flashing red lights warning of impending danger to any person involved in the process of Mr Simelane's appointment to the position of National Director. Any failure to take into account these comments, or any decision to ignore them and to proceed with Mr Simelane's appointment without more, would not be rationally related to the purpose of the power, that is, to appoint a person with sufficient conscientiousness and credibility. The Minister did in fact study the Ginwala Commission Report to the extent that it related to Mr Simelane before advising the President. He also studied the report of the Public Service Commission[88] and representations that had been made to him by Mr Simelane's legal team in relation to that report. We must also look at Mr Simelane's evidence at the enquiry, the Public Service Commission's recommendations and, to some extent, the representations made by Mr Simelane's legal team, in order to determine whether the President acted rightly in not taking the evidence before the Commission into account.

Ginwala Commission: Mr Simelane's evidence

[53] The Democratic Alliance relies specifically on four aspects of the evidence of Mr Simelane:

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[87] Id at paras 320-2.

[88] See [4 g] above.

a. Mr Simelane's failure to disclose a letter that had been drafted by him and sent by the Minister consequent upon a letter received by the Minister from the then President[89] (to Mr Pikoli) together with Mr Simelane's evidence relating to the contents of the letter he had drafted;

b. Mr Simelane's failure to disclose the former President's letter to Mr Pikoli's attorneys in response to their request for certain documents;

c. Mr Simelane's failure to disclose a legal opinion that had been obtained by him and which was adverse to his opinion concerning the relationship between the National Director and the Director-General.

d. Mr Simelane's evidence accusing Mr Pikoli of dishonesty.

The non-disclosure and content of Minister Mabandla's letter

[54] During the week immediately before Mr Pikoli's suspension, President Mbeki wrote a letter (the former President's letter) to the then Minister[90] requiring her to obtain certain information from Mr Pikoli concerning the intended arrest and prosecution of Mr J Selebi who was, at the time, the National Commissioner of the South African Police Service. The letter in relevant part reads:

> "In view of the constitutional responsibilities of the President with regard to the Office of the National Commissioner of the police service, I deem it appropriate that you obtain the necessary information from the National Director of Public Prosecution regarding the intended arrest and prosecution of the National Commissioner. This would enable me to take such informed decisions as may be necessary with regard to the National Commissioner."

[89] Mr Thabo Mbeki.

[90] Ms Bridgette Mabandla (Minister Mabandla).

It is apparent that the President's request was one for further information and did not request Minister Mabandla to give any instructions to the prosecuting authority in relation to the arrest or prosecution of Mr Selebi.

[55] It is common cause that Mr Simelane drafted Minister Mabandla's letter to Mr Pikoli consequent upon the former President's letter. The salient parts of the letter read:

> "[I]n order for me to exercise my responsibilities as required by the Constitution, I require all of the information on which you relied to take the legal steps to effect the arrest of and the preference of charges against the National Commissioner of the police service. This includes but is not limited to specific information or evidence indicating the direct involvement of the National Commissioner in any activity that constitutes a crime in terms of the laws of South Africa. In pursuing your intended course of action and any prosecution, the NPA must do so in the public interest notwithstanding a prima facie case. Such exercise of discretion requires that all factors be taken into account including the public interest. Therefore, I must be satisfied that indeed the public interest will be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against the National Commissioner of the police service, you shall not pursue the route that you have taken steps to pursue."

[56] There is no dispute that this letter was not disclosed to the Ginwala Commission. It is transparent that the letter, seen in isolation, can be nothing but conduct by Minister Mabandla amounting to improper interference with, as well as

hindrance and obstruction of, the National Director of Public Prosecutions in the exercise, carrying out or performance of his powers, duties and functions.[91]

[57] Mr Pikoli replied to this part of the letter in the following terms:

> "Finally your letter may be construed as an instruction to the NPA not to proceed with the arrest and preferring of charges against Mr Selebi until you have satisfied yourself that sufficient information and evidence exist to warrant such steps, and that such a prosecution would be in the public interest. I wish to point out respectfully that if indeed it were an instruction, it would be unlawful, it would place me in a position where I would have to act in breach of the oath of office I took".

[58] This reply too was not disclosed. It must be remembered that one of the issues pertinent to the Ginwala Commission was whether there had been any interference in contravention of section 32(1)(b) of the Act. It was in this context that Mr Simelane's evidence concerning the non-disclosure and content must be understood.

[59] Two aspects of the evidence are relevant here:

a. His evidence surrounding the non-disclosure of the document is absorbing indeed:

> "Adv Trengove: Did you know about the minister's letter of 18th September 2007 instructing Mr Pikoli not [to] proceed with the arrest and prosecution until she was satisfied that it was in the public interest? Did you know about that?
>
> Adv Simelane: Yes.

[91] In contravention of section 32(1)(b) of the Act, quoted above n 40.

Adv Trengove: And did you know that the letter and instruction was given on the 18th of September . . . did you know that?

Adv Simelane: Yes.

Adv Trengove: And did you know that Mr Pikoli refused to comply with that instruction?

Adv Simelane: Yes I remember his response, yes I think I read it once.

Adv Trengove: And do you know that he contended that if indeed it was such an instruction, that it would be unconstitutional?

Adv Simelane: Yes I recall that from his response.

Adv Trengove: Why didn't you disclose these events in the government's papers?

Adv Simelane: Because these are the details that wasn't necessary to disclose, because what was taken into account was not the reason why Mr Pikoli was insistent on proceeding in the manner that he had intended to proceed. What was at issue was the manner in which he proposed to do it, having regard to the representations that had been made earlier that Rev Chikane also spoke to and what implications for national security would be there if it was pursued in the manner that he had intended at that time.

Adv Trengove: Are you suggesting that these events were not relevant to the suspension of Mr Pikoli?

Adv Simelane: No.

Adv Trengove: No what?

Adv Simelane: I am not suggesting that these events were irrelevant for the suspension of Pikoli.

Adv Trengove: Sorry you have a double negative in there which makes your answer ambiguous. Are you saying that these events were irrelevant or they were relevant?

Adv Simelane: I am not saying they were irrelevant.

Adv Trengove: You are not saying they were irrelevant. Do you concede they were relevant to his suspension?

Adv Simelane: They were considered and they were part of it, so they would be relevant.

Adv Trengove: Do you concede that they were highly relevant?

Adv Simelane: They were relevant and they were considered in that context.

Adv Trengove: Do you concede that they were highly relevant?

Adv Simelane: I am not sure whether it makes a difference if they were highly, or very highly or very very highly.

Adv Trengove: Which adjective would you use?

Adv Simelane: They were important.

Adv Trengove: Important, but not disclosed.

. . .

Adv Trengove: I want to suggest to you that an honest preparation of the government's papers would have disclosed the letter and Mr Pikoli's refusal to obey the unlawful instruction a mere four days before his suspension.

Adv Simelane: I disagree and I object to the suggestion that the preparation of government's submission may have been dishonest or was dishonest. It was honest in its preparation and we, in its preparation we did not leave out that which we believed needed to be put there. This was part of the context

in which that submission was prepared. So there is nothing dishonest that went into that preparation. That would be my submission."

b. The evidence concerning content, too, is interesting:

"Adv Trengove: Important but not disclosed.

Adv Simelane: Because they constituted part of the detail of what was, or were the main reasons. And one of which linked to that was the issue of national security.

Adv Trengove: They weren't part of the detail. They were an unconstitutional and unlawful attempt to interfere with the performance by Mr Pikoli of his constitutional duty.

Adv Simelane: Those are your instructions, I disagree.

Adv Trengove: I beg your pardon.

Adv Simelane: I am saying those are your instructions, I disagree.

Adv Trengove: I see. Why do you disagree? Was it a lawful instruction given by the minister?

Adv Simelane: The instruction, if you say that was an instruction, to me it was not saying Mr Pikoli cannot carry out what he wanted to do. So I don't read, I don't recall the letter like that.

Adv Trengove: Well let me read you the critical sentence . . . :

'I must be satisfied that indeed the public interest will be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against National Commissioner of Police Service, you shall not pursue the route have taken steps to pursue.'

Is that not an instruction to stop the proposed arrest and prosecution of Mr Selebi?

Adv Simelane: No I don't read it like that because I read it in the context . . . (intervenes)

Adv Trengove: You don't like it?

Adv Simelane: No I said I don't read it like that.

Adv Trengove: I see.

Adv Simelane: Yes.

Adv Trengove: How did you read it, as a request?

Adv Simelane: Well, I read it contextually, contextually in that it's a letter that asked for a report first so that the minister could then advise the president in exercise of her responsibilities over this institution and therefore she was then saying until Mr Pikoli then gives that report which she had requested, he shouldn't pursue that route that he intended to take.

Adv Trengove: Whatever her justification for it, it was an instruction not to go ahead, correct?

Adv Simelane: Until he gave that report yes.

Adv Trengove: No, not until he gave that report, until she was satisfied there was enough evidence . . . (intervenes)

Adv Simelane: Because she would be satisfied when she receives a report with the necessary information from Mr Pikoli, that's what she asked for.

Adv Trengove: No, no, she demanded the information, but said: You stop your intended arrest and prosecution until I am satisfied that there is enough

> evidence for you to go ahead. That is an arrogation of a constitutional function that belongs to Mr Pikoli, correct?
>
> Adv Simelane: No I don't read it to say that he, Mr Pikoli couldn't carry through what he wanted to do. I don't read it the way you are reading it.
>
> Adv Trengove: Why did you not disclose this letter to this commission?
>
> Adv Simelane: Because this letter together with the point on which you have questioned me I have said were part of the issue of national security that had to be considered."

[60] I have already said that Minister Mabandla's letter appears to constitute a contravention of the Act as an improper interference with the prosecuting authority. Mr Simelane's attempt to explain its content and justify his own draft is revealing.

[61] If he did understand what he drafted he should have known that, at the very least, the letter was capable of the construction that it constituted improper interference and if he did not begin to see this possibility the question whether he would resist interference by others requires some explanation and answer. It is probable that he did indeed understand what he drafted.

[62] Mr Simelane, having conceded that the letter was both relevant and important, found himself driven to irrelevancies in the attempt to explain the failure to disclose it. These extracts reflect on Mr Simelane's credibility and conscientiousness. They are material. Any decision by any person aware of this evidence to ignore it in the decision-making process involving Mr Simelane's credibility would have been, on the

face of it and in the absence of any explanation from that person, irrational. In other words, not taking the evidence into account was not, on the face of it, rationally related to the purpose of appointing a National Director, sufficiently conscientious and credible to resist interference with his office.

[63] Almost all this evidence was also in the Public Service Commission Report. The Minister says he evaluated this report in the light of the criticisms made of it by Mr Simelane's lawyers. In fact, he considered it carefully and came to the conclusion that no disciplinary enquiry should be instituted. He must have been aware of this evidence but decided to ignore it and to advise the President to ignore it.

Failure to disclose the then President's letter

[64] About a month after Mr Pikoli's suspension[92] his attorney wrote a letter to Mr Simelane, Minister Mabandla and to the Presidency requesting certain information. The letter, to the extent relevant, reads:

> "One of the issues in the inquiry is whether the President or anybody in the Presidency, the Minister of Justice or anybody in her Ministry or you or anybody in your Department interfered with the NPA's investigation and prosecution of the National Commissioner of Police Mr Selebi. Adv Pikoli informs us that there was such interference in the immediate run up to his suspension on 23 September 2007. . . . May we please have copies of all communications and other documents relating to the investigation and prosecution of Mr Selebi which you or your Department may have sent to or received from the President or anybody in the Presidency at any time since 15 September, the Minister of Justice or anybody in her Ministry at any time since 15 September . . ."

[92] On 22 October 2007.

[65] The former President's letter of 17 September 2007 was not disclosed. We would do well to examine Mr Simelane's evidence under cross-examination:

"Adv Trengove: . . . if I may just pick it up in the opening sentence in paragraph 3:

> 'May we please have copies of all communications and documents relating to the investigation and prosecution of Mr Selebi which you or your office sent to or received from the president or anybody in The Presidency at any time since 15 September 2007.'

Do you see that?

Adv Simelane: Yes.

Adv Trengove: That squarely covered the president's letter to the minister of 17 September 2007, correct?

Adv Simelane: Yes if you mention that letter yes.

Adv Trengove: Now let's go then to your response to that letter . . . ?

Adv Simelane: Yes.

Adv Trengove: It's your response, it's dated the 1st November and it is addressed to Mr Moosajee of Deneys Reitz. . . .

. . .

Adv Trengove: . . . Then you go on in the next paragraph:

> 'We are not in possession of any documents relating to the investigation of the National Commissioner of Police, save for

reports prepared by your client. Our information is that the investigation against the national commissioner is ongoing.'

Was that statement true?

Adv Simelane: My understanding is that the investigation was ongoing.

Adv Trengove: Why do you ignore the critical part of this statement? You denied that you were in possession . . . of any of the documents requested of you, correct?

Adv Simelane: Well save for the reports that were submitted yes.

Adv Trengove: Yes. Why did you not disclose the president's letter to the minister which was specifically sought?

Adv Simelane: Well I wasn't informed about the letter, I became aware of the letter much later.

. . .

Adv Trengove: I still don't have it. I understand that you say you haven't seen the president's letter. Is my understanding also correct that you say you had heard about that letter however?

Adv Simelane: Yes because the minister, yes had received the letter.

Adv Trengove: Now then why didn't you disclose it?

Adv Simelane: Well the way we, the way I read the request and understood the request, it was for any information that related to this investigation. I didn't read the president's letter to be one of those that they requested.

Adv Trengove: I see. So you thought about the president's letter but concluded that it wasn't covered by the request?

Adv Simelane: No, I mean I was aware of it as I said, I heard that it was there.

Adv Trengove: Yes.

Adv Simelane: But I focused on the previous correspondence and the reports that were sent. Hence I drafted the letter in this way, because I read the request from the attorneys to be requiring that only.

Adv Trengove: Are you saying that you thought the president's letter fell outside the request?

Adv Simelane: Yes I didn't read it to fall within this particular request.

Adv Trengove: Well, why don't you go back to the request of the minister . . .

> 'May we please have copies of all communications and other documents relating to the investigation and prosecution of Mr Selebi, which you or your office sent to or received from the president.'

How can there be any ambiguity about its meaning?

Adv Simelane: I think we read this narrowly. I didn't read it to include this.

Adv Trengove: No, no you can't read it honestly and believe that the president's letter falls outside of it.

Adv Simelane: No I didn't read it to include.

Adv Trengove: I beg your pardon?

Adv Simelane: I didn't read it to, I didn't understand it to fall into this.

Adv Trengove: How did you understand it so as to exclude the letter from the president?

Adv Simelane: No I didn't read the request to be including in its ambit a letter of that type from the president, that's why I would not have . . . (intervenes)

Adv Trengove: But the request is very simple, it says to the minister: Minister, did you receive any communication from the president concerning the Selebi investigation at any time after 15 September. Now how can there be any doubt about the fact that the president's letter fell squarely within the terms of that request?

Adv Simelane: Look I didn't read it to be requiring a letter like that. So if you are saying in your view it should have been included, I can understand that interpretation.

Adv Trengove: My view is irrelevant, but we are going to submit to this inquiry that the concealment of that letter could only have been dishonest. Do you have any response to it?

Adv Simelane: No I don't think so, because we have sought to explain to this inquiry why it was felt that that letter need not be disclosed.

. . .

Adv Trengove: No, this has got nothing to do with permission, this has got to do with honesty and dishonesty. You said: We have no such a document in our possession. And I want to know who decided to tell that lie, you or the minister?

Adv Simelane: We didn't, I don't think it is a lie, because . . . (intervenes).

. . .

Adv Simelane: I think as I said I was aware that the minister had received a letter from the president, because she mentioned it. So I was aware of the letter but I hadn't seen the letter.

Adv Trengove: Won't you just answer my question though?

Adv Simelane: I don't understand, that the letter was privileged. We had always had that view that the letter was privileged.

Adv Trengove: And is that why you denied that you had it?

Adv Simelane: No we didn't, we didn't deny that the letter was there, we didn't make reference to it in our response, as I said because I didn't understand the request to be inclusive of that particular letter.

Adv Trengove: You see because I want to suggest to you that if privilege was your issue or excuse, then the honest response would have been: Yes we have correspondence from The Presidency, but we refuse to give it to you because it is privileged. That would have been the honest response. It is not honest to say we don't have anything of the kind. Do you understand that?

Adv Simelane: Yes I think we could have, if I had instructions to make reference to the letter and it was given to me, I would have then made reference to it."

[66] After some cross-examination, Mr Simelane conceded without qualification that the request by Mr Pikoli's lawyers squarely covered the letter of the then-President to Minister Mabandla. But then the trouble began. According to the record, Mr Simelane tried to evade the question whether the statement that the Presidency, the then Minister and Mr Simelane himself were "not in possession of any documents relating to the investigation of the National Commissioner of Police" was true. He then said that the statement was true. When pertinently asked why the letter had not been disclosed he said variously that the letter had not been disclosed because he became aware of the letter much later, that he was aware of the letter but thought it was not covered by the request, that he had known about the letter but had focused on the previous correspondence and reports that had been sent, that he considered the letter to be a privileged document, that he had no instructions to make reference to the letter (presumably from Minister Mabandla) and, most importantly, that he did not

"read" the President's letter to be one of those that had been requested. The last reason necessarily implies that he in fact read the former President's letter.

[67] All these statements cannot be true. If he read the letter, he must have known about it and if he knew about it he could not say he got to know about it much later. If he did not know about the letter, he could not have read it, could not have thought that it was privileged, could not have focused on something else and could not have been waiting for instructions.[93] It is inconceivable that the former President's letter was not in his possession when he drafted the follow up letter to Mr Pikoli, on behalf of himself, Minister Mabandla and the Presidency, presumably on instruction from Minister Mabandla.

[68] We must remember that Mr Simelane wrote this letter to the attorney saying that there was no relevant document in his possession more than a month after he had drafted the letter that had been sent to Mr Pikoli consequent upon the former President's letter.[94] Either Mr Simelane drafted the response on behalf of Minister Mabandla without reading the former President's letter or he had it in his possession and read it. If he did not have the letter when he wrote the reply, this raises serious questions about his conscientiousness. If he did indeed have the letter, sharp questions about his dishonesty rear their heads.

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[93] At [64] and [65] above.

[94] The letter to Mr Pikoli consequent upon the receipt by Minister Mabandla of the former President's letter was drafted on behalf of Minister Mabandla and was dated 18 September 2007 while the letter by Mr Simelane to Mr Pikoli's attorneys was dated 1 November 2007.

[69] On the face of it, the contradictions reflect on Mr Simelane's credibility, integrity and conscientiousness. They were and remain material. Any decision, by any person aware of this evidence, to ignore it in the decision-making process involving Mr Simelane's credibility would have been, on the face of it and in the absence of any explanation from that person, not rationally related to the purpose for which the power was conferred.

[70] All but an irrelevant three and a half lines of this evidence was in the Public Service Commission Report. The Minister evaluated this report in the light of the criticisms made of it by Mr Simelane's lawyers. Indeed he studied it carefully and decided that the disciplinary enquiry recommended by the Public Service Commission should not be instituted. He must have been aware of this evidence but decided to ignore it and to advise the President to ignore it. Absent any sound explanation, a decision to ignore this evidence or the failure to take it into account would be irrational in the sense of not being rationally connected to the purpose for which the power was conferred.

Failure to disclose legal opinion

[71] It is common cause that Mr Simelane obtained a legal opinion that was to some extent adverse to his view on the relative roles of the National Director and the Director-General. His evidence on this score and his disclosure only during cross-examination of the fact that he had secured that legal opinion is illuminating:

"Adv Trengove: I want to turn to a different topic and that is the difference of opinion that existed between yourself and Mr Pikoli about your role in the NPA. You are acquainted with that topic, is that correct?

Adv Simelane: Yes.

Adv Trengove: And you are aware of the fact that part of the complaint against Mr Pikoli is based on your evidence to the effect that he did not permit you to play the role in the NPA that you believed you were entitled and obliged to do.

Adv Simelane: Yes.

Adv Trengove: Correct. There was a difference of opinion between yourself and Mr Pikoli. Mr Pikoli's opinion was that he alone had the final say in the management of the NPA. Is that correct? I am not sure that your microphone is switched on, could you perhaps check?

Adv Simelane: Yes that was his opinion.

Adv Trengove: And in fact he insisted that the constitutional independence of the prosecuting service required that to be so, correct?

Adv Simelane: Yes in respect of prosecutorial decisions, yes that's what he said.

. . .

Adv Trengove: That was your opinion that you are the accounting officer and in that capacity that you have all the powers and duties of the PFMA, Public Finance Management Act, Sections 38 to 43 confer on an accounting officer, is that correct?

Adv Simelane: Yes that's my argument.

. . .

Adv Trengove: You say in paragraph 13 [in your supplementary affidavit] that part 2 of the PFMA, comprising Sections 38 to 43, deals with the responsibilities of accounting officers. Am I correct in my understanding that your contention in other words is that your responsibilities were those spelt out in Sections 38 to 43?

Adv Simelane: Yes of the accounting officer, yes.

Adv Trengove: And you go on:

> 'One such responsibility is to ensure the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution.'

Correct?

Adv Simelane: Yes.

. . .

Adv Trengove: Have you taken legal advice on the issue?

Adv Simelane: It's pretty straightforward, it doesn't need legal advice in my view.

Adv Trengove: Won't you answer the question. Have you taken legal advice on the question?

Adv Simelane: No."

And then a few minutes later after discussion of another topic:

"Adv Trengove: You said you took no legal advice on this issue, correct.

Adv Simelane: No, I don't remember really getting counsel opinion on it. No in fact, yes I think you are quite right, we actually did, we got the opinion of Adv Maleka, yes now I recall and Adv Khoza, yes we did.

Adv Trengove: Mr Simelane, you said you took no advice. You repeated that same answer and then when you saw me turning up a document you changed your mind.

Adv Simelane: No you are quite wrong. What I was trying to recall was what the opinion was and it actually covered quite a lot of issues, more than this one specific issue. So I am correcting myself that we did actually get an opinion on a whole range of issues about the role of the NDPP. If I recall that was our opinion yes.

. . .

Adv Trengove: Yes. You were intimately involved in the preparations of the papers.

Adv Simelane: Absolutely.

Adv Trengove: And in those papers one of the grounds, one of the accusations against Mr Pikoli is precisely this difference of opinion between you and him, correct?

Adv Simelane: Yes.

Adv Trengove: And yet you don't tell the commission that you have taken legal advice on the question.

Adv Simelane: Sorry can you repeat that, I didn't hear it nicely.

Adv Trengove: You don't disclose to the commission that you had taken legal advice on the question.

Adv Simelane: No I didn't think there was a need to disclose that I took legal advice on the particular issue."

[72] The Minister tries to justify this about-face by saying that Mr Simelane is entitled, when he remembers something, to change his mind and say that he has done so. This attempt is, in my view, in vain.

[73] One of the important purposes of the Ginwala Commission was precisely to investigate this difference of view and to express a view on it. Mr Simelane must have deliberately taken the decision to obtain the legal opinion. He could in all probability not have forgotten about it. Absent any explanation, his failure to disclose a legal opinion adverse to his (and I may say adverse to the case he was making before the Commission) was seemingly aimed at misleading the Commission. His denial that he had obtained that legal opinion would, absent any explanation, be dishonest. What is more, when asked why the opinion had not been disclosed to the Commission, Mr Simelane did not say that he had forgotten to include it but rather that he did not think there was a need to disclose that he took advice on the issue. How does this statement square with conscientiousness? Important questions remain unanswered once again.

[74] This evidence too, reflected in the Report of the Public Service Commission, must have been known to the Minister and was ignored. The decision to ignore and the advice to the President to ignore relevant indications of dishonesty that could detract from the credibility, integrity and conscientiousness of Mr Simelane would, in the circumstances, be irrational unless there were a proper reason for ignoring it.

Improper accusation of dishonesty

[75] Mr Simelane did not accuse Mr Pikoli of dishonesty in any papers before the Commission until he was cross-examined. He then tried to improve his case by falsely accusing Mr Pikoli of dishonesty:

"Adv Trengove: Now that was the difference between you and Mr Pikoli. He insisted that he was the head and had the final say. You insisted that in your capacity as accounting officer there are certain matters in which you had the final say, correct?

Adv Simelane: Yes.

Adv Trengove: Now in fairness to you and in fairness to Mr Pikoli, could you please turn to the comment that you make, on page 3, at the foot of the page, where you say in the very last line on page 3 in paragraph 8 you say the following, you are speaking about this difference between yourself and Mr Pikoli and you say:

> 'However, having said that I wish to state that there was no acrimony between Pikoli and I as the differences between us were purely professional.'

Is that correct?

Adv Simelane: Yes that's correct.

Adv Trengove: So Mr Simelane as I understand you on this score you do not accuse Mr Pikoli of anything worse than that he held a view which differed from yours, correct?

Adv Simelane: Yes and the consequences that flow from that view.

Adv Trengove: Oh yes, but you accept that he genuinely held a different view from yours, correct?

Adv Simelane: Yes he held a different view.

Adv Trengove: And accepting that you differed from him on the law, given his perception of the law he acted entirely as he thought the law required him to do, correct?

Adv Simelane: I think with respect to the responsibilities of the accounting officer I was of the view and still am of the view that Mr Pikoli actually has a much better

understanding and shares the same understanding that I share on the responsibilities of the accounting officer.

Adv Trengove: I see, so what you are really saying is that he was dishonest?

Adv Simelane: Well what I am saying is that he knows the correct position and in my discussions with him he, in fact he has even indicated on no less than two occasions that I am the accounting officer and therefore I should deal with . . . (intervenes)

Adv Trengove: Are you saying that he was dishonest? That he said he knew one thing, but said another, is that what you are saying?

Adv Simelane: Well if you call that dishonesty then so be it, but he definitely on no less than two occasions made it clear to me that you are the accounting officer, you deal with the issues.

Adv Trengove: Are you suggesting that while he insisted to have the final say in the management of the NPA, he actually knew that you had the final say as accounting officer?

Adv Simelane: On the issues of accounting officer, yes he definitely knew, he was in that position.

Adv Trengove: Now that's a very serious accusation because that's an accusation of dishonesty, correct?

Adv Simelane: If that's what you call it, but I can't tell you . . . (intervenes)

Adv Trengove: No, no not what I call it. You do know what the difference is between honesty and dishonesty, don't you Mr Simelane?

Adv Simelane: Yes I think I know the difference.

Adv Trengove: And the evidence of what you are now giving, the implication of what you are now saying is that Mr Pikoli was dishonest on this score.

Adv Simelane: Well the point is that he deliberately argued that he is not, that the accounting officer is not responsible for the part 2 of the PFMA that you have just cited, if his evidence would be that those are not the responsibilities of the accounting officer, I disagreed with him there and I disagree with him today.

Adv Trengove: I am not asking you what the position would be if he said that or if he said this. I am asking you whether you are saying that Mr Pikoli was dishonest on this score. You were there, I wasn't. Was he dishonest or was it a purely professional difference of opinion on the law?

Adv Simelane: It was a different view and it is a dishonest view in my opinion for Mr Pikoli to argue that he does not know and he doesn't agree that the accounting officer has those responsibilities in part 2 that you cited.

Adv Trengove: It was dishonest for him to argue that you say?

Adv Simelane: Yes.

Adv Trengove: I see. Now that's a very serious accusation to make against the NDPP, correct?

Adv Simelane: Oh yes, it's a serious accusation.

Adv Trengove: Yes. Why did you never in any of your affidavits say anything of the kind?

Adv Simelane: Say what? I think I stated it in the affidavits clearly that we differed on that particular point.

Adv Moroka: Chair, if Mr Trengove would refrain from interrupting the witness. He is entitled to finish his answer.

Adv Trengove: Mr Simelane, you never in any of your affidavits suggested that Mr Pikoli was dishonest on this score, correct?

Adv Simelane: I never used the word dishonest in the affidavits.

Adv Trengove: By whatever name you did not accuse him of dishonesty, duplicity, or whatever you might call it, correct?

Adv Simelane: No I didn't accuse him of dishonesty in the affidavit.

Adv Trengove: The only thing you said in your affidavit was:

> 'I wish to state that there was no acrimony between Pikoli and I and the difference between us was purely professional.'

That means an honest difference of opinion between two professional people, correct?

Adv Simelane: A difference of opinion and a professional one, yes.

Adv Trengove: I want to suggest to you Mr Simelane your current evidence that Mr Pikoli dishonestly pretended to hold one view when in fact he knew better, is a fabrication in the witness box this morning, because otherwise you would have raised it in the affidavits.

Adv Simelane: I disagree."

[76] Again this evidence raises questions that require urgent answers about Mr Simelane's integrity and conscientiousness. Unless there is a proper explanation for the contradiction in his overall testimony about whether there was a genuine difference of opinion between him and Mr Pikoli or whether Mr Pikoli was being dishonest in holding his opinion, there is cause for grave concern. Absent the resolution of this issue, the evidence could not be ignored without affecting the rationality of the decision.

[77] This evidence was not contained in the report of the Public Service Commission and the Minister may not in fact have seen it. But having known of the evidence that Mr Simelane gave that is referred to in the report of the Public Service Commission, the Minister ought to have seen to it that Mr Simelane's evidence was subjected to closer examination. The decision not to do so in the light of the Report of the Public Service Commission is irrational. If the evidence had been subjected to closer scrutiny this aspect of the matter would undoubtedly have been discovered. Once this had happened, any decision not to investigate the matter further in the process of making the appointment would not have been rationally linked to the purpose for which the power to appoint had been conferred.

Summary of consequences of the Ginwala Commission criticisms and evidence

[78] In my view all the criticisms of the evidence and approach of Mr Simelane by the Ginwala Commission have, on the face of it, a sufficient basis in the evidence before it. So are all the criticisms expressed of Mr Simelane in the Report of the Public Service Commission. The President, on the advice of the Minister, decided to ignore the submissions in the Public Service Commission Report too. These were not to be taken into account. The reasons why he did so are important.

[79] We must now evaluate the reasons why the Minister decided to ignore the criticisms by the Ginwala Commission, the evidence before the Ginwala Commission as well as the recommendations of the Public Service Commission and to advise the President to ignore these matters in the process of making the appointment.

The Minister's reasons

[80] The first reason given is that the Public Service Commission had not given Mr Simelane an opportunity to be heard. Mr Simelane had been heard in the Ginwala Commission and had been given every opportunity to defend his position. If the Minister had decided to commence a disciplinary enquiry against Mr Simelane, he would have been given a hearing there once again. In any event, it was not the Public Service Commission that had the power to institute disciplinary proceedings against Mr Simelane. That decision had been made after Mr Simelane had been heard. The fact that Mr Simelane had not been given a hearing before the Public Service Commission had made its recommendations to the Minister is no reason for not instituting disciplinary proceedings particularly because Mr Simelane had been heard by the Minister.

[81] The second reason given was that he agreed with the submissions made to him by Mr Simelane's lawyers consequent upon the recommendations of the Public Service Commission. These submissions were aimed at and succeeded in persuading the Minister not to institute disciplinary proceedings against Mr Simelane. They were technical and legalistic in nature. They were intent upon establishing that Mr Simelane's conduct was not hit by the relevant legislation. Nowhere in these submissions to the Minister is it said, nor could it have been credibly said, that Mr Simelane's integrity and honesty had been left untouched and that he had come out of the process morally unscathed. Indeed, Mr Simelane's lawyers submitted that if

their submissions on whether Mr Simelane's conduct fell within conduct prohibited by law, he should be counselled and that disciplinary proceedings should nevertheless not be instituted against him. This was an admission by Mr Simelane's legal representatives that his conduct before the Ginwala Commission was less than desirable. It seems that the Minister ignored submissions by Mr Simelane's legal representatives conceding that his credibility was not wholly intact after evidence at the Ginwala Commission had been given. This too could not have been rationally related to the purpose for which the power had been given.

[82] Thirdly, having decided not to accept the recommendations of the Public Service Commission, and in effect not to give Mr Simelane an opportunity to explain, the Minister reasons that it was not right for Mr Simelane's conduct at the Ginwala Commission to be held against him because Mr Simelane had not been given an opportunity to respond to the Public Service Commission and because the allegations had not been proved absent an enquiry. Quite apart from the fact that it was the Minister's decision that resulted in the fact that Mr Simelane had not been able to defend himself in an enquiry, the Minister's statement is a concession that if the allegations against Mr Simelane continued to stand after being tested, they would be of a kind that would reflect badly on him. And the Minister is right in this.

[83] The fourth basis on which the findings and evidence were not taken into account is that the Commission was not investigating Mr Simelane but Mr Pikoli. This reason is also unacceptable because it implies that dishonesty on the part of a

senior state official before a commission of enquiry, where the enquiry is not directly about the person concerned, can be disregarded.

[84] The last reason given is that the Ginwala Commission is not a court. This is an irrelevant consideration. It does not matter for the purposes of evaluation of credibility whether a person is dishonest and devious to a court, to a commission of enquiry, to an employer or to anyone else for that matter. Dishonesty is dishonesty wherever it occurs. And it is much worse when the person who had been dishonest is a senior government employee who gave evidence under oath. Although not a court, the Ginwala Commission was about as important a non-judicial fact-finding forum as can be imagined.

[85] The reasons given by the Minister for ignoring these indications of dishonesty, albeit prima facie, in the evidence of Mr Simelane before the Ginwala Commission, the evaluation of his evidence by that Commission, and the recommendations of the Public Service Commission did not in all circumstances hold any water. Indeed, they do not disturb my original conclusion that the failure to take these indications into account were not rationally related to the purpose for which the power to appoint a fit and proper person as a National Director were given.

Conclusion

[86] The difficulties concerning Mr Simelane's evidence that appear from a study of the records of the Ginwala Commission were and remain highly relevant to

Mr Simelane's credibility, honesty, integrity and conscientiousness. The Minister's advice to the President to ignore these matters and to appoint Mr Simelane without more was unfortunate. The material was relevant. The President's decision to ignore it was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational.

[87] And the President decided to heed that advice. The President knew that there had been a commission of enquiry but he accepted the Minister's reasoning that the Commission's findings should be disregarded because the enquiry had not been appointed to investigate Mr Simelane. Though the President said that he accepted the findings of the Commission, this acceptance appears to have been qualified by his reliance on the circumstance that the Commission had not been appointed to investigate Mr Simelane. The President appears to be saying therefore that he accepted the findings of the Commission only to the extent that they related to Mr Pikoli.

[88] The President too should have been alerted by the adverse findings of the Ginwala Commission against Mr Simelane and ought to have initiated a further investigation for the purpose of determining whether real and important questions had been raised about Mr Simelane's honesty and conscientiousness. This he should have done despite his knowledge of Mr Simelane as a person. There is no rational relationship between ignoring the findings of the Ginwala Commission without more and the purpose for which the power had been given.

[89] The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively. The means employed accordingly colour the entire decision which falls to be set aside.

[90] This is not to say that Mr Simelane cannot validly be appointed National Director. He may have an explanation and may well be able to persuade the President that he is a fit and proper person and should be appointed.

[91] Given this finding, it is unnecessary for this Court to determine whether Mr Simelane is in fact a fit and proper person to be appointed as the National Director or whether the President had an ulterior purpose in making the appointment. There is no finding in relation to these issues.

Remedy

[92] There is no merit in the contention by the Minister that Mr Simelane should stay in office and the matter should be referred back to the President for reconsideration. Mr Simelane is suspended and an Acting National Director has been appointed. There is accordingly no reason for our decision to have prospective effect alone.

[93] However, in these circumstances, we should make an order that the invalidity of Mr Simelane's appointment will not by itself affect the validity of any of the decisions taken by him while in office as National Director. This will mean that all decisions made by him remain challengeable on any ground other than the circumstance that his appointment was invalid.[95]

Costs

[94] There is no reason why costs should not follow the result. The second respondent, the Minister, who opposed confirmation of the Supreme Court of Appeal order, must pay the costs. The Democratic Alliance had four counsel. In my view, the costs of two counsel in this Court are appropriate.[96]

[95] *Order*

The following order is made:

1. The appeal is dismissed.
2. The second respondent must pay the applicant's costs in this Court, including the costs of two counsel.

[95] It is not clear from the papers whether the processes followed were those appropriate to the performance of functions by the President as Head of State or as the head of the national executive. Section 179(1)(a) requires the President to appoint the National Director in his capacity as "head of the national executive". Section 84(2)(e) applies to appointments the President makes, in the words of the section, "other than as head of the national executive". There is a difference between the two provisions. See *Chonco I* above n 69 at paras 28-40.

[96] No appropriate basis has been advanced not to interfere with the unusual costs order granted by the Supreme Court of Appeal, which included the costs of three counsel.

3. The declaration of invalidity by the Supreme Court of Appeal of the decision of the President of the Republic of South Africa, the First Respondent, taken on 25 November 2009, purportedly in terms of section 179 of the Constitution, read with sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998, to appoint Mr Menzi Simelane, the Fourth Respondent, as the National Director of Public Prosecutions is confirmed.
4. Decisions taken and acts performed by Mr Menzi Simelane in his capacity as the National Director of Public Prosecutions are not invalid merely because of the invalidity of his appointment.

ZONDO AJ:

[96] Subject to what follows below, I agree with the order and reasoning of the main judgment.

[97] In paragraph 81 of the main judgment it is implied that there was no need for, or, no obligation on, the Public Service Commission (PSC) to afford Mr Simelane an opportunity to be heard either prior to or after it had concluded its investigation into Mr Simelane's conduct and made its recommendation that the Minister for Justice and Constitutional Development (Minister) take disciplinary action against Mr Simelane.

The main judgment makes this point in response to the Minister's view that the PSC should have given Mr Simelane an opportunity to be heard but the PSC refused to do so. The Minister criticised the PSC's failure or refusal to give Mr Simelane an opportunity to be heard as a breach of the *audi alteram partem* rule which is entrenched in our law. He said it violated Mr Simelane's right to be heard. The main judgment implies that this is not so.

[98] I am unable to say that a statutory body such as the PSC[97] is not obliged to give a person whose conduct it is asked to investigate (and in regard to which it must make recommendations) an opportunity to be heard before it can conclude its investigations or, at any rate, before it makes its recommendations to an authority that has to make a decision such as the decision the PSC recommended in this case. Experience shows that, generally speaking, statutory bodies such as the PSC usually give affected persons an opportunity to be heard before they conclude their investigations and make recommendations.[98] The main judgment says that Mr Simelane had already been heard in the enquiry into the conduct of Mr Pikoli under the National Prosecuting Authority Act[99] (Ginwala Inquiry) and he was going to be heard once again in the disciplinary inquiry.

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[97] The PSC is established in terms of section 196(1) of the Constitution which provides that "[t]here is a single Public Service Commission for the Republic." In terms of section 196(4)(f) the PSC has the power to, of its own accord or on receipt of a complaint, investigate, evaluate and monitor the public service sector particularly in relation to its personnel. The Public Service Commission Act 46 of 1997 provides further for the powers, functions and operation of the PSC.

[98] For example, commissions of inquiry as contemplated in the Commissions Act 8 of 1947.

[99] 32 of 1998. See section 12(6)(a).

[99] In my view the main judgment fails to appreciate that, if Mr Simelane was entitled to a hearing, the PSC should have heard him not only on whether there were grounds to believe that he had prima facie done wrong but also on what steps, if any, the PSC had to recommend be taken by the Minister. The Ginwala Inquiry had nothing to do with hearing Mr Simelane on what steps, if any, the Minister should take concerning his conduct. Accordingly, it would be incorrect to suggest that the Ginwala Commission provided Mr Simelane with the kind of opportunity to be heard to which the Minister was referring.[100]

[100] The main judgment also says that Mr Simelane was going to be heard once again in the disciplinary enquiry. This was if the PSC's recommendation was accepted and implemented. I also do not think that this answers the criticism of the PSC on the *audi alteram partem* point. The opportunity to be heard that Mr Simelane was going to be afforded in the disciplinary inquiry, if one was established, would have focused on whether or not he was guilty of the allegations of misconduct that would have been brought against him and on what the appropriate sanction would be if he was found guilty. That focus is rather different from the focus of the opportunity to be heard to which he may have been entitled to be given by the PSC. As I have said, the focus of the latter opportunity would in part have been on what steps the PSC should recommend be taken by the Minister against Mr Simelane if, prima facie, there were grounds for some steps to be taken against him.

[100] An example of a case where the opportunity to be heard that was given to workers did not cover the critical issue on which they should have been heard is *Zondi and Others v Administrator, Natal, and Others* 1991 (3) SA 583 (A) at 591D-G.

[101] In the light of the above, although I incline towards the view that a statutory body such as the PSC is required to observe the *audi alteram partem* rule in a case such as this, it is, in my view, not necessary on the facts of this case to express a definitive view. I am prepared to assume, without deciding, in the Minister's favour that the PSC was obliged to have given Mr Simelane an opportunity to be heard. However, when one approaches the matter on this footing, it does not follow that the PSC's failure to give Mr Simelane an opportunity to be heard necessarily has the consequence that the Minister could ignore the PSC's findings and recommendations. Since the authority to initiate a disciplinary process vested in the Minister[101] and Mr Simelane's lawyers had submitted their representations to him, the Minister was obliged to take into account both the PSC's report as well as Mr Simelane's representations and decide whether he should initiate a disciplinary process. It seems that this is what the Minister did but he came to the conclusion that there were no grounds to initiate a disciplinary process. In regard to that conclusion I am in agreement with the finding of the main judgment.

[101] Sections 3(7)(b), 16A(1)(a) and 16B(1)(a), read together with the definitions provided for in section 1 of the Public Service Act, 1994 make it clear that the power to initiate a disciplinary process against the Head of the Department for Justice and Constitutional Development lies with the Minister.

For the Applicant:	Advocate O Rogers SC, Advocate A Katz SC, Advocate D Borgström and Advocate N Mayosi instructed by Minde Shapiro and Smith Inc.
For the Second Respondent:	Advocate M T K Moerane SC, Advocate L Gcabashe and Advocate P Jara (Pupil) instructed by the State Attorney.
For the Fourth Respondent:	Advocate D Unterhalter SC, Advocate G Malindi SC, Advocate I Goodman and Advocate L K Adebola-Ramadi (Pupil) instructed by the State Attorney.

8

IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED ✓

DATE 22/1/15 SIGNATURE

CASE NO: 1054/2015

DATE: 23/01/2015

IN THE MATTER BETWEEN

THE HELEN SUZMAN FOUNDATION	APPLICANT
AND	
THE MINISTER OF POLICE	1ST RESPONDENT
LIEUTENANT GENERAL ANWA DRAMAT	2ND RESPONDENT
MAJOR-GENERAL BERNING NTLEMEZA	3RD RESPONDENT
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	4TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicant (also, at times, referred to as "HSF") applies for certain declaratory relief flowing from the suspension by the first respondent ("the Minister"), on

23 December 2014, of the second respondent (without being disrespectful, but for the sake of brevity, I will refer to him as "Dramat") from his position as the National Head of the Directorate for Priority Crime Investigation ("DPCI").

The applicant also applies for ancillary declaratory relief, *inter alia*, flowing from the appointment by the Minister of the third respondent as Acting National Head of the DPCI following the Minister's suspension of Dramat.

[2] Before me, Mr Unterhalter SC, assisted by Mr Du Plessis, appeared for the applicant and Mr Mokhari SC, assisted by Ms Seboko, appeared for the first respondent.

[3] Dramat, although duly cited by the applicant, did not take an active part in the proceedings although he did, through his attorney, file a written notice to abide on 13 January 2015.

Attached to the founding papers, there is also a letter from Dramat's attorney, dated 12 December 2014, written to the Minister in response to the latter's notice of "contemplated provisional suspension" to Dramat dated 9 December 2014. In this letter to the Minister, Dramat's attorney also challenges the lawfulness of the intended suspension of his client.

[4] The third and fourth respondents did not take part in the proceedings.

[5] The matter was enrolled before me as an urgent application on Thursday 15 January 2015. On that occasion the question of urgency was challenged on behalf of the

Minister, not because the latter felt that the case was not urgent, but because of the technical objection that the case was enrolled for a Thursday instead of a Tuesday, in terms of the existing Practice Directive, and insufficient time was given to the Minister to file his opposing affidavit and heads of argument.

During an adjournment, the question of urgency was resolved, and the Minister was afforded an opportunity to file his opposing papers and heads of argument which were given to me over the week-end of 17 and 18 January. The case was postponed until 19 January, when the merits of the case were argued before me.

Brief notes on the chronological sequence of events

[6] On 9 December 2014, the Minister wrote a letter to Dramat under the following heading:

> "Contemplated Provisional Suspension of the National Head of the Directorate for Priority Crime Investigation Lieutenant General Dramat in terms of section 17DA(2)(a)(i) and (iv) of the South African Police Service Act 68 of 1995, SAPS Act.
>
> Subject: Rendition of Zimbabwean nationals in 2010/2011
>
> This serves to advise your good-self that the Minister of Police is considering placing you on provisional suspension in terms of section 17DA(2)(a)(i) and (iv) of the SAPS Act on the following grounds ..."

For reasons which will appear later, the repeated reference by the Minister to the provisions of section 17DA(2) is of some significance.

[7] The notice of 9 December 2014 (evidently only given to Dramat on 10 December) is a lengthy affair. However, I consider the contents to be, in particular, of importance from the point of view of the Minister, so that it is convenient to quote extracts therefrom:

> "The following Zimbabwean nationals were renditioned and/or illegally deported by the Directorate for Priority Crime Investigation in 2010 and 2011 following a joint operation with Zimbabwean police (then follows eight names).
>
> The Zimbabwean nationals ... were allegedly fugitives for a crime of murder and robbery committed in Zimbabwe. They were renditioned from South Africa to Zimbabwe; it is further alleged that two of them were eventually killed by Zimbabwean police. ...
>
> The exchange of criminal suspects between the two law enforcement agencies was allegedly not done in terms of Southern African Development Community's Protocol on Extradition; South Africa's Extradition Act 67 of 1962, as well as national legislation on mutual legal assistance in criminal matters.
>
> According to the Hansard record of parliament of 13th December 2011, your reply dated 25 November 2011, you supposedly responded to a parliamentary question on these acts of renditions, wherein you supposedly misled the Minister and parliament by stating that it was the Department of Home Affairs who deported the Zimbabwean nationals; well-knowing that the Zimbabwean

nationals were wanted for criminal offences in Zimbabwe and had been illegally deported by Directorate for Priority Crime Investigation (DPCI).

There is suggestive evidence at my disposal that the Zimbabwean nationals were wanted in Zimbabwe in connection with the murder of a police colonel ... Therefore, in such an instance, mutual legal assistance on criminal matters and extradition procedures should have been instituted.

Evidence at my disposal, suggest that you probably sanctioned the entry of Zimbabwean police to South Africa and further sanctioned a joint operation between Directorate for Priority Crime Investigation (DPCI) and Zimbabwean police to trace the fugitives.

Furthermore, there is suggestive evidence that the South African Department of Home Affairs and the Zimbabwean Embassy were not involved in the illegal deportation of the Zimbabwean nationals.

In this regard you are instructed to furnish reasons to the Minister of Police, within the next five (5) days, as to why you should not be provisionally suspended pending internal investigations on the following acts of misconduct;

(1) undermining the legislative authority of the Minister of Justice and the South African judiciary to make a determination and adjudication on the extradition of the Zimbabwean nationals wanted in Zimbabwe for the murder of a police colonel ...;

(2) bringing the international image of the Republic of South Africa into disrepute by contravening the SADC Protocols on Extradition, Mutual and Legal assistance and the United Nations' Convention against the Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, by allegedly being an accomplice or co-perpetrator on torture, murder and renditions of Zimbabwean nationals;

(3) possibly misleading the Minister and parliament as to the lawfulness of the deportations in question and the departments involved;

(4) allegedly committing the following criminal law offences:

(i) kidnapping;

(ii) defeating the ends of justice;

(iii) forgery, fraud;

as an accomplice and co-perpetrator;

(5) allegedly, involving the Directorate for Priority Crime Investigation in illegal renditions activities.

Your co-operation in the spirit of good governance is appreciated.

Kind regards

N P T Nhleko
Minister of Police

Date: 10/12/2014" (The underlining is presumably that of the Minister.)

[8] On 12 December 2014 Dramat's attorney wrote a lengthy letter (the contents of which I will not quote, for the sake of brevity) to the Minister in reaction to the 9/10 December notice of Contemplated Provisional Suspension.

I briefly summarise some of the features of this letter, which, like the 9/10 December notice, is an annexure to the founding affidavit:

The attorney has been acting for Dramat since September 2013 in the matter surrounding the so-called "Zimbabwean rendition". Correspondence had been exchanged between the attorney, the State Attorney, the National Commissioner and IPID (the Independent Police Investigation Directorate to which I will refer as "IPID").

The attorney, correctly in my view, reminded the Minister that section 17DA(2) was found to be invalid and unconstitutional by the Constitutional Court on 27 November 2014 and severed, or deleted from the SAPS Act on that date. The case referred to, which I will revisit later, is *Helen Suzman Foundation v President of the Republic of South Africa and others* (case no CCT 07/14) and *Hugh Glenister v President of the Republic of South Africa and others* (case no CCT 09/14). The attorney pointed out to the Minister that the purpose of this constitutional litigation in *Suzman* and *Glenister* was to ensure that the DPCI is adequately independent and has operational autonomy. The attorney points out to the Minister, correctly, that the main thrust was to forbid improper interference by the Minister and the National Commissioner with the Head and members of the DPCI in the exercise or performance of their powers, duties and functions. (I will refer to the *Suzman* and *Glenister* cases as "the 2014 judgment".)

The attorney also reminded the Minister that he was cited as the second respondent in the Constitutional Court in the aforesaid cases, fully represented by three advocates and that he should be aware of the orders of constitutional invalidity deleting

section 17DA(2) and the "(2)" in section 17DA(1) from the SAPS Act. The attorney then says the following to the Minister:

> "You would therefore be in contempt of the Constitutional Court, should you proceed with the contemplated provisional suspension of Lieutenant General Dramat. Clearly your advisors should from time to time look at the law and recent Constitutional Court judgments against you."

The attorney then reminds the Minister that Dramat dealt with the allegations against him with regard to the so-called Zimbabwean rendition, in a statement of 23 October 2013 which is again attached to the attorney's letter as annexure "A". The attorney also stated that he finds it alarming that it had come to the attention of Dramat that certain witnesses had been told (presumably by IPID officials) that unless they incriminate Dramat, they would be of no value to the investigator. It was also submitted in the aforesaid statement that the DPCI was at the time (and still is according to the attorney) tasked and seized with very sensitive and high profile investigations and that the timing of the then IPID investigation and the current contemplated suspension was seen as a "smear campaign" to derail any investigations or arrests that the DPCI is in the process of conducting. The attorney, correctly, refrained from listing details of the sensitive matters and the high profile individuals.

The attorney then also reminded the Minister that IPID sent an undated letter to Dramat which contained the same allegations as those referred to by the Minister in his Notice of Contemplated Suspension. Dramat was required to answer certain questions regarding the "rendition" of the Zimbabwean nationals which he did in a statement dated 11 November 2013 which is also attached to this letter of the attorney

as annexure "B". In the statement it was specifically pointed out that Dramat never authorised or sanctioned co-operation or kidnapping of any of the Zimbabwean nationals referred to in the IPID correspondence. It was also pointed out that Dramat unequivocally denied any knowledge of any action whatsoever that he authorised or participated in which was aimed to defeat the due administration of justice. Fraud and theft allegations were equally vague and spurious and denied. The attorney pointed out to the Minister that the Notice of Contemplated Suspension takes the matter far beyond the allegations made by IPID, namely that Dramat undermined the legislative authority of the Minister of Justice and the judiciary and that he is allegedly an accomplice and co-perpetrator on torture, murder and renditions. It was recorded that Dramat was reserving his rights in this regard. It was pointed out that neither IPID, nor the National Commissioner or the NDPP complied with the request of more than a year earlier for concrete evidence in support of these allegations to be furnished to Dramat. At all times, Dramat offered his full co-operation with a *bona fide* investigation. Dramat got information that the authorities were trying to get a warrant for his arrest. It was reiterated by his attorney that Dramat would voluntarily appear before a competent court to answer to any charges. The attorney again recorded that efforts now to press on with the alleged Zimbabwean rendition complaint, more than four years after the event, amounted to nothing other than slanderous, malicious conjecture designed to derail sensitive investigations of the DPCI and/or an attempt to discredit the reputation and integrity of Dramat and the DPCI.

The attorney concludes by reminding the Minister that he does not have the power to suspend the Head of the DPCI and any efforts to continue to do so would be met with an application to this court for urgent relief.

[9] The Minister did not answer this letter. The statements, "A" and "B", attached to the letter, are broadly summarised in the letter, and the contents will not be repeated.

[10] On 23 December 2014, the Minister wrote to Dramat informing him that he was placing Dramat "on precautionary suspension with full pay and benefits" with immediate effect.

In the letter, which is difficult to read because of the quality thereof, the Minister acknowledges the fact that section 17DA(2) of the South African Police Services Act had been struck down. He argues, that he nevertheless retains the right to suspend Dramat. He argues that he is empowered to do so on a certain reading of the 2014 judgment and that he is also empowered to suspend Dramat in terms of certain provisions of the Public Service Act, 1994 ("the Public Service Act" or "the PSA") which came into operation on 3 June 1994 as well as the Public Service Handbook.

[11] On 24 December 2014, Dramat responded to the suspension notice in a long letter written to the Minister under his own hand.

I find it convenient to quote some of the paragraphs:

> "1. I have for several months reflected very carefully on the issues that have unfolded in front of me. I have consulted my legal representatives and I have been advised of my legal remedies.
>
> 2. I respectfully point out that the tactical 'backpedalling' from the initial notice and the current reliance on the Public Service Act and Public

Service Regulations and *SMS Handbook* is a clear indication to me that no matter what steps I take to defend my position, a decision had already been made, from the outset, to remove me from my position.

4. Having seen our country enter into a democratic phase, I felt that I could contribute in a meaningful way and continue to develop the principles which I fought and for which I was imprisoned.

5. My appointment as the Head of the DPCI, I perceived at the time, was based on my credentials, my level of expertise and the fact that I respectfully believe that I have always acted with integrity in the manner in which I deal with people and investigations.

6. No doubtedly you are aware that I have recently called for certain case dockets involving very influential persons to be brought or alternatively centralised under one investigating arm and this has clearly caused massive resentment towards me.

7. I can unequivocally point out that I am not willing to compromise the principles that I have always believed in. I am not willing to be 'agreeable' or 'compliant' in so far as I would then be acting contrary to my own moral principles and, also, contrary to the position in which I was appointed.

10.1 The so-called 'Zimbabwean rendition investigation' is a smoke-screen. There are no facts whatsoever that indicate that at any given time I have acted illegally or unlawfully ... Most certainly there has never been any evidence whatsoever that I have, in any way, interfered with any potential witnesses or attempted to jeopardise the investigation against me during the past four years.

10.2 I wish to reserve my rights to fully vindicate myself against all those who have sought to tarnish my name and reputation. I do not wish to engage with those involved in this correspondence, in so far as that is reserved for another forum, if necessary.

11. I therefore deny, with respect that the Notice of Precautionary Suspension is legal, valid or regular. In fact it is totally irregular and constitutionally invalid.

12. I am also aware that in the next two months there will be a drive to remove certain investigations that fell under my 'watch', re-allocate certain cases and that unfortunately, certain sensitive investigations may even be closed down. This is something that I have to live with.

14. I note with interest that a two month period has been set to hold an 'enquiry' (*sic*!). I can honestly say that the investigation into the 'Zimbabwean rendition' case, has run for a very lengthy period of time and till to date there has been no evidence whatsoever. It is clear that I am being pushed out.

17. ... After due consideration, with specific reference to the background alluded to above, I am willing to submit a request to vacate office by applying to the National Commissioner to approve my early retirement in terms of section 35 of the Act. Quite clearly there is a pre-condition that the unlawful precautionary suspension be uplifted without me having to approach the court to do so.

18. I therefore require that we should enter into a joint consensus seeking meeting as a matter of urgency to prevent any instability within the

DPCI. Under the above circumstances your reply is eagerly anticipated by no later than 5 January 2015."

As far as I could make out no such reply was forthcoming.

[12] On 30 December 2014, the present applicant's attorneys wrote to the Minister as follows:

"1. We represent the Helen Suzman Foundation ('our client').

2. Our client understands that Lt Gen Dramat has been placed on 'precautionary suspension' by you in your capacity as the Minister of the Police and that the suspension is for a period of sixty days from 23 December 2014. Our client also understands that no other disciplinary processes to remove Lt Gen Dramat have been instituted or followed by you or any other body at this stage.

3. As you will know, as a matter of South African law, it is imperative for the DPCI to be adequately independent from the National Executive. The suspension of the National Head strikes at the very heart of our constitutional democracy.

4. As you will also know, our client is (and has been) concerned to ensure that the rule of law is upheld in all spheres, including the essential fight against corruption and organised crime mandated by the Constitution.

5. You will doubtless agree that, in this context, it is important to ensure that any suspension of the National Head or any office-bearers in the DPCI is constitutionally compliant and lawful. It appears that the suspension was not grounded in law.

6. To this end, our client requires you to furnish the following information in writing by no later than Wednesday, 7 January 2015, so that it may adequately protect its rights and the public interest:

6.1 a copy of any document which evidences or constitutes the purported suspension of Lt Gen Dramat, including any letter of suspension issued to Lt Gen Dramat;

6.2 the effective date of the suspension;

6.3 the duration of the suspension;

6.4 whether any of the facts in paragraph 2 above are incorrect and, if so, which facts and for what reason;

6.5 a copy of any documents and information on the basis of which the suspension was decided by you;

6.6 a copy of any reports pertaining to Lt Gen Dramat produced by the Independent Police Investigative Directorate;

6.7 full reasons for the suspension of the National Head;

6.8 details of what empowering provision you have used or invoked for the purposes of the purported suspension of the National Head;

6.9 what disciplinary steps have been taken by you or any other institution or body in relation to Lt Gen Dramat that relate in any way to the suspension or the grounds for such suspension;

6.10 a copy of any letter purportedly appointing any other person, including Major General Berning Ntlemeza, as Acting National Head of the DPCI.

7. Should you fail to deliver the above information timeously or should the information not negate our client's concerns about the unlawfulness of the decision to suspend the National Head, our client will have no option but to assume that there was no lawful basis for such decision, to assume that the facts in paragraph 2 are correct and to exercise its legal rights in its and the public's interest on an urgent basis.

Yours faithfully"

[13] There was no answer to this letter, so that the applicant launched its application on 9 January, two days after the dead-line it imposed expired. I have dealt with the procedural development of the case between 15 January, when it was first enrolled, and Monday 19 January.

What could be added to this chronology, is that when the Minister filed his answering affidavit, the applicant called, in terms of rule 35(12), for the opportunity to take copies of certain documents referred to in the answering affidavit including the "IPID report", certain "witness statements", "other relevant documentation", a "report" and a "file". In an answer, the Minister refused to make these copies available claiming that the applicant was shifting the goal-posts having based its application on whether the Minister had the power to suspend the National Head in the light of the 2014 judgment. The Minister also claimed that, according to IPID, the matter was still under investigation and its report, until the investigation is completed, is confidential. On this basis, the Minister offered no evidence whatsoever to show improper involvement of Dramat in the "Zimbabwean rendition" case. Dramat himself, as the only possible role player, before this court, in the affair, expressly denies any

involvement, as appears from his two statements, dating back to 2013, furnished to the Minister by his attorney. He repeats his denial of any liability in his 24 December letter to the Minister.

Declaratory relief sought by the applicant

[14] The relevant paragraphs of the notice of motion read as follows:

> "2. declaring that the decision of the Minister of Police, the Honourable Mr Nkosinathi Nhleko ('the Minister'), of 23 December 2014, to suspend Lt Gen Anwa Dramat, the National Head of the Directorate for Priority Crime Investigation ('DPCI') ('the suspension decision') is unlawful and setting aside the suspension decision;
>
> 3. declaring that the decision of the Minister to appoint Major-General Berning Ntlemeza as Acting National Head of the DPCI ('the appointment decision') is unlawful and setting aside the appointment decision;
>
> 4. declaring that the Minister is not empowered to suspend the National Head of the DPCI other than in accordance with sections 17DA(3) and (4), read with section 17DA(5), of the South African Police Service Act, 1995;"

There is also a prayer for costs against whoever opposes the application.

Section 17DA and other provisions of the South African Police Service Act, 1995 ("the SAPS Act")

[15] The DPCI (also popularly known as "the Hawks") is a creature of the SAPS Act. It is created in terms of section 17 which constitutes Chapter 6A of the SAPS Act. More particularly, it is created by section 17C(1) which provides:

> "The Directorate for Priority Crime Investigation is hereby established as a Directorate in the Service."

The "Service" means the South African Police Service established by section 5(1) of the SAPS Act.

Section 17C(2) provides that the Directorate consists of, *inter alia*, the National Head of the Directorate at national level, "who shall manage and direct the Directorate and who shall be appointed by the Minister in concurrence with Cabinet" and subsection (2)(aA) also provides for a Deputy National Head at national level.

[16] I turn to section 17DA which goes under the heading "Removal from office of National Head of Directorate".

Before portions of this section were struck down as unconstitutional by the Constitutional Court in the 2014 judgment, and deleted from the SAPS Act with effect from the date of the order, which was 27 November 2014, it read as follows:

> "(1) The National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (2), (3) and (4).
>
> (2) (a) The Minister may provisionally suspend the National Head of

the Directorate from his or her office, pending an inquiry into his or her fitness to hold such office as the Minister 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 Head of the Directorate, the reasons therefor and the representations of the National Head of the Directorate, if any, shall be communicated in writing to Parliament within fourteen days after such removal if Parliament is then in session or, if Parliament is not then in session, within fourteen days after the commencement of its next ensuing session.

(c) The National Head of the Directorate provisionally suspended from office shall during the period of such suspension be entitled to such salary, allowance, privilege or benefit to which he or she is otherwise entitled, unless the Minister determines otherwise.

(d) An inquiry referred to in this subsection –

(i) shall perform its functions subject to the provisions of the Promotion of Administrative Justice Act, 2000

(Act 3 of 2000), in particular to ensure procedurally fair administrative action; and

(ii) shall be led by a judge or retired judge: provided that the Minister shall make the appointment after consultation with the Minister of Justice and Constitutional Development and the Chief Justice.

(e) The National Head of the Directorate shall be informed of any allegations against him or her and shall be granted an opportunity to make submissions to the inquiry upon being informed of such allegations.

(3) (a) The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.

(b) The adoption by the National Assembly of a resolution calling for that person's removal from office.

(4) A resolution of the National Assembly concerning the removal from office of the National Head of the Directorate shall be adopted with the supporting vote of at least two-thirds of the members of the National Assembly.

(5) The Minister –

(a) may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and

(b) shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal.

(6) The Minister may allow the National Head of the Directorate, at his or her request, to vacate his or her office –

(a) on account of continued ill-health; or

(b) for any other reason which the Minister deems sufficient.

(7) The request in terms of subsection (6) shall be addressed to the Minister at least six calendar months prior to the date on which the National Head of the Directorate wishes to vacate his or her office, unless the Minister grants a shorter period in a specific case." (Emphasis added.)

[17] It is common cause that the Constitutional Court, in the 2014 judgment, dated 27 November 2014:

(1) declared the "(2)" in section 17DA(1) inconsistent with the Constitution and therefore invalid, and deleted it from the date of the order;

(2) declared section 17DA(2) inconsistent with the Constitution and therefore invalid, and deleted it from the date of the order.

[18] This means:

(1) that section 17DA(1) now reads (in peremptory language):

"The National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (3) and (4)."

(2) Where section 17DA(2) has now been deleted and declared unconstitutional and invalid, the Minister no longer has the power, in terms of that subsection, to provisionally suspend the National Head and, pending an inquiry, remove him or her from office for the reasons mentioned in the relevant subsection; and

(3) the powers of the Minister to suspend or remove the National Head are now limited to the provisions of subsection (5)(a) and (b) which renders the Minister's power to suspend and/or remove the National Head subject to the prior start of the proceedings of a Committee of the National Assembly for the removal (subsection (5)(a)) and the passing of a resolution by the National Assembly calling for the removal of the National Head by a two-thirds majority (subsection (5)(b)).

[19] From the aforegoing, the following remarks are also, in my view, valid:

1. The "Contemplated Provisional Suspension" notice by the Minister to Dramat of 9/10 December 2014 is invalid because it purports to base this contemplated provisional suspension on the provisions of section 17DA(2)(a)(i) and (iv) which, by then, had already been struck down as invalid and unconstitutional and deleted from the Act.

2. The remarks by the Minister in his suspension notice to Dramat of 23 December 2014 that

> "The remaining provisions of the section (my note: which would include subsections (3), (4) and (5)) deal with the suspension and removal of the Head when the process for the removal has been

initiated by Parliament. These provisions are not applicable to the current situation."

are misplaced. It fails to take into account the peremptory provisions of section 17DA(1), as it now reads and as it read when the suspension notice was given, that "the National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (3) and (4)".

[20] It is common cause that, when the suspension and provisional suspension notices were sent to Dramat, there had not been (and still is not) a "start of the proceedings of a Committee of the National Assembly for the removal of that person" or a resolution by the National Assembly calling for the National Head to be removed, which are the only two occurrences which can trigger the powers of the Minister to suspend or remove the National Head, depending on the circumstances.

[21] In their comprehensive and able argument, counsel for the Minister offered submissions on the interpretation of the 2014 judgment and the effect thereof on the striking down of subsection (2) which are not in harmony with the remarks I have made. I will consider those submissions when dealing with the 2014 judgment.

Helen Suzman Foundation v President of the Republic of South Africa and others; Glenister v President of the Republic of South Africa and others (CCT 07/14, CCT 09/14) [2014] ZACC 32 of 27 November 2014: "the 2014 judgment"

[22] As I have already indicated, the Minister contends for a different conclusion following the deletion by the Constitutional Court of section 17DA(2) to the one I attempted to advance.

[23] Correctly, the Minister says the following:

> "33. The contemplated suspension in section 17DA(5) is triggered by the process that is initiated by the Committee of the National Assembly for the removal from office of the Head of the DPCI on account of misconduct, incapacity or incompetence. If the Committee of the National Assembly makes a finding against the Head of the DPCI, he/she may be removed from office by the adoption of a resolution supported by a vote of at least two-thirds of the members of the National Assembly. The procedure in section 17DA(5) for the suspension of the Head of the DPCI is triggered by the commencement of the proceedings before the Committee of the National Assembly. So, the section 17DA(5) suspension is parliamentary initiated. That is the marked difference between the procedure in the repealed section 17DA(2) and the section 17DA(5)."

[24] The Minister then goes on to submit that, despite the striking down and deletion of 17DA(2), he nevertheless retains the right of suspension and removal of the Head. He does so in the following terms:

> "34. In striking down section 17DA(2) the Constitutional Court did not explicitly or implicitly say that as the Minister I cannot suspend the Head of the DPCI other than in terms of section 17DA(5). To the

contrary, the Constitutional Court affirmed my power to suspend and my power to execute an oversight role over the Head of the DPCI. If the judgment of the Constitutional Court were to be read to imply that I cannot suspend the Head of the DPCI other than in terms of section 17DA(5) then this would invariably mean that my oversight role over the Head of the DPCI has been abrogated."

[25] The Minister then goes on to advance the following interesting and, at first blush, attractive, argument:

"This would mean that I would play a meaningless oversight role to hold the Head of the DPCI accountable to the legislation applicable to him, but I cannot initiate an investigation upon receiving information pointing to serious allegations of misconduct against him, and I cannot initiate an inquiry to ascertain the veracity of such allegations nor to institute a disciplinary inquiry. This would mean that I can only fold my arms and be at the mercy of the parliamentary Committee should it decide to start the proceedings for the removal of the Head of the DPCI. It is also not clear how the parliamentary Committee would initiate the proceedings for the removal of the Head of the DPCI without an investigation relating to the alleged conduct."

[26] The Minister then goes on to advance what he considers to be the correct interpretation of the judgment in the context of the Minister's powers to suspend the Head:

"36. On a proper reading of the Constitutional Court judgment, it struck down section 17DA(2) on two grounds: first that the subsection lacks

clarity meaning that it is convoluted; second, that the words 'as the Minister deems fit' gives the Minister the discretion to suspend the Head of the DPCI without pay which invariably compromises the job security of the Head of the DPCI and insulation from political and executive interference. I fully agree with the Constitutional Court's *ratio decidendi* on this issue. The Head of the DPCI and the DPCI must be protected from executive and political interference. He or she must be independent and perform his/her duties without fear, favour or prejudice.

37. However, in finding that section 17DA(2) is inconsistent with the provisions of job security, independence and that it lacks clarity, the Court, however, made it clear that that does not mean that I do not have the power to suspend the Head of the DPCI in the context envisaged in section 17DA(2) save for the offending provisions of the subsection which I have already dealt with above."

[27] In support of his argument, the Minister relies on what was said in paragraph [85] of the 2014 judgment:

"[85] But for 'as the Minister deems fit' and the possibility of a suspension without pay and benefits provided for in subsection (2)(c), I can find no reason to attack the bases on which this subsection empowers the Minister to suspend the National Head. These are specific, objectively verifiable and acceptable grounds for suspension and removal. 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 withholding the 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 that Draconian power also cry out against its retention. It is the employer's duty to expedite the inquiry to avoid lengthy suspensions on pay."

(I emphasised the first portion of this paragraph in the judgment because it is also emphasised by the Minister, if I understand him correctly, as the main thrust of his argument as to how to interpret the judgment.)

[28] What the Minister fails to do, is to also scrutinise the paragraphs in the 2014 judgment following upon paragraph [85]:

"[86] The only real threat to job security is the Minister's power to remove the National Head from office in terms of section 17DA(1) and (2). These provisions are not clearly set out and therefore do not provide even a modicum of clarity. The removal process is initiated through the appointment of a judge by the Minister to head an inquiry into whether the National Head should be removed from office on any of the grounds listed in section 17DA(2)(a). Based on the recommendation of that judge, the Minister may remove the Head. Thereafter the fact of the removal, the reason therefor and the

representations of the National Head, if any, are to be conveyed to Parliament within fourteen days of the removal.

[87] Unlike section 12(6) of the NPA Act that empowers Parliament to reverse the removal of the NDPP or Deputy NDPP by the President, section 17DA(2)(b) does not say what it is that Parliament is required to do upon receipt of the information relating to the Minister's removal of the National Head. There is no provision made for Parliament's interference with that decision. This begs the question, what purpose does it then serve to inform Parliament? A proper reading of subsection (2) indicates that the Minister's removal of the National Head is, subject to whatever Court processes that may ensue, final. Parliament has no meaningful role to play but merely to note the decision. One would have thought that the requirements that Parliament be informed of the removal, be furnished with reasons for the removal and the representations by the National Head within fourteen days of removal, where intended to facilitate speedy intervention by Parliament before more, possibly unjustified, damage is done to the life of the National Head or the functionality of the DPCI. That intervention would ordinarily entail an assessment of the propriety of the finding of wrongdoing and the punishment meted out to the National Head, if correctly found guilty of wrongdoing.

[88] But, not only is the section silent on what Parliament is supposed to do, it is also silent on how it is to do whatever is supposed to be done, if any, and on the time frames within which any action is to be taken. It is similar to section 17CA(3) which requires the Minister to inform

Parliament of the appointment of the National Head within fourteen days of the appointment, but does not say what, if any. Parliament is supposed to do with that information. Evidently it is, as in this instance, merely for noting. All these are additional pointers to the lack of clarity that pervades the SAPS Act as amended. Parliament's power to intervene, as in the case in terms of section 12(6) of the NPA Act, cannot be read into this section without the Court usurping the legislative role of Parliament. There is a yawning chasm between the subsection (2) procedure and the role of Parliament set out in subsections (3) to (6).

[89] This subsection (2) removal power is inimical to job security. It enables the Minister to exercise almost untrammelled power to axe the National Head of the anti-corruption entity. The need for job security was articulated in *Glenister II* in these terms:

> 'At the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.'
>
> (My note: this is a reference to *Glenister v President of the Republic of South Africa and others* 2011 3 SA 347 (CC) at paragraph [222].)

[90] Subsections (3) to (6) provide for those special measures that entrench the employment security of the National Head. They deal

with the suspension of the National Head by the Minister, flowing from a possible removal process initiated by a Committee of the National Assembly. Although the Minister still has the power to suspend, no provision is made for suspension without salary, allowances and privileges. A recommendation by a Committee of the National Assembly for the removal of the National Head would have to enjoy the support of at least two-thirds of the members of the National Assembly to be implemented. The removal would then be carried out by the Minister.

[91] This suspension by the Minister and removal through a Parliamentary process guarantees job security and accords with the notion of sufficient independence for the anti-corruption entity the State creates. That portion of section 17DA(1) that refers to subsection (2) and subsection (2) itself are, however, inconsistent with the constitutional obligation to establish an adequately independent corruption-busting agency. They must thus be set aside. The balance of section 17DA passes constitutional muster and would thus continue to guide the suspension and removal process of the National Head." (Emphasis added.)

[29] The Minister, in his argument, has placed a particular emphasis on the last sentence of paragraph [91] which stipulates: "The balance of section 17DA passes constitutional muster and would thus continue to guide the suspension and removal process of the National Head." The Minister argues that the use of these words "is quite telling" and then submits:

"The choice of the words in these lines is consistent with what the Court had already found in paragraph [85] that my power to suspend the Head of the DPCI do not get abrogated by the deletion of section 17DA(2)."

The Minister appears to argue that these remaining provisions of section 17DA (including (3), (4) and (5) dealing with suspension and/or removal through the parliamentary process) can be used by the Minister for "guidance" when he exercises his still existing powers of suspension in a manner other than in terms of section 17DA(5).

Astonishingly, the Minister then says the following about the "guidance" so available to him:

"The guidance I received from the remaining provisions of section 17DA is that a suspension must be with pay and the removal if it were to be considered must be done through a parliamentary process." (Emphasis added.)

It seems to me that the Minister concedes that the "guidance" is linked to the suspension or removal through a parliamentary process. This concession, if it is one, flies in the face of the Minister's argument that "... the Court however made it clear that that does not mean that I do not have the power to suspend the Head of the DPCI in the context envisaged in section 17DA(2)..."

[30] I can find no support whatsoever for the Minister's submissions and for the interpretation which he seeks to attach to the 2014 judgment:

1. In paragraph [91] of the 2014 judgment, it is stated unequivocally that the reference to subsection (2) in 17DA(1) as well as subsection (2) itself are inconsistent with the constitutional obligation to establish an adequately independent corruption-busting agency and must be set aside. This was done with effect from the date of the order, on 27 November 2014.

2. This means that section 17DA(1) now provides, in peremptory terms, that: the National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (3) and (4). There is no room whatsoever for the Minister's argument that he can, somehow, still suspend the Head "in the context envisaged in section 17DA(2)".

3. It follows that the "contemplated provisional suspension" of Dramat, of 9/10 December 2014, which was expressly based on the provisions of section 17DA(2), long after this subsection was deleted by the Constitutional Court, was unlawful as it flew in the face of the 2014 judgment and section 17DA(1), and therefore void *ab initio* ("van die aanvang af nietig" – Hiemstra and Gonin *Trilingual Legal Dictionary* 2nd ed page 144).

4. It follows that the suspension of Dramat by the notice of suspension of 23 December 2014, which incorporates, by reference, the contemplated provisional suspension, and which declares the provisions of section 17DA(3) and (4) to be "not applicable" and which, like the "contemplated provisional suspension" was written well after the deletion of the offending provisions on 27 November 2014, is also unlawful and void *ab initio* as it flies in the face of the 2014 judgment and the provisions of section 17DA(1).

In *Pikoli v President of Republic of South Africa and others* 2010 1 SA 400 (GNP) at 408C-E the following is said:

> "The purported exercise of public power that is not authorised by law is invalid from the outset. A declaration that executive action is invalid 'is merely descriptive of a pre-existing state of affairs'. In the interest of an orderly society, however, such action is treated as if it were valid until it is declared invalid. The Court that finds executive action not authorised by law, must declare it invalid."

See also sections 1(c) and 2 of the Constitution of the Republic of South Africa, 1996.

Cora Hoexter *Administrative Law in South Africa* 2nd ed p545-546.

Fose v Minister of Safety & Security 1997 3 SA 786 (CC) where the learned Judge, still dealing with the interim Constitution 200 of 1993, says the following at 834F:

> "Section 4(1) makes unconstitutional conduct a nullity, even before Courts have pronounced it so."

At 834I, the learned Judge points out that it is not the declaration itself (that administrative or executive conduct is unconstitutional) that renders the conduct unconstitutional. The declaration is merely descriptive of a pre-existing state of affairs.

Cora Hoexter, op cit, also referred to by the learned Judge in *Pikoli*, puts it as follows on p545-546 where she deals with remedies in proceedings for judicial

review (more with regard to the Promotion of Administrative Justice Act no 3 of 2000, or "PAJA", but I am of the view that the same remarks apply to other executive action not necessarily included in the definition of "administrative action" in PAJA. Indeed, in *Pikoli*, the court was confronted with executive action not included in the definition of administrative action, and involving the removal from office by the President of the National Director of Public Prosecutions):

> "An administrative action or decision, no matter how blatantly illegal it may appear to be, continues to have effect until such time as it is pronounced invalid by the Court. At that point the decision not only ceases to have effect but may be treated as if it never existed. Invalidity thus operates with retrospective effect, both at common law and under the Constitution, as a consequence of constitutional supremacy and in accordance with the doctrine of objective invalidity. In administrative law 'setting aside' is a logical consequence of declaring the decision to be invalid, and is simply a way of saying that the decision no longer stands, or that it is void. It is one of the remedies provided for in section 8 of the PAJA."

(The learned author here refers to section 8(1)(c) of PAJA.) At 547, the learned author also states: "An invalid act, being a nullity, cannot be ratified, 'validated' or amended." I do not refer to all the authorities listed in the footnotes.

Mr Mokhari, in his diligent address, and on the subject of the unlawful act being treated as valid until it is declared unvalid, also referred me to the well-known case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 6 SA 222 (SCA) where the following is said at 242B-C:

> "The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

It is clear, as I pointed out, that this principle is recognised both in *Pikoli*, and by *Cora Hoexter*. However, where the declaration of invalidity operates with retrospective effect, and has the effect of the unlawful act being treated as if it never existed, it would seem to me that all actions taken by the Minister following the unlawful suspension will be tainted and of no consequence if I were to declare the suspension to be unlawful and invalid.

[31] As to the reference by *Cora Hoexter* to PAJA, Mr Mokhari also reminded me of the provisions of section 8 of that Act. If I understood him correctly, he argued that from the wording of paragraph 5.1 of the founding affidavit ("to review and set aside the decisions of the Minister ..."), it is plain that this is an application for review in terms of PAJA, so that the remedy sought falls under section 8(c) of that Act which reads as follows:

"(1) The Court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

(a) ...

(b) ...

(c) setting aside the administrative action and –

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) ..."

If I understood the argument correctly, it is that in the light of these provisions it is incumbent on this court to remit the matter for reconsideration by the Minister unless it is considered to be an exceptional case (which I understood counsel to argue it is not) whereupon the court can substitute or vary the decision of the Minister.

In his replying address, Mr Unterhalter argued, correctly in my view, that this is not a review application in terms of PAJA but an attack on the legality of the Minister's decision.

It seems to me that one of the leading cases on the subject is *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 1 SA 374 (CC) where the following is said at 400D-F:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality."

In this case, I have found, that the Minister purported to exercise a power and perform a function beyond that conferred upon him by law, following the order in the 2014 judgment.

Cora Hoexter distinguishes between the application of the principle of legality and the PAJA route. At 122 she says:

> "But legality also has a wider meaning that goes *beyond* administrative action, and this is probably the more common usage of the term today. Here it refers to a broad *constitutional* principle of legality that governs the use of *all* public power rather than the narrower realm of administrative action. This principle of legality (or 'legality and rationality') is an aspect of the rule of law, a concept implicit in the interim Constitution and the founding value of our constitutional order in terms of section 1(c) of the 1996 Constitution. The

fundamental idea it expresses is that 'the exercise of public power is only legitimate where lawful'."

For these reasons, I am of the view that it is appropriate to attack the actions of the Minister on the strength of the principle of legality, rather than in terms of PAJA. It should also be borne in mind that the executive powers or functions of the National Executive, or some of them referred to in the definition of "administrative action" in PAJA, are excluded from the operation of that Act. One of the actions excluded from the PAJA definition is contained in the provisions of section 92(3) of the Constitution which reads:

"Members of the Cabinet must –

(a) act in accordance with the Constitution ..."

[32] I turn to the position of the third respondent.

The position of the third respondent, Major-General Berning Ntlemeza ("the third respondent")

[33] In the founding affidavit, the applicant alleges that an Acting National Head (here purportedly the third respondent) cannot be appointed if Dramat was not lawfully suspended. The applicant argues that in the circumstances the appointment decision of the third respondent must suffer the same fate as the suspension decision of Dramat.

[34] This allegation is not dealt with in the opposing affidavit. The Minister only offers a blanket denial of everything in the founding papers inconsistent with his version in the opposing affidavit.

[35] I have pointed out that section 17C of the SAPS Act provides for the establishment of the DPCI and provides that the Directorate will, *inter alia*, consist of a Deputy National Head at national level.

[36] The procedure involving the appointment of the Deputy National Head as Acting National Head is governed by the provisions of section 17CA(12). This subsection reads as follows:

> "(12) (a) Whenever the National Head of the Directorate is absent or unable to perform his or her functions, the Minister shall appoint the Deputy National Head of the Directorate as the Acting National Head of the Directorate.
>
> (b) Whenever the office of the National Head of the Directorate is vacant or the National Head of the Directorate is for any reason unable to take up the appointment contemplated in subsection (1), the Minister shall appoint the Deputy National Head of the Directorate as the Acting National Head of the Directorate.
>
> (c) If both the National Head of the Directorate and the Deputy National Head of the Directorate are absent the Minister shall appoint a suitably qualified and experienced person as the Acting National Head of the Directorate.

(d) Whenever the Deputy National Head of the Directorate is absent or unable to perform his or her functions, the National Head of the Directorate shall appoint a suitably qualified and experienced person as the Acting Deputy National Head of the Directorate.

(e) Whenever the office of the Deputy National Head of the Directorate is vacant the Head of the Directorate shall appoint a suitably qualified person as the Acting Deputy National Head of the Directorate."

[37] In the Minister's heads of argument, it is stated that the Minister appointed the third respondent as Acting National Head in terms of subsection (12)(c). It is stated that the Minister could not appoint the Deputy National Head of the DPCI because the DPCI does not have a Deputy National Head currently. Under these circumstances, it is questionable whether the Minister complied with the provisions. Subsection (12)(e) provides that if the office of the Deputy National Head is vacant (like here) the Head of the Directorate shall appoint a suitably qualified person as the Acting Deputy National Head, and not the Minister. It is also questionable whether subsection (12)(c) was applicable because that foreshadows a situation where both the National Head and the Deputy National Head "are absent". It may be arguable that such a state of affairs does not apply to the present circumstances. Nevertheless, I make no formal pronouncement on this, as the issue was not pressed before me.

[38] In prayer 3 of the notice of motion, the applicant seeks declaratory relief to the effect that the appointment of the third respondent by the Minister as Acting National Head of the DPCI is unlawful and also for the setting aside of that appointment decision.

[39] It was argued on behalf of the Minister that the relief sought in prayer 3 would not necessarily follow even if prayer 2 was granted. The relief sought in prayer 2 is a declaration that the decision of the Minister to suspend Dramat as the National Head is unlawful and the setting aside of that suspension decision is also sought.

It was argued on behalf of the Minister that the granting of prayer 3, following upon the granting of prayer 2, will only be a foregone conclusion if further relief is granted to the applicant to the effect that Dramat should be reinstated in his position, something not expressly requested in the notice of motion.

In this regard, I was referred by Mr Mokhari to the case of *Transnet Ltd and others v Chirwa* 2007 2 SA 198 (SCA) where it is stated that the process by which the employee was dismissed was tainted through bias, and was correctly set aside in terms of section 6(2)(a)(iii) of PAJA. It was held that where the learned Judge *a quo*, having set aside the dismissal by the employer, also granted retrospective reinstatement, he was wrong in taking the latter step. It was held that in administrative law the subject is usually entitled only to have the decision at issue set aside and the matter remitted for a fresh decision. It is on this basis, if I understood the argument correctly, that it was argued that reinstatement of Dramat will not follow, even upon granting of the relief in prayer 2 namely a declarator to the effect that the suspension was invalid and unlawful. It was further argued that, even upon the granting of prayer 2, and the

setting aside of the suspension of Dramat as unlawful, the Minister is still obliged "in the absence of the reinstatement of Dramat" to ensure that the DPCI has a National Head, which the Minister did by appointing the third respondent in compliance with section 17CA(12)(c).

In his replying address, Mr Unterhalter confirmed that reinstatement of Dramat was not specifically sought and need not be granted in those terms. He argued, correctly, that this was not a PAJA application, as I have already pointed out so that the *dicta* in *Chirwa* and, for that matter, the provisions of the Labour Relations Act are not applicable. This is not a case of Dramat approaching the court as an aggrieved employee. The applicant is not acting on behalf of Dramat but as a non-governmental organisation with the objective, *inter alia*, to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights. He pointed out that the applicant approaches the court, firstly, in its own interest. It is an organisation that is primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law. These are all implicated by the unlawful decisions of the Minister to suspend Dramat and to appoint the third respondent. It was argued that, in addition to his unlawful actions, the Minister has failed in his constitutional duty to protect the independence of the DPCI and uphold the rule of law in South Africa. It was argued, secondly, that the applicant also approaches the court in the public interest. All South Africans have an interest in the rule of law, the requirements for a properly functioning constitutional democracy and, in particular, that urgent steps be taken to root out corruption. Counsel confirmed, correctly in my view, that this is a challenge based on the principle of legality, and not a PAJA application.

[40] I return briefly to the argument raised in the founding papers (not specifically challenged in the opposing affidavit) that the third respondent cannot be appointed if Dramat was not lawfully suspended and that the appointment decision of the third respondent must suffer the same fate as the suspension decision of Dramat.

In *Seale v Van Rooyen NO and others, Provincial Government, North West Province v Van Rooyen NO and others* 2008 4 SA 43 (SCA) the following is said at 50C-D:

> "I think it is clear from *Oudekraal*, and it must in my view follow, 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."

In commenting on this decision, *Cora Hoexter*, at 549-550, says, after quoting the relevant passage from *Seale*:

> "In other words, as *Oudekraal* itself makes clear, the factual existence of an act is capable of supporting subsequent acts only as long as the first act is not set aside. In this instance a decision to grant a servitude had indeed been set aside, and the subsequent registration of the servitude was therefore of no force and effect."

[41] In the circumstances, I have concluded that the position is as follows, and I find accordingly:

1. the purported suspension of Dramat was not authorised by law, unconstitutional and invalid from the outset – *Pikoli* at 408C-D;

2. the appointment of the third respondent as Acting National Head depends for its validity on the suspension of Dramat and is, consequently, invalid as the legal foundation for such an appointment was non-existent – *Seale* at 50C-D;

3. where the suspension of Dramat was invalid and a nullity from the outset, he was, in law, never suspended, so that there is no basis for ordering his reinstatement;

4. where the appointment of the third respondent as Acting National Head depended for its validity on the suspension of Dramat, which was invalid and a nullity, the appointment of the third respondent is also invalid as the legal foundation therefor was non-existent. Such appointment, therefore, also falls to be declared invalid, and, inasmuch as it may be necessary, set aside.

Other legislation and provisions relied upon by the Minister in support of his decision to suspend Dramat

[42] In the face of the striking down and deletion by the Constitutional Court of section 17DA(2) of the SAPS Act, which the Minister argues, as I have illustrated, did not deprive him of his powers to suspend and remove Dramat, the Minister also, in the purported suspension notice of 23 December 2014, suggested that he is empowered to suspend Dramat by the provisions of the Public Service Act, Proclamation no 103 of 1994, and the so-called *SMS Handbook*, and more particularly chapter 7 thereof.

[43] In section 1 of the Public Service Act ("the PSA") "member of the services" is defined as meaning a member of –

"(a) ...

(b) the South African Police Service appointed, or deemed to have been appointed. in terms of the South African Police Service Act, 1995 (Act 68 of 1995); or

(c) ..."

Section 2(2) of the PSA provides:

"(2) Where members of the services, educators or members of the Intelligence Services are not excluded from the provisions of this Act, those provisions shall, subject to subsection (2A), apply only in so far as they are not contrary to the laws governing their employment." (Emphasis added.)

The provisions in subsection (2A) are not applicable for present purposes.

[44] As already pointed out, chapter 6A of the SAPS Act (containing sections 17A to 17L) deals with the DPCI, which is also established in terms of section 17C(1). It also, in section 17CA contains detailed provisions relating to the appointment, remuneration and conditions of service of those comprising the DPCI. I have quoted, at some length, from some of the provisions of the SAPS Act. In short, the provisions of the SAPS Act fully govern the employment of members of the DPCI. This includes 17DA dealing with the removal from office of the National Head of the Directorate. Consequently, any conditions or provisions in the PSA, not in harmony with what is enacted in the SAPS Act, will not apply to Dramat. The argument of the Minister, in this regard, can therefore not be upheld.

[45] It was pointed out by counsel for the applicant, correctly in my view, that the *Senior Management Service Handbook*, published in 2003 ("*SMS Handbook*") is delegated legislation under the PSA and would therefore also not be applicable to the suspension and/or removal of the Head of the DPCI as this is governed, as pointed out, by section 17DA of the SAPS Act.

[46] In any event, if one has regard to chapter 7 of the *SMS Handbook*, on which the Minister relies, the provisions of paragraph 2.3 thereof under the heading "Scope of application" read as follows:

> "(1) This Code and Procedure applies to the employer and all members. It does not, however, apply to the employer and members covered by a disciplinary Code and Procedure –
>
> (a) ...
>
> (b) contained in legislation or regulations."

The disciplinary procedure in the present case, specifically the suspension and/or removal of the National Head of the DPCI, is covered by the SASP Act so that chapter 7 of the *SMS Handbook* does not apply to Dramat.

It was also argued on behalf of the applicant that the *SMS Handbook* merely confirms that which the SAPS Act makes abundantly clear. Section 17DA(1) of the SAPS Act unambiguously provides, as already mentioned, that the Head of the DPCI shall not be suspended or removed from office except in accordance with the provisions of subsection (3) and (4). Peremptory language in a statute must, in the absence of strong indications to the contrary, be interpreted as compulsory and not merely

directory. Not only are there no such contrary indications, but all the indications are that it should be interpreted to exclude any other mechanisms for suspension. It follows that the Minister's attempted reliance on any other legislation to justify his actions is misplaced.

Other arguments offered on behalf of the Minister

[47] I have dealt with most of the arguments presented on behalf of the Minister.

[48] An argument advanced on behalf of the Minister, which I have not yet mentioned, was raised for the first time during the proceedings before me. It has to do with a compromise or *transactio*.

In short, it has to do with Dramat's letter to the Minister of 24 December 2014, extracts of which I have quoted. The argument seems to be based on Dramat's utterance that he is willing to submit a request to vacate his office by applying for approval of early retirement but subject to the precondition that the unlawful precautionary suspension be uplifted without Dramat having to approach the court to do so.

[49] The argument, if I understood it correctly, appears to be that these utterances by Dramat constitute a compromise or an agreement not to litigate so that the applicant is debarred from proceeding with this application.

[50] I was referred to the case of *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and others* 1978 1 SA 914 (A). In the judgment it was

stated, at 921B-C that a *transactio* is an agreement between litigants for the settlement of a matter in dispute and the purpose thereof is not only to put an end to existing litigation but also to prevent or avoid litigation.

Inasmuch as such a *transactio* may have been binding on the applicant, which it clearly is not, there is no evidence whatsoever of such an agreement having been entered into between the Minister and Dramat. Indeed, in his opposing affidavit, dated 14 January 2015, the Minister says that he is in the process of arranging a meeting with Dramat.

[51] In any event, as Mr Unterhalter correctly argued, no agreement between Dramat and the Minister, if there were to be one, can act as a bar to the applicant proceeding with the present application. The applicant, as stated, litigates in its own interest and in the public interest in an effort to uphold the principles of democracy and constitusionalism, as well as the rule of law. The application is aimed at attacking the constitutionality and validity of the Minister's actions.

[52] In the circumstances, I see no merit in the Minister's argument based on the alleged compromise or *transactio*.

The applicant's *locus standi*/standing to launch this application

[53] In the opposing affidavit, the Minister argues that this relief is sought by the applicant "on behalf of the second respondent" in circumstances where the second respondent has not authorised the applicant to bring the application on his behalf neither has he filed an affidavit supporting the application. It is argued that the applicant has no right

in law to bring an application on behalf of the second respondent for his reinstatement or the upliftment of his suspension when there is no evidence in the founding papers to the effect that the second respondent seeks to challenge the suspension in court. It is argued that the applicant seeks to be the guardian of the second respondent when the latter has the ability and capacity to act on his own behalf and to bring an application himself, if he so wishes.

[54] The applicant's assertion that it brings the application in the public interest is, so the Minister submits, a red herring because the applicant cannot act in the public interest when the aggrieved party is present and available to act on his own. It is argued that the applicant cannot rely on the provisions of section 38 of the Constitution to establish the necessary *locus standi* to launch this application. The applicant is required, so the argument goes, to demonstrate in the founding papers that Dramat is unable to act on his own and for that reason it was in the public interest that the applicant should so act. Consequently, the applicant does not have the necessary legal standing to bring this application.

[55] In response to this argument, it was pointed out on behalf of the applicant that the latter does not contend that it seeks relief "on behalf of the second respondent". This is not a requirement under the law on own-interest standing. Nor is it a requirement that the applicant must demonstrate that Dramat "supports the application". It is irrelevant whether Dramat is "present and available to act on his own". This fact is irrelevant to the objective legal question as to whether or not the Minister acted in accordance with the law in his attempts to remove Dramat from office.

[56] Counsel for the applicant pointed out that their client relies on own-interest and public interest standing, *inter alia* as provided for in sections 38(a) and (d) of the Constitution.

Section 38 reads as follows:

> "38. **Enforcement of rights.** - Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest, and
>
> (e) an association acting in the interest of its members."
>
> (Emphasis added.)

[57] I was reminded by counsel for the applicant that their client brings this application, firstly, in its own interest. It was submitted that it is trite that our law accords generous rules for standing which permit applicants to seek relief either on their own behalf or on behalf of others. It is also trite, so it was submitted, that constitutional standing is broader than traditional common law standing. See *Giant Concerts CC v Renaldo Investments (Pty) Ltd and others* 2013(3) BCLR 251 (CC).

It was further argued that even if the applicant's own interest standing is questionable (which the applicant denies) this may not prohibit a court from hearing the matter, if the interests of justice so demand. CAMERON J said in *Giant Concerts*,

> "There may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."

[58] Counsel submitted that the applicant has sufficiently demonstrated that as an organisation which is primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law, its rights and interests are affected by the unlawful decisions of the Minister to suspend Dramat and to appoint the third respondent. This is a matter of such grave importance that it is undoubtedly in the interest of justice for the applicant to invoke section 38(a) of the Constitution. This is particularly so in the context of the applicant's involvement in ensuring that the DPCI is properly insulated from political interference and safeguarding the DPCI's independence, through its interventions as an *amicus curiae* in *Glenister II* and as an applicant in the 2014 judgment. In neither of those cases the *locus standi* of the applicant was attacked. It is difficult to see how an objection to the *locus standi* can be upheld in this particular matter under these circumstances. After all, the present matter flows from the 2014 judgment for reasons which have already been explained.

[59] As to public interest standing, which also involves the 2014 judgment, section 38(d) of the Constitution allows a party to bring constitutional challenges "in the public

interest". It has been held repeatedly that the court should adopt a "generous" or "broad" approach to standing in these matters. CAMERON J held in *Beukes v Krugersdorp Transitional Local Council* 1996 3 SA 467 (W) at 474 that such a generous approach is not limited to the Constitutional Court, but should be adopted by "all courts that are called upon to adjudicate constitutional claims" and the generous nature of the test applies both in respect of who qualifies as having standing and how that standing may be evidenced.

[60] It was also argued that the conduct or views of Dramat do not in any way affect the public interest in upholding the rule of law and dealing with blatantly unlawful acts by the National Executive in respect of a key public institution. In any event, so it was further argued, it is clear from Dramat's letter of 24 December 2014 that the offer (of taking early retirement) was made under duress and because Dramat is disillusioned with the Minister's inability to act lawfully and with attempts to subvert his office and authority.

[61] In all the circumstances, I am satisfied that the applicant has made out a proper case for legal standing and that the attack on the applicant's standing is ill-founded. I add, for the sake of clarity, that I was specifically informed by counsel for the Minister during the proceedings that the issue of standing was not raised as a point *in limine* for immediate decision but that it had to be decided as part of the main judgment.

Conclusions

[62] I have already set out my conclusions, particularly when dealing with the position of the third respondent and other subjects.

[63] For the reasons mentioned, and because of my finding of unlawful conduct and unconstitutional conduct on the part of the Minister, I am satisfied that a proper case was made out for the relief sought.

Costs

[64] The costs should follow the result in the normal manner. The costs should also include the costs of two counsel.

[65] Counsel on both sides were in agreement before me that the costs flowing from the proceedings of 15 January 2015 should be costs in the application.

The order

[66] I make the following order:

1. It is declared that the decision of the first respondent (the Minister of Police) of 23 December 2014 to suspend Lieutenant General Anwa Dramat, the National Head of the Directorate for Priority Crime Investigation ("the DPCI") is unlawful and invalid and the decision is set aside.
2. It is declared that the decision of the Minister to appoint Major-General Berning Ntlemeza as Acting National Head of the DPCI is unlawful and invalid and the decision is set aside.
3. It is declared that the Minister is not empowered to suspend the National Head of the DPCI other than in accordance with sections 17DA(3) and (4), read with section 17DA(5), of the South African Police Service Act, 1995.

4. The Minister is ordered to pay the costs of the applicant, which will include the costs of the proceedings of 15 January 2015 and the costs of two counsel.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

1054/2015

HEARD ON: 15 & 19 JANUARY 2015
FOR THE APPLICANT: D UNTERHALTER SC ASSISTED BY M DU PLESSIS
INSTRUCTED BY: WEBBER WENTZEL
FOR THE 1ST RESPONDENT: W MOKHARI SC ASSISTED BY Ms T SEBOKO
INSTRUCTED BY: HOGAN LOVELLS (SOUTH AFRICA) INC AS ROUTLEDGE MODISE INC

9

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 255/15

In the matter between:

ROBERT McBRIDE Applicant

and

MINISTER OF POLICE First Respondent

MINISTER FOR PUBLIC SERVICE AND ADMINISTRATION Second Respondent

and

HELEN SUZMAN FOUNDATION Amicus Curiae

Neutral citation:	*McBride v Minister of Police and Another* [2016] ZACC 30
Coram:	Mogoeng CJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J.
Judgments:	Bosielo AJ (unanimous)
Heard on:	17 May 2016
Decided on:	6 September 2016
Summary:	Confirmation proceedings — independence of police complaints body — section 206(6) of the Constitution — decision by Minister to suspend and institute disciplinary proceedings against Executive Director of the Independent Police Investigative Directorate invalid and set aside

Declaration of invalidity — section 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 — sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994 — regulation 13 of the IPID Regulations

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ORDER

On application for confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria:

1. It is declared that the following provisions are invalid to the extent that they authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate—

   1.1. section 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011;

   1.2. sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994;

   1.3. regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GN R98 of Government Gazette 35018 of 10 February 2012), (IPID Regulations).

2. Parliament is directed to cure the defects in the legislation within 24 months from the date of this order.

3. Pending the correction of the defect(s):

   3.1. Section 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 is to be read as providing as follows:

"Subsections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995 apply to the suspension and removal of the Executive Director of IPID, with changes as may be required by the context."

3.2. Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994 and regulation 13 of the IPID Regulations are declared inconsistent with section 206(6) of the Constitution and shall not apply to the Executive Director of the Independent Police Investigative Directorate.

4. It is declared that the decision of the Minister of Police to suspend Mr Robert McBride from his position as Executive Director of the Independent Police Investigative Directorate is invalid and is set aside.

5. The order in paragraph 4 is suspended for 30 days in order for the National Assembly and the Minister of Police, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 above.

6. It is declared that the decision of the Minister of Police to institute the disciplinary inquiry against Mr Robert McBride, which was to commence on 21 May 2015, is invalid and is set aside.

7. The Minister of Police is directed to pay the costs of Mr Robert McBride, including the costs of two counsel.

JUDGMENT

BOSIELO AJ (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring):

Introduction

[1] On 4 December 2015, acting in terms of section 172(1)(a) of the Constitution,[1] the High Court of South Africa, Gauteng Division, Pretoria (High Court) declared several sections of the Independent Police Investigative Directorate Act (IPID Act)[2] inconsistent with the Constitution and invalid. These were section 6(3)(a) and 6(6) of the IPID Act; sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act;[3] and regulation 13 of the IPID Regulations for the Operation of the Independent Investigative Directorate (IPID Regulations),[4] which were found to be inconsistent with section 206(6) of the Constitution and thus invalid, to the extent that they purport to authorise the Minister of Police to suspend, take disciplinary steps pursuant to the suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate (IPID).[5]

[2] For this declaration of invalidity to have legal force, it must be confirmed by this Court in terms of section 172(2)(a) of the Constitution.[6] Hence the application to this Court.

[3] The applicant is Mr Robert McBride, the Executive Director of IPID since 3 March 2014. He has been on precautionary suspension since 24 March 2015 –

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[1] Section 172(1), in relevant part, 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."

[2] 1 of 2011.

[3] Proclamation 103 of 1994.

[4] Independent Police Investigative Directorate Act, 2011 Regulations for the Operation of the Independent Police Investigative Directorate, GN 98, *GG* 35018, 10 February 2012.

[5] *McBride v Minister of Police and Another* [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) (High Court judgment).

[6] Section 172(2)(a) reads:

> "The Supreme Court of Appeal, a High Court 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."

pending a disciplinary inquiry to be initiated against him by the Minister of Police. The first and second respondents are the Minister of Police and the Minister of Public Service and Administration respectively. Only the Minister of Police (Minister) participated in the proceedings before us. The Helen Suzman Foundation (HSF), a non-governmental organisation whose main objective is to defend the values that underpin our constitutional democracy and to promote respect for human rights and the rule of law, was admitted as amicus curiae (friend of the court) and presented oral submissions before us.

[4] Section 206(6) of the Constitution provides for the establishment of an independent police complaints body by national legislation.[7] Pursuant to this section, Parliament established IPID. Its primary duty is to investigate any alleged misconduct or offence committed by a member of the police service. IPID's independence is further bolstered by section 4 of the IPID Act which provides that the Directorate functions independently from the South African Police Service (SAPS).[8]

[5] However, this must be contrasted with section 206(1) of the Constitution, which provides for a member of the Cabinet to be responsible for policing and the determination of national policing policy.[9] Allied to this is section 6(3)[10] of the IPID

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[7] Section 206(6) of the Constitution reads:

> "On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province."

[8] Section 4 of the IPID Act reads:

> "(1) The Directorate functions independently from the South African Police Service.
>
> (2) Each organ of state must assist the Directorate to maintain its impartiality and to perform its functions effectively."

[9] Section 206(1) of the Constitution provides:

> "A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial government and taking into account the policing needs and priorities of the provinces as determined by the provincial executives."

[10] Section 6(3) provides:

> "In the event of an appointment being confirmed—

Act which makes IPID's Executive Director subject to the laws governing the public service as well as section 6(6)[11] which authorises the Minister to remove the Executive Director from office on specified grounds. But this section is silent on oversight of the Minister's action by Parliament.

[6] Mr McBride's primary submission is that the cumulative effect of these pieces of legislation is that IPID does not have sufficient safeguards to ensure that its Executive Director and IPID, as an institution, are able to act with sufficient independence. The gravamen of this submission is that these provisions are inimical to any notion of the independence of the Executive Director as demanded by both the Constitution and the IPID Act.

[7] Although the Minister opposed the application in the High Court, before us he made qualified, albeit far-reaching, concessions. The Minister accepted that the impugned provisions do not provide adequate protection of the independence of IPID. As a result, he supported the confirmation of invalidity as per paragraph 1 of the order of the High Court. But he opposed confirmation of paragraphs 3, 4, 5 and 6 of the High Court's order. These, in part, sought to read section 17DA(3) to 17DA(7) of the South African Police Service Act[12] (SAPS Act) into section 6(6) of the IPID Act –

(a) the successful candidate is appointed to the office of Executive Director subject to the laws governing the public service with effect from a date agreed upon by such person and the Minister; and

(b) such appointment is for a term of five years, which is renewable for one additional term only."

[11] Section 6(6) reads:

"The Minister may, remove the Executive Director from office on account of—

(a) misconduct;

(b) ill health; or

(c) inability to perform the duties of that office effectively."

[12] 68 of 1995. Section 17DA reads, in relevant part:

"(3)

(a) The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.

pending the expiry of 12 months or correction of the defect(s) by the Legislature, whichever should occur first. The other part of the opposed order has the effect of insulating the Executive Director from the application of sections 16A(1),[13] 16B,[14]

(b) The adoption by the National Assembly of a resolution calling for that person's removal from office.

(4) A resolution of the National Assembly concerning the removal from office of the National Head of the Directorate shall be adopted with a supporting vote of at least two-thirds of the members of the National Assembly.

(5) The Minister—

(a) may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and

(b) shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal.

(6) The Minister may allow the National Head of the Directorate, at his or her request, to vacate his or her office—

(a) on account of continued ill-health; or

(b) for any other reason which the Minister deems sufficient.

(7) The request in terms of subsection (6) shall be addressed to the Minister at least six calendar months prior to the date on which the National Head of the Directorate wishes to vacate his or her office, unless the Minister grants a shorter period in a specific case."

[13] Section 16A(1) reads:

"An executive authority shall—

(a) immediately take appropriate disciplinary steps against a head of department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder;

(b) immediately report to the Minister the particulars of such non-compliance; and

(c) as soon as possible report to the Minister the particulars of the disciplinary steps taken."

[14] Section 16B reads:

"Discipline

(1) Subject to subsection (2), when a chairperson of a disciplinary hearing pronounces a sanction in respect of an employee found guilty of misconduct, the following persons shall give effect to the sanction:

(a) In the case of a head of department, the relevant executive authority; and

(b) in the case of any other employee, the relevant head of department.

(2) Where an employee may lodge an internal appeal provided for in a collective agreement or in a determination in terms of section 3(5), a sanction referred to in subsection (1) may only be given effect to—

(a) if an internal appeal is lodged, after the appeal authority has confirmed the sanction pronounced by the chairperson of a disciplinary hearing; or

(b) if no internal appeal is lodged, after the expiry of the period within which the appeal must have been lodged.

17(1)[15] and 17(2)[16] of the Public Service Act. The Minister also opposed the setting aside of the decision to suspend Mr McBride from his position as Executive Director of IPID, and institute disciplinary proceedings against him. It is to be noted that the High Court suspended the effect of these two orders, pending parliamentary intervention.

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(3) The Minister shall by regulation make provision for—

(a) a power for chairpersons of disciplinary hearings to summon employees and other persons as witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and other objects; and

(b) travel, subsistence and other costs and other fees for witnesses at disciplinary hearings.

(4) If an employee of a department (in this subsection referred to as 'the new department'), is alleged to have committed misconduct in a department by whom he or she was employed previously (in paragraph (b) referred to as 'the former department'), the head of the new department—

(a) may institute or continue disciplinary steps against that employee; and

(b) shall institute or continue such steps if so requested—

(i) by the former executive authority if the relevant employee is a head of department; or

(ii) by the head of the former department, in the case of any other employee.

(5) In order to give effect to subsection (4), the two relevant departments shall co-operate, which may include exchanging documents and furnishing such written and oral evidence as may be necessary.

(6) If notice of a disciplinary hearing was given to an employee, the relevant executive authority shall not agree to a period of notice of resignation which is shorter than the prescribed period of notice of resignation applicable to that employee."

[15] Section 17(1) reads:

"(a) Subject to paragraph (b), the power to dismiss an employee shall vest in the relevant executive authority and shall be exercised in accordance with the Labour Relations Act.

(b) The power to dismiss an employee on account of misconduct in terms of subsection (2)(d) shall be exercised as provided for in section 16B(1)."

[16] Section 17(2) reads:

"An employee of a department, other than a member of the services, an educator or a member of the Intelligence Services, may be dismissed on account of—

(a) incapacity due to ill health or injury;

(b) operational requirements of the department as provided for in the Labour Relations Act;

(c) incapacity due to poor work performance; or

(d) misconduct."

[8] Central to this application is the crisp question: whether, in the light of the applicable statutory framework, IPID enjoys adequate structural and operational independence, as envisaged by section 206(6) of the Constitution, to ensure that it is effectively insulated from undue political interference.

Background

[9] At the time when Mr McBride took office on 3 March 2014, there was a political storm brewing over the alleged unlawful rendition of four Zimbabwean nationals in November 2010 and January 2011. Lieutenant-General Anwa Dramat (General Dramat), then the head of the Directorate for Priority Crime Investigation (DPCI) and Major General Sibiya (General Sibiya), then the provincial head of, Gauteng, were allegedly implicated in these unlawful renditions.

[10] IPID initiated an investigation into this matter overseen by Advocate Mosing (Mr Mosing), of the National Prosecuting Authority (NPA), assisted by Mr Innocent Khuba (Mr Khuba), the Provincial Head: IPID, Limpopo. On 22 January 2014, IPID issued its first report (January report) which concluded that General Dramat and General Sibiya were involved in the illegal renditions of the Zimbabweans. It recommended that criminal charges be brought against them.

[11] Mr Khuba explained in his affidavit that because he regarded the January report as provisional, he continued with his investigations. His investigations gave birth to a second report, dated 18 March 2014 (March report), which was signed by Mr Khuba; Mr Matthews Sesoko, Chief Director: IPID Investigation and Information Management (Mr Sesoko); and Mr McBride. Contrary to the first report, the second report concluded that there was no evidence implicating General Dramat and General Sibiya in the illegal renditions of the Zimbabweans. As a result it recommended that no criminal charges be brought against them. This report was submitted to the National Director of Public Prosecutions (NDPP) for a decision on possible prosecution on 13 April 2015.

[12] Faced with the glaring discrepancies in the two reports, the Minister suspected serious tampering. As a result, he commissioned Werksmans Attorneys (Werksmans) to investigate the two reports. Relying on the January report and the investigation by Werksmans, the Minister invoked his powers in terms of section 6(6) of the IPID Act, the Public Service Act and Chapter 7 of the Senior Management Services Handbook (SMS Handbook), and placed Mr McBride on precautionary suspension on 24 March 2015. Acting on the strength of section 6(6)(a) of the IPID Act read with the provisions governing disciplinary proceedings under the Public Service Act and the IPID Regulations, the Minister served Mr McBride with a notice to attend a disciplinary enquiry.

In the High Court

[13] The Minister's actions stung Mr McBride into a defensive mode. Mr McBride instituted an urgent application before the High Court, firstly for an interim interdict to restrain the Minister from suspending him, and secondly, for an order declaring section 6(3)(a) and 6(6) of the IPID Act, regulation 13 of the IPID Regulations, sections 16A(1), 16B, 17(1) and (2) of the Public Service Act (only insofar as they apply to the Executive Director of IPID), paragraphs 2.5, 2.6, 2.7(1) – (5) of Chapter 7 and paragraphs 18-19 of Chapter 8 of the SMS Handbook (impugned provisions) constitutionally invalid and setting them aside. In addition, Mr McBride sought an order to review and set aside the decision by the Minister to suspend him as the Executive Director of IPID and to institute disciplinary proceedings against him.

[14] Relying on section 206(1) of the Constitution, the Minister opposed this application. He asserted that this section gives him the power to oversee the police as the Cabinet member responsible for policing. The disciplinary proceedings he had instituted against Mr McBride were therefore lawful as they are authorised by section 206(1). He contended further that sections 6(3)(a) and 6(6) of the IPID Act authorised him to invoke the laws governing the public service to remove the Executive Director of IPID from office. He also relied on sections 16A(1), 16B, 17(1)

and 17(2) of the Public Service Act, which authorise him to take appropriate disciplinary proceedings against Mr McBride as head of IPID.

[15] The High Court found that the independence of IPID is expressly guaranteed and protected under section 206(6) of the Constitution, which is "significant and decisive".[17] Furthermore, the High Court reasoned that, given that IPID performs overlapping anti-corruption functions with the DPCI, it must be afforded at least the equivalent protections that the Constitution requires for the DPCI.[18] In *Glenister II*,[19] this Court found that the independence of the DPCI was an implicit constitutional requirement, flowing from section 7(2) of the Constitution and the threat to South Africa posed by endemic corruption. The High Court found that inasmuch as the DPCI is independent despite there being no express constitutional entrenchment of its independence, by parity of reasoning "the effect of the constitutional entrenchment of the independence of IPID is that the *operational and structural independence of IPID must be at least as strongly protected as that of the DPCI*".[20]

[16] The High Court went further to hold that IPID's constitutionally guaranteed independence requires more stringent protection. This is because, unlike the DPCI which is situated within SAPS, IPID is institutionally and functionally independent from SAPS.[21] Another reason presented by the High Court as to why the principles pronounced in *Glenister II* extend to IPID is that, having found that the DPCI requires adequate independence from Executive interference in that case, it would be subversive of IPID not to afford it the same level of independence as the DPCI. As IPID has oversight and accountability responsibilities over the DPCI, affording the DPCI adequate independence without doing the same for IPID appears to be self-

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[17] High Court judgment above n 5 at paras 15-6.

[18] Id at para 20.

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

[20] High Court judgment above n 5 at para 17.

[21] Id at para 21.

defeating. In this regard, the High Court held that IPID's oversight role over the DPCI would be compromised and might create room for political interference to seep through and render the DPCI's independence nugatory.[22]

[17] Crucially, the High Court held that section 6(3)(a) and 6(6) of the IPID Act, sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act and regulation 13 of the IPID Regulations are inconsistent with section 206(6) of the Constitution. This was based on the fact that the impugned sections do not provide for parliamentary oversight in relation to the suspension, discipline or removal of the Executive Director and that they afford the Minister unilateral powers and the sole discretion to terminate the Executive Director's tenure. Furthermore, the Minister is entitled to discipline the Executive Director on the same basis as any head of department in the public service, without any special oversight or protection. The High Court found that this amounts to inadequate security of tenure for a national head of an independent body investigating police misconduct, including corruption.[23] Hence it declared the impugned sections inconsistent with section 206(6) of the Constitution and invalid. However the declaration of invalidity was suspended for 12 months to allow Parliament to remedy the defects.

[18] As an interim measure, the High Court read section 17DA of the SAPS Act into section 6(6) of the IPID Act, with the other impugned provisions being read as having no application to the Executive Director of IPID. The decisions to suspend and institute a disciplinary inquiry against Mr McBride were set aside – with the order setting aside the Minister's decision to suspend Mr McBride being itself suspended for 30 days to allow the National Assembly and the Minister to exercise their powers in terms of section 17DA (as it was read into section 6(6) of the IPID Act), should they so choose. All of these orders were referred to this Court for confirmation.[24]

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[22] Id at para 24.

[23] Id at para 46.

[24] The full order of the High Court was as follows:

The issues

[19] The issues are as follows:

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1. It is declared that the following provisions are unconstitutional and unlawful to the extent that they purport to authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or to remove from office the Executive Director of the Independent Police Investigative Directorate:
   1.1 Sections 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act, No. 1 of 2011;
   1.2 Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, 1994; and
   1.3 Regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GNR 98 of Government Gazette 35018 of 10 February 2012) ("IPID Regulations").
2. The declaration of invalidity in paragraph 1 is suspended for a period of 12 months from the date of the order to enable Parliament to correct the constitutional defect(s).
3. Pending the correction of the defect(s), or the expiry of the 12-month period, whichever occurs first:
   3.1 Section 6(6) of the Independent Police Investigative Directorate Act, No. 1 of 2011 is to be read as providing as follows:

   "Sub-sections 17DA(3) to 17DA(7) of the SAPS Act apply to the suspension and removal of the Executive Director of IPID, with such changes as may be required by the context"; and
   3.2 Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, 1994 and regulation 13 of the IPID Regulations, shall be read as having no application to the Executive Director of the Independent Police Investigative Directorate.
4. It is declared that the decision of the Minister of Police to suspend the Applicant from his position as Executive Director of the Independent Police Investigative Directorate is unlawful and invalid and the decision is set aside.
5. It is declared that the decision of the Minister of Police to institute the disciplinary inquiry against the Applicant, which was to commence on 21 May 2015, is unlawful and invalid and the decision is set aside.
6. The order in paragraph 4 is suspended for 30 days in order for the National Assembly and the Minister of Police, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 above.
7. All of the above orders are referred to the Constitutional Court for confirmation and shall have no force unless and until confirmed by the Constitutional Court.
8. The First Respondent is directed to pay the costs of the Applicant, including the costs of two counsel.
9. The First Respondent is ordered to pay the costs of the Helen Suzman Foundation, including the costs of two counsel.
10. The First Respondent is ordered to pay the costs of the Council for the Advancement of the South African Constitution.

a) Should the declaration of constitutional invalidity of the impugned sections be confirmed?

b) Should the decision by the Minister to suspend Mr McBride and institute the disciplinary proceedings, taken in terms of the laws governing the Public Service, be allowed to stand and continue?

c) Is the order granted by the High Court a just and equitable remedy as contemplated by section 172(1)(b) of the Constitution?

d) Costs.

Should invalidity be confirmed?

[20] I pause to observe that a day before the hearing, the Minister filed a draft order with the Registrar of this Court. This draft order was foreshadowed in his written submissions. It reads thus:

"1. The orders of constitutional invalidity granted by the High Court of South Africa (Gauteng Division, Pretoria) in respect of sections 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 ('IPID Act'), and Regulation 13 of the Regulations for the Operation of the Independent Police Investigative Directorate GN R 98 GG No 35018 (10 February 2012) ('IPID Regulations') are confirmed;

2. The orders of invalidity in paragraph 1 above are suspended for a period of 18 months to enable Parliament to cure the constitutional defect;

3. Pending the enactment of legislation by Parliament, or the expiry of the 18 month period in paragraph 2 above:

3.1 Section 6(6) of the IPID Act is to be read as providing as follows:

'Sub-sections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995 to apply to the suspension and removal of the Executive Director of the Independent Police Investigative Directorate, with such changes as may be required by the context'; and

3.2 regulation 13 of the IPID Regulations, shall be read as having no application to the Executive Director of the Independent Police Investigative Directorate;

4. It is declared that the decisions to suspend, and institute disciplinary proceedings against the Applicant are invalid;

5. The decisions in paragraph 4 above are not set aside;

6. It is declared that, in terms of paragraph 3.1. above, and section 17DA(3) of the SAPS Act as applied to the Executive Director of IPID, the relevant Portfolio Committee of the National Assembly is deemed to be seized with the disciplinary proceedings already instituted against the Applicant;

7. The First Respondent is directed to the pay the costs of the Applicant in the High Court, including those occasioned by the employment of two counsel; and

8. There is no order as to the costs of the confirmation proceedings before this Court."

[21] It is clear from the draft order that the Minister made a qualified concession. But he supports the confirmation of the declaration of invalidity in respect of the orders in paragraphs 1 to 4 only. However, he resists the setting aside of his decision to suspend Mr McBride from his position as the Executive Director of IPID as well as to institute disciplinary proceedings against him. Despite conceding their invalidity, he nonetheless urged us to endorse the disciplinary proceedings already underway and for them to be deemed to be undertaken by the relevant Portfolio Committee of the National Assembly.

[22] As appears from the Minister's draft order, the Minister supports confirmation by this Court of the declaration of invalidity in respect of section 6(3)(a) and 6(6) of the IPID Act and regulation 13 of the IPID Regulations. Although the Minister supports the declaration of invalidity in respect of his decision to suspend and institute disciplinary proceedings against Mr McBride, he requests that the decision not be set aside but that the relevant Portfolio Committee of the National Assembly be deemed

to be seized with the disciplinary proceedings already underway. But the Minister requests that the disciplinary proceedings against Mr McBride be allowed to proceed to finality – thus validating the proceedings the Minister concedes are invalid.

[23] As already stated, section 172(1)(a) of the Constitution provides that when a court decides a constitutional issue within its powers, it must declare any law or conduct inconsistent with the Constitution invalid to the extent of such inconsistency. This section is couched in peremptory terms. It is therefore a constitutional imperative. This Court has a duty to satisfy itself that the declaration of invalidity of the various impugned sections was properly made.[25] It also has to satisfy itself whether the impugned sections are inimical to the independence of IPID. This requires this Court to examine each of the impugned provisions to determine whether they are congruent with, or subversive of, IPID's independence as demanded by section 206(6) of the Constitution.

[24] IPID is an independent police complaints body established in terms of section 206(6) of the Constitution. Section 4(1) of the IPID Act requires it to function independently of SAPS. This is to ensure that IPID is able to investigate cases or complaints against the police without any fear, favour or prejudice or undue external influence. Section 4(2) of the IPID Act requires that each organ of state assist the Directorate to maintain its impartiality and to perform its functions effectively. Importantly, section 2 of the IPID Act requires IPID to play an oversight role over SAPS and Municipal Police Services. Given the nature, scope and importance of the role played by police in preventing, combating and investigating crime, IPID's oversight role is of cardinal importance. This is aimed at ensuring accountability and

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[25] *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at paras 66-7. Notably, in *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68, this Court held:

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."

transparency by SAPS and Municipal Police Services in accordance with the principles of the Constitution.[26]

[25] IPID is headed by an Executive Director who is nominated by the Minister in terms of section 6(1) of the IPID Act. This nomination must be either confirmed or rejected by the Parliamentary Committee within a period of 30 parliamentary working days.

[26] The Executive Director's responsibilities are set out in section 7 of the IPID Act. They include: providing strategic leadership to the Directorate;[27] appointing provincial heads of each province;[28] appointing such staff as may be necessary to enable the Directorate to perform its functions in terms of the Act;[29] giving guidelines concerning the investigation and management of cases by officials within the respective provincial offices, the administration of national and provincial offices and, the training of staff at national and provincial levels;[30] referring criminal cases revealed as a result of an investigation to the NPA for criminal prosecution and notifying the Minister of such referral;[31] ensuring that complaints regarding disciplinary matters are referred to the National Commissioner and where appropriate, the Provincial Commissioner;[32] once a month submitting a summary of disciplinary matters to the Minister and providing the Secretary with a copy thereof;[33] and keeping proper records of all financial transactions, assets and liabilities of the Directorate,

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[26] One of the objects of the IPID Act is set out in section 2(g) as follows:

> "to enhance accountability and transparency by the South African Police Service and Municipal Police Services in accordance with the principles of the Constitution."

[27] Section 7(11).

[28] Section 7(2).

[29] Section 7(3)(a).

[30] Section 7(3)(e)(i)-(iii).

[31] Section 7(4). In terms of section 7(5), the NPA must notify the Executive Director of its intention to prosecute, whereafter the Executive Director must notify the Minister thereof and provide a copy to the Secretary.

[32] Section 7(6).

[33] Section 7(7).

ensuring that the Directorate's financial affairs comply with the Public Finance Management Act[34] and, preparing an annual report in the manner contemplated in section 32.[35] The Executive Director is also the accounting officer of the Directorate. Evidently, his duties are extensive and wide.

[27] This must be seen against section 7(7) of the IPID Act which requires the Executive Director to submit a summary of disciplinary matters to the Minister. In addition, section 32 requires the Executive Director to prepare and submit an annual report in the form prescribed by the Minister within five months of the end of the financial year to the Minister. Evidently, this is intended to ensure that the Executive Director accounts to the Minister about the activities within IPID. This is probably because the Minister, as the political head of the police, bears political responsibility for the police.

[28] But does this on its own undermine IPID's independence to a point where it offends section 206(6) of the Constitution? No. The fact that IPID is required by both the Constitution and the IPID Act to be independent does not mean that it cannot be held accountable. Like all other organs of state, IPID must be accountable for its actions. To be insulated from undue political interference or control does not mean that IPID should be insulated from political accountability. Accountability is one of the important values enshrined in our Constitution – a basic tenet for good governance. Hence the requirement that it must submit reports about its activities to the Minister who in turn will place them before Parliament. This Court explained this apparent conundrum in *Glenister II* as follows:

> "The second general point we make is that adequate independence does not require insulation from political accountability. In the modern polis, that would be impossible. And it would be averse to our uniquely South African constitutional structure. What is required is not insulation from political accountability, but only

[34] 1 of 1999.

[35] Section 7(1)(a)-(c).

> insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit."[36]

[29] Section 6(3)(a) of the IPID Act makes the Executive Director subject to the laws governing the public service. In terms of the Public Service Act, section 16A(1)(a) authorises the executive authority to take appropriate disciplinary steps against the head of the department and to report such non-compliance to the Minister. Section 16B in turn authorises the institution of disciplinary proceedings against such a head, whilst section 17(1) vests the power to dismiss in the relevant executive authority. Is this statutory regime compatible with the independence of IPID and its Executive Director as envisaged by section 206(6) of the Constitution? I think not.

[30] It is axiomatic that public servants are government employees. They are beholden to government. They operate under government instructions and control. The authority to discipline and dismiss them vests in the relevant executive authority. This does not require parliamentary oversight. To subject the Executive Director of IPID to the same regime is to undermine or subvert his independence. It is not congruent with the Constitution.

[31] What then does the independence of IPID mean? Does it mean complete or sufficient independence? Admittedly, it is difficult to attempt to define the precise contours of a concept as elastic as this. It requires a careful examination of a wide range of facts to determine this question. Amongst these are the method of appointment, the method of reporting, disciplinary proceedings and method of removal of the Executive Director from office, and security of tenure. However, this Court has had occasion to deal with the independence of a similar institution in *Helen Suzman Foundation*[37] and *Glenister II*. Although the two cases deal with the

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[36] *Glenister II* above n 19 at para 216.

[37] *Helen Suzman Foundation v President of the Republic of South Africa and Others* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) (*Helen Suzman Foundation*).

independence of the DPCI, whose mandate is different to that of IPID, they offer useful guidelines in giving substance to IPID's constitutionally guaranteed independence – they offer bright lights for us as we traverse this new area.

[32] Grappling with the principle of the independence of the DPCI as a corruption-fighting body, Ngcobo CJ observed as follows in *Glenister II*, with the agreement of the majority:

> "The question, therefore, is not whether the DPCI is fully independent, but whether it enjoys an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it 'discharges its responsibilities effectively', as required by the Constitution."[38]

[33] The Chief Justice also states:

> "Ultimately therefore, the question is whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as to shield it from undue political influence."[39]

[34] To address this vexed issue, the High Court sought guidance from a number of international instruments.[40] These included: the United Nations Convention against Corruption;[41] the Council of Europe's Commissioner for Human Rights' Opinion on the Independent and Effective Determination of Complaints Against the Police;[42] and

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[38] *Glenister II* above n 19 at para 125.

[39] Id at para 121. See also High Court judgment above n 5 at para 28.

[40] High Court judgment above n 5 at para 36.

[41] It calls for independent bodies or persons (specialised in combating corruption through law enforcement) that can "carry out their functions effectively and without any undue influence" (article 36). For this, the independent body should have complete discretion in the performance or exercise of its functions and not be subject to the direction or control of a minister or any other party. In principle, it should give an account after its work has been performed when it reports to parliament (rather than the executive).

[42] The Council of Europe's Commissioner for Human Rights' *Opinion on the Independent and Effective Determination of Complaints Against the Police* (2009), similarly found that:

> "An independent and effective complaints system is essential for securing and maintaining public trust and confidence in the police, and will serve as a fundamental protection against

the AU Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa.[43]

[35] That Court had recourse to a report by the Organisation for Economic Co-operation and Development titled: *Specialised Anti-corruption Institutions: Review of Models*,[44] which was cited with approval by this Court in *Glenister II*.[45] The report proffers the following definition of independence:

> "Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference."[46]

[36] *Glenister II* expressly stated that this definition was not part of international law, but accepted that it serves as a useful interpretive tool against which IPID's independence may be measured. I have found the criteria adumbrated in this definition to be both useful and illuminating in trying to define and delineate the contours of independence as it pertains to the independence of IPID.

> ill-treatment and misconduct. An independent police complaints body . . . should form a pivotal part of such a system."

[43] The AU Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, 2006, calls upon State Parties "to establish independent civilian policing oversight mechanism[s]". In relevant part, the AU Resolution reads:

> "[A]ccountability and the oversight mechanisms for policing forms the core of democratic governance and is crucial to enhancing the rule of law and assisting in restoring public confidence in police."

[44] Available at: http://www.oecd.org/dataoecd/7/4/39971975.pdf, accessed on 6 June 2016.

[45] *Glenister II* above n 19 at para 187.

[46] Id at paras 119 and 188.

[37] In *Glenister II*, the majority held that a corruption-fighting entity will have the requisite independence if it can be established that the "reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features".[47] Factors that might be considered in assessing the independence of an institution include security of tenure and remuneration, and the mechanisms in place for accountability and oversight.[48] Since IPID is entrusted with wide-reaching police oversight powers, the same considerations, at the very least, should be factored in when assessing its independence. In contradistinction to the DPCI, the threshold for satisfying independence in respect of IPID is arguably more stringent given that the Constitution expressly demands its independence.

[38] On the other hand, section 6 of the IPID Act gives the Minister enormous political powers and control over the Executive Director of IPID. It gives the Minister the power to remove the Executive Director of IPID from his office without parliamentary oversight. This is antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not.

[39] To subject the Executive Director of IPID, which the Constitution demands to be independent, to the laws governing the public service – to the extent that they empower the Minister to unilaterally interfere with the Executive Director's tenure –

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[47] *Glenister II* above n 19 at para 207.

[48] Id at para 210.

is subversive of IPID's institutional and functional independence, as it turns the Executive Director into a public servant subject to the political control of the Minister.

[40] Without adequate independence, it would be easy for the Minister to usurp the power of the Executive Director under the guise of exercising political accountability or oversight over IPID in terms of section 206(1) of the Constitution. In this case, acting unilaterally, the Minister invoked the provisions of section 16A(1) of the Public Service Act, placed Mr McBride on suspension and instituted disciplinary proceedings against him. Undoubtedly, such conduct has the potential to expose IPID to constitutionally impermissible executive or political control. That action is not consonant with the notion of the operational autonomy of IPID as an institution. Put plainly it is inconsistent with section 206(6) of the Constitution. It follows that it is invalid and must be set aside.

[41] All this should be seen against the extensive powers IPID has to investigate the police. Section 28 of the IPID Act authorises the Directorate to investigate a whole variety of matters involving the police and complaints of assault, torture, rape, discharge of firearms, death while in police custody and as a result of police action. Section 28(1)(g) authorises the Directorate to investigate corruption within the police, whilst section 28(2) empowers the Directorate to investigate systemic corruption within the police force. There have in recent years been alleged instances of police brutality and killings perpetrated against civilians. Undoubtedly, these are very serious matters which affect the public. Naturally, the public has a direct interest in seeing these matters being vigorously pursued and properly investigated. IPID is given this responsibility. It is cast in the role of a watchdog over the police. It is therefore necessary to its credibility and the public confidence that it be not only independent but that it must also be seen to be independent to undertake this daunting task without any interference, actual or perceived, by the Minister.

[42] A question might be asked whether the statutory framework created by the impugned sections conduce to engendering public confidence in the independence of

IPID. This Court dealt with this issue of public confidence in *Glenister II*,[49] and reiterated it in *Helen Suzman Foundation*, where it stated:

> "This Court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . . By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence."[50]

[43] To my mind, the cumulative effect of the impugned sections has the potential to diminish the confidence the public should have in IPID. 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.

[44] Based on the above exposition, I conclude that the impugned sections do not pass constitutional muster. It follows that the order of constitutional invalidity by the High Court must be confirmed.

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[49] *Glenister II* above n 19 at para 207.

[50] *Helen Suzman Foundation* above n 37 at para 31.

What is a just and equitable remedy?

[45] As I indicated earlier, the Minister conceded that the decisions to suspend and institute disciplinary proceedings against Mr McBride are invalid. However, he pleaded that they should not be set aside but rather be allowed to continue to finality as if they were undertaken by the relevant Portfolio Committee of the National Assembly. The main submission is that the Minister took this decision in good faith as, when he took it, he considered it to be constitutional as the relevant section had not been declared unconstitutional. Furthermore, it was submitted that to set it aside would be disruptive. It would thus not be a just and equitable remedy as the disciplinary proceedings against Mr McBride had already commenced and were partly heard before an independent chairperson. The Minister submitted that setting aside these proceedings would permit Mr McBride to continue working as the Executive Director notwithstanding the fact that there is a prima facie case of gross misconduct against him.

[46] On the contrary, Mr McBride argued that the decisions by the Minister must be set aside. In the main, he contended that it would infringe the rule of law for this Court to preserve the Minister's actions which have been proved to be unconstitutional. In other words it would be untenable, if not invidious, for this Court to countenance an act which has been declared unconstitutional. In essence, he submits that no court can make an unlawful act lawful.

[47] As a counter, the Minister argued that this Court has in the past endorsed the principle that administrative decisions taken under a valid law that is subsequently declared unconstitutional are not automatically invalid but rather "[t]he rule of law requires their preservation". Three decisions of this Court were cited in support of this claim: *Van Rooyen,*[51] *Democratic Alliance*[52] and *Kruger.*[53]

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[51] *Van Rooyen and Others v the State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) (*Van Rooyen*).

[52] *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) (*Democratic Alliance*).

[48] I will briefly deal with the three cases to demonstrate that the reliance on them was misguided.

[49] In *Cross-Border Road Transport Agency*, this Court held that the legal consequence which ordinarily flows from a declaration of constitutional invalidity is that the impugned law is invalid from the date of its promulgation.[54] This is the so-called default position. In other words, the order of invalidity will have immediate retrospective effect unless the order is varied by an order of court. This can be done for a variety of reasons provided it is just and equitable.

[50] In *Van Rooyen*, it is true that, although several provisions of the Magistrates' Courts Act were declared to be invalid, the decisions taken under them were preserved.[55] This is because the interests of justice demanded this, as it would have caused chaos if all previous magistrates' courts' decisions were overturned. No comparable interests of justice considerations exist in the present case.

[51] Similarly, in *Democratic Alliance*, the invalid decisions by Mr Simelane were preserved as it would have brought about confusion and disorder if all the decisions taken by Mr Simelane were set aside as nullities. Yacoob ADCJ therefore rightly preserved these decisions.[56]

[52] The Minister incorrectly contends that *Kruger* supports the proposition that "an act done pursuant to invalid statutory provisions must nonetheless remain valid in the interests of certainty and to avoid disruption". But the case supports no such general

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[53] *Kruger v President of Republic of South Africa and Others* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) (*Kruger*).

[54] *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) at para 20.

[55] *Van Rooyen* above n 51 at para 260.

[56] *Democratic Alliance* above n 52 at para 93.

proposition. In *Kruger*, the Court preserved the conduct of the Road Accident Fund that had relied on invalid proclamations. This was to avoid disruption and disorder. There must be an interests of justice consideration that overrides the presumption of objective constitutional invalidity.[57]

[53] It is worth noting that Mr McBride is not opposed to his suspension followed by disciplinary proceedings. Furthermore, he has declared his willingness to participate in any process provided it is constitutionally compliant.

[54] In an attempt to obviate the disruption which the Minister feared might ensue if his decisions to suspend and discipline Mr McBride are set aside, the High Court made an order that the declaration of invalidity of the Minister's decision to suspend and institute disciplinary proceedings against Mr McBride be suspended for 30 days in order for the National Assembly and the Minister, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 of its order. Mr McBride is amenable to this. I find this to be just and equitable for both parties. It affords the Minister the opportunity, if he so wishes, to restart the process but on a proper basis. At the same time it ensures that Mr McBride's suspension is reasonable as he is still protected by the constitutionally protected presumption of innocence in his favour.

[55] I thus confirm the High Court's reading-in of the relevant provisions of the SAPS Act to operate on an interim basis. Furthermore, I regard a notional severance of the relevant provisions of the Public Service Act and the IPID regulations to be fair and equitable. This is intended to secure the independence of the IPID on an interim basis, until Parliament remedies the defects identified. During this time, the impugned provisions of the IPID Act, the Public Service Act and the IPID Regulations – to the extent that they allow the Minister to suspend, remove or institute disciplinary proceedings against the Executive Director – will remain inoperative.

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[57] *Kruger* above n 53 at paras 69-70.

[56] The High Court gave adequate consideration to what a just and equitable remedy should be as required by section 172 of the Constitution. Its conclusion was well-reasoned and fully supported by the facts of the case. Accordingly, I confirm the orders of the High Court.

Costs

[57] The general principle is that costs must follow the result. In other words a successful party must be awarded costs. At the hearing, the Minister submitted that, because he made some legal concessions, no costs order should be made in this Court. But he still opposed the matter until late in the proceedings. The Minister's draft order was served and filed at the proverbial eleventh hour, after the parties had already finalised their preparation and incurred high costs. I am therefore of the view that there is no reason to depart from the general rule, costs must follow the result.

[58] In the result, the following order is made:

1. It is declared that the following provisions are invalid to the extent that they authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate—

    1.1. section 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011;

    1.2. sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994;

    1.3. regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GN R98 of Government Gazette 35018 of 10 February 2012), (IPID Regulations).

2. Parliament is directed to cure the defects in the legislation within 24 months from the date of this order.

3. Pending the correction of the defect(s):

   3.1. Section 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 is to be read as providing as follows:

   "Subsections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995 apply to the suspension and removal of the Executive Director of IPID, with changes as may be required by the context."

   3.2. Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994 and regulation 13 of the IPID Regulations are declared inconsistent with section 206(6) of the Constitution and shall not apply to the Executive Director of the Independent Police Investigative Directorate.

4. It is declared that the decision of the Minister of Police to suspend Mr Robert McBride from his position as Executive Director of the Independent Police Investigative Directorate is invalid and is set aside.

5. The order in paragraph 4 is suspended for 30 days in order for the National Assembly and the Minister of Police, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 above.

6. It is declared that the decision of the Minister of Police to institute the disciplinary inquiry against Mr Robert McBride, which was to commence on 21 May 2015, is invalid and is set aside.

7. The Minister of Police is directed to pay the costs of Mr Robert McBride, including the costs of two counsel.

For the Applicant:	S Budlender and J Bleazard instructed by Adams & Adams Attorneys
For the First Respondent:	W Mokhari SC, T Ngcukaitobi, F Hobden and J Raizon instructed by Hogan Lovells (South Africa) incorporated as Routledge Modise Incorporated
For the Amicus Curiae:	C Steinberg instructed by Webber Wentzel Attorneys

10

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 89/17

In the matter between:

UNITED DEMOCRATIC MOVEMENT	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB ZUMA	Second Respondent
AFRICAN NATIONAL CONGRESS	Third Respondent
DEMOCRATIC ALLIANCE	Fourth Respondent
ECONOMIC FREEDOM FIGHTERS	Fifth Respondent
INKATHA FREEDOM PARTY	Sixth Respondent
NATIONAL FREEDOM PARTY	Seventh Respondent
CONGRESS OF THE PEOPLE	Eighth Respondent
FREEDOM FRONT	Ninth Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Tenth Respondent
AFRICAN INDEPENDENT PARTY	Eleventh Respondent
AGANG SOUTH AFRICA	Twelfth Respondent
PAN AFRICANIST CONGRESS OF AZANIA	Thirteenth Respondent
AFRICAN PEOPLE'S CONVENTION	Fourteenth Respondent
and	

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First Amicus Curiae
UNEMPLOYED PEOPLES' MOVEMENT	Second Amicus Curiae
INSTITUTE FOR SECURITY STUDIES	Third Amicus Curiae
SHOSHOLOZA PROGRESSIVE PARTY	Fourth Amicus Curiae

Neutral citation:	*United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Mogoeng CJ (unanimous)
Heard on:	15 May 2017
Decided on:	22 June 2017
Summary:	section 102 of the Constitution — motion of no confidence — voting — secret ballot — President — Speaker section 42 of the Constitution — section 55 of the Constitution — accountability — section 57 of the Constitution — National Assembly — separation of powers

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ORDER

On application for exclusive jurisdiction or direct access the Court orders:

1. The United Democratic Movement is granted direct access.
2. It is declared that the Speaker of the National Assembly has the constitutional power to prescribe that voting in a motion of

no confidence in the President of the Republic of South Africa be conducted by secret ballot.

3. The Speaker's decision of 6 April 2017 that she does not have the power to prescribe that voting in the motion of no confidence in the President be conducted by secret ballot is set aside.

4. The United Democratic Movement's request for a motion of no confidence in the President to be decided by secret ballot is remitted to the Speaker for her to make a fresh decision.

5. The Speaker and the President must pay the costs of the United Democratic Movement, the Economic Freedom Fighters, the Inkatha Freedom Party and the Congress of the People, including costs of two counsel where applicable.

JUDGMENT

MOGOENG CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] South Africa is a constitutional democracy – a government of the people, by the people and for the people through the instrumentality of the Constitution. It is a system of governance that "we the people" consciously and purposefully opted for to create a truly free, just and united nation.[1] Central to this vision is the improvement of the quality of life of all citizens and the optimisation of the potential of each through good governance.

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[1] The Preamble to the Constitution starts: "We, the people of South Africa".

[2] Since constitutions and good governance do not self-actualise, governance structures had to be created to breathe life into our collective aspirations. Hence the existence of the legislative, executive and judicial arms of the State. They each have specific roles to play and are enjoined to inter-relate as foreshadowed by the following principle that guided our constitution-making process:

> "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."[2]

[3] Knowing that it is not practical for all fifty five million of us to assume governance responsibilities and function effectively in these three arms of the State and its organs, "we the people" designated messengers or servants to run our constitutional errands for the common good of us all. These errands can only be run successfully by people who are unwaveringly loyal to the core constitutional values of accountability, responsiveness and openness. And this would explain why all have to swear obedience to the Constitution before the assumption of office.[3]

Essential context

[4] Unelected servants of the people serve in the Judiciary that comprises Judges and Magistrates. Judges are selected by a constitutional body which comprises Members of Parliament from the ruling and opposition parties, a few Judges, a Cabinet Member, a few legal practitioners, a university law teacher and the President's appointees.[4] Of the candidates who prove to be fit and proper for a judicial vacancy at the level applied for, one is then appointed by the President.[5] And like all other accountable servants of the people, their under-performance or

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[2] Constitutional Principle VI in Schedule 4 to the interim Constitution. See also *Certification of the Constitution of Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification* case) at para 45.

[3] Sections 48, 62, 87, 95 and 174 of the Constitution.

[4] Section 178 of the Constitution.

[5] Section 174 of the Constitution.

sanctionable conduct could result in their removal from office through an impeachment process if the Judiciary, Parliament and the President so decide.[6]

[5] The people's representatives in Parliament are chosen through an electoral process. Each citizen qualified to vote may participate in that process that is designed to deliver free and fair elections. Those who stand for public office and are elected[7] must attend the first sitting of the National Assembly.[8] It is at that first sitting that at least three things over which the Judiciary presides must happen. First, Members of the Assembly must be affirmed or sworn in.[9] Second, the Speaker of the Assembly must be elected by Members.[10] Third, Members of the Assembly must elect the President of the Republic.[11] Meaning, two arms of the State, the Judiciary and Parliament, each has a different but critical role to play in the process of electing the Head of State and Head of the Executive after general elections. Thereafter the President must be sworn in.[12] And that oath comes with serious obligations.[13]

[6] The President is an indispensable actor in the proper governance of our Republic and bears important constitutional responsibilities.[14] To enable him or her to discharge these obligations, he or she has a fairly free hand in assembling the service-delivery team – another set of servants comprising the Deputy President and a number of Ministers required to exercise the executive authority of the Republic.[15] As

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[6] Section 177 of the Constitution.

[7] Sections 19 and 47 of the Constitution.

[8] Section 51 of the Constitution.

[9] Section 48 of the Constitution.

[10] Section 52 of the Constitution.

[11] Section 86 of the Constitution.

[12] Section 87 and Schedule 2 item 1 of the Constitution.

[13] Schedule 2 item 1 of the Constitution.

[14] Sections 83, 84 and 85 of the Constitution. See also *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 20-2.

[15] Section 91 of the Constitution.

many Deputy Ministers as are deemed necessary may also be appointed.[16] Like Cabinet Ministers, they may be dismissed.[17]

[7] Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office-bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests. *Amandla awethu, mannda ndiashu, maatla ke a rona or matimba ya hina* (power belongs to us) and *mayibuye iAfrika* (restore Africa and its wealth) are much more than mere excitement-generating slogans. They convey a very profound reality that State power, the land and its wealth all belong to "we the people", united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since State power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.

[8] This is all designed to ensure that the trappings or prestige of high office do not defocus or derail the repositories of the people's power from their core mandate or errand. For this reason, public office-bearers, in all arms of the State, must regularly explain how they have lived up to the promises that inhere in the offices they occupy. And the objective is to arrest or address underperformance and abuse of public power and resources. Since this matter is essentially about executive accountability, that is where the focus will be.

[9] Accountability, responsiveness and openness[18] enjoin the President, Deputy President, Ministers and Deputy Ministers to report fully and regularly to

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[16] Section 93 of the Constitution.

[17] Sections 91(2) and 93(1) of the Constitution.

[18] Section 1(d) of the Constitution.

Parliament on the execution of their obligations.[19] After all, Parliament "is elected to represent the people and to ensure government by the people under the Constitution".[20]

[10] It thus falls on Parliament to oversee the performance of the President and the rest of Cabinet and hold them accountable for the use of State power and the resources entrusted to them. And sight must never be lost that "all constitutional obligations must be performed diligently and without delay".[21] When all the regular checks and balances seem to be ineffective or a serious accountability breach is thought to have occurred, then the citizens' best interests could at times demand a resort to the ultimate accountability-ensuring mechanisms. Those measures range from being voted out of office by the electorate[22] to removal by Parliament through a motion of no confidence[23] or impeachment.[24] These are crucial accountability-enhancing instruments that forever remind the President and Cabinet of the worst repercussions that could be visited upon them, for a perceived or actual mismanagement of the people's best interests.

[11] Whether that time has come and how exactly to employ any of these instruments is the judgement call of the same Parliament that elected the President and to which he or she accounts. Some Parliamentarians believe that that time has come and have tabled a motion of no confidence in the President. They have themselves invited this Court to get involved and clarify the nature and extent of Parliament's power. Rightly so, because "[e]veryone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court".[25]

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[19] Sections 92(2), 92(3) and 93(2) of the Constitution.

[20] Section 42(3) of the Constitution.

[21] Section 237 of the Constitution.

[22] Section 19 of the Constitution. See also the *Certification* case above n 2 at paras 106 and 186.

[23] Section 102 of the Constitution.

[24] Section 89 of the Constitution.

[25] Section 34 of the Constitution.

[12] Implicit in this application is a deep-seated concern about just how effective Parliament's constitutionally-prescribed accountability-enforcing mechanisms are. Do they ensure that there is enforcement of consequences for failure to honour core constitutional obligations or is it easy to escape consequences by reason of the inefficacy of mechanisms? And does the Constitution read with the Rules of the National Assembly give the Speaker the power to prescribe voting by secret ballot in a motion of no confidence in the President?

Background

[13] What reportedly triggered the tabling of a motion of no confidence in the President, is that on 31 March 2017, invoking his constitutional powers,[26] the President dismissed the Finance Minister, Mr Pravin Gordhan, and his Deputy, Mr Mcebisi Jonas.[27] Very soon after their dismissal, our economy was downgraded to a sub-investment grade otherwise known as "junk status".

[14] And it was largely because of the economic downgrade that three of the political parties represented in the National Assembly, the United Democratic Movement (UDM), the Democratic Alliance (DA) and the Economic Freedom Fighters (EFF) asked the Speaker of the National Assembly to schedule a motion of no confidence in the President. She agreed and scheduled it for 18 April 2017.

[15] On 6 April 2017 the UDM wrote a letter to the Speaker. She was asked to prescribe a secret ballot as the voting procedure for the scheduled motion of no confidence in the President. In substantiation, the UDM cited what it termed the obvious importance of the matter, the public interest imperative that a truly democratic outcome be guaranteed and the high likelihood that the vote would otherwise be tainted by the perceived fear of adverse and career-limiting consequences, instead of being the free will of Members. The oath or affirmation

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[26] Sections 91(2) and 93(1) of the Constitution.

[27] Other Cabinet Members were also replaced in the same reshuffle.

taken by Members and considerations of accountability were added in support of a secret ballot as the preferred voting procedure. While admitting that the Rules of the National Assembly do not make express provision for a secret ballot in that motion, the UDM contended that some direction could be found in sections 57 and 86(2) of the Constitution, read with item 6(a), Part A of Schedule 3 to the Constitution and rule 2 of the Rules of the National Assembly.

[16] The UDM argued that because none of these legal instruments prohibits a secret ballot, cumulatively they offer sufficient guidance for voting in secret. It contended that *Tlouamma*,[28] a decision of the High Court in the Western Cape, was distinguishable. The Court in this case had held that there was no implied or express constitutional requirement for voting by secret ballot on a motion of no confidence in the President. It had then dismissed an application for an order to compel the National Assembly to vote on a motion of no confidence by secret ballot. The UDM reiterated that the public interest dictated that the vote of no confidence be conducted by a secret ballot.

[17] In response, the Speaker said voting procedures in the Assembly are determined by the Constitution and the Rules of the National Assembly and that none of them provides for a vote on a motion of no confidence to be conducted by a secret ballot. She also placed reliance on *Tlouamma*.

[18] In conclusion, the Speaker said that she had no authority in law or in terms of the Rules to determine that voting on that motion be conducted by secret ballot. Also, she was entrusted with the responsibility to ensure that the House is at all times able to perform its constitutional functions in strict compliance with the Constitution, the Rules and Orders of the National Assembly. For these reasons, she concluded that the UDM's request could not be acceded to.

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[28] *Tlouamma v Speaker of the National Assembly* [2015] ZAWCHC 140; 2016 (1) SA 534 (WCC).

[19] Aggrieved by that response, the UDM, supported by some of the political parties represented in the National Assembly[29] and friends of the court,[30] approached this Court to determine whether the Constitution and the Rules of the National Assembly require or permit or prohibit the Speaker to direct that a vote on a motion of no confidence in the President be conducted by secret ballot. It seeks an order in the following terms:

> "1 It is directed that the matter is to be dealt with as an urgent application and the applicant's non-compliance with the ordinary rules for service and time-periods is condoned.
>
> 2 It is declared that this Court has exclusive jurisdiction to determine the application, alternatively the applicant is granted direct access to this Court.
>
> 3 It is declared that:
>
> 3.1 The Constitution requires that motions of no confidence in terms of section 102 of the Constitution must be decided by secret ballot;
>
> 3.2 Alternatively to paragraph 3.1, it is declared that the Constitution permits motions of no confidence in terms of section 102 of the Constitution to be decided by secret ballot.
>
> 4 It is declared that:
>
> 4.1 The National Assembly Rules permit motions of no confidence in terms of section 102 of the Constitution to be decided by secret ballot;
>
> 4.2 Alternatively to paragraph 4.1, Rules 102 to 104 of the National Assembly Rules are unconstitutional and invalid to the extent that they preclude secret ballots being used for motions of no confidence.
>
> 5 The decision of the Speaker dated 6 April 2017 to refuse to allow the no confidence motions to be decided by secret ballot is reviewed and set aside and declared unconstitutional and invalid.
>
> 6 The Speaker is directed to make all the necessary arrangements to ensure that the motion of no confidence currently scheduled for 18 April 2017 is decided

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[29] The EFF, the Inkatha Freedom Party and the Congress of the People, are cited as the fifth, sixth and eighth respondents in this matter. These respondents made common cause with the UDM and were, for all practical purposes, its co-applicants.

[30] Council for the Advancement of the South African Constitution, the Unemployed Peoples' Movement, the Institute for Security Studies and the Shosholoza Progressive Party.

by secret ballot, including designating a new date for the motion to be debated and voted on no later than 25 April 2017.

7 The costs of this application are to be paid by the Speaker, jointly and severally with any other party opposing the relief sought."

[20] It is now common cause among the parties that this application is no longer immediately urgent.

Jurisdiction

[21] The jurisdiction of this Court is sought to be established on two alternative grounds – direct access and exclusive jurisdiction.

[22] Section 167(6) of the Constitution provides for direct access to this Court in the following terms:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
> (a) to bring a matter directly to the Constitutional Court; or
> (b) to appeal directly to the Constitutional Court from any other court."

[23] The requirements for leave to bring an application or an appeal directly to this Court are fundamentally similar. For this reason, when in the case of a direct appeal the interests of justice requirement would be satisfied for purposes of granting leave when certain factors exist, similar factors ought to redound to the success of an application for direct access.[31] But direct access or direct appeal is certainly not available for the asking. Proof of exceptional circumstances, in the form of sufficient urgency or public importance and proof of prejudice to the public interest or the ends of justice and good governance, must demonstrably be established.[32]

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[31] *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 35; *Xolisile Zondi v Members of the Executive Council for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 12; and *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 7-9.

[32] *Mazibuko* id and *Bruce* id.

[24] In *Mazibuko*[33] this Court was seized with a dispute relating to a motion of no confidence in the President. Some of the issues to be resolved were: (a) whether the Speaker of the National Assembly had the power to schedule a motion of no confidence on his own authority; (b) whether the Rules were inconsistent with the Constitution to the extent that they did not provide for motions of no confidence in the President, as envisaged in section 102(2); and (c) whether Parliament had failed to fulfil a constitutional obligation in terms of section 167(4)(e) of the Constitution.[34]

[25] The application was brought in the form of a direct appeal from the High Court to this Court. In addressing the issues, this Court had regard to whether the interests of justice require that leave be granted and to the great significance of a motion of no confidence in our constitutional democracy. It also took into account that when and how to vindicate the power to initiate, debate and vote on a motion of no confidence under section 102 is an issue that deserves the attention of this Court. The primary purpose of this motion, which is to ensure that the President and the national Executive are held accountable, was also taken into account to undergird the proposition that the matter would in all likelihood end up in this Court.[35]

[26] All of the above led to the conclusion that a direct appeal had to be granted. As for the application for an order declaring that this Court has exclusive jurisdiction, the majority said:

> "Given the outcome of the direct access application, we expressly refrain from deciding whether the requirements of section 102(2) create an obligation on the assembly within the meaning of section 167(4)(e). Resolving that dispute must wait for another day."[36]

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[33] *Mazibuko* id at para 1.

[34] Id at para 3.

[35] Id at paras 20-2.

[36] Id at para 74.

[27] We would do well to leave the resolution of the question whether this Court has exclusive jurisdiction in this matter for another day. Here too, we embrace and reiterate the observations relating to the importance of a motion of no confidence in our constitutional democracy, its primary objective as an effective consequence-enforcement tool and the likelihood of the dispute ending up in this Court even if we were to direct that it be heard by the High Court first.

[28] A motion of no confidence in the Head of State and Head of the Executive is a very important matter. Good governance and public interest could at times haemorrhage quite profusely if that motion were to be left lingering on for a considerable period of time. It deserves to be prioritised for attention within a reasonable time.[37] The relative urgency of the guidance needed by Parliament from this Court is also an important factor to take into account. Consistent with the approach in *Mazibuko* in relation to an application for direct appeal, we too find it convenient to resolve the jurisdictional issue on the basis of direct access. Based on these factors, it is in the interests of justice to grant direct access.

The nature and purpose of a motion of no confidence

[29] The proper approach is one guided by this Court's jurisprudence on constitutional interpretation. In *Hyundai* we said:

> "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."[38]

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[37] Id at para 66.

[38] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 21.

[30] In *Matatiele*, we also made the following observations in relation to the correct approach to adopt in construing our Constitution:

> "Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it 'has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.' Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole."[39]

[31] And this is the approach to be adopted in pursuit of the correct answer to the issues raised in this matter. The Preamble to our Constitution is a characteristically terse but profound recordal of where we come from, what aspirations we espouse and how we seek to realise them. Our public representatives are thus required never to forget the role of this vision as both the vehicle and directional points desperately needed for the successful navigation of the way towards the fulfilment of their constitutional obligations. Context, purpose, our values as well as the vision or spirit of transitioning from division, exclusion and neglect to a transformed, united and inclusive nation, led by accountable and responsive public office-bearers, must always guide us to the correct meaning of the provisions under consideration. Our entire constitutional enterprise would be best served by an approach to the provisions of our Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution.

[32] Although a motion of no confidence may be invoked in instances that are unrelated to the purpose of holding the President to account,[40] it is a potent tool

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[39] *Matatiele Municipality v President of the Republic of South Africa (2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele*) at para 36.

[40] See [75].

towards the achievement of that purpose. In that context, it is inextricably connected to the foundational values of accountability and responsiveness to the needs of the people. It is a mechanism at the disposal of the National Assembly to resort to, whenever necessary, for the enhancement of the effectiveness and efficiency of its constitutional obligation to hold the Executive accountable and oversee the performance of its constitutional duties.

[33] And accountability is necessitated by the reality that constitutional office-bearers occupy their positions of authority on behalf of and for the common good of all the people. It is the people who put them there, directly or indirectly, and they, therefore, have to account for the way they serve them.

[34] A motion of no confidence therefore exists to strengthen regular and less "fatal" accountability and oversight mechanisms. To understand how a motion of no confidence in the President enhances and fits into the broader accountability scheme, it is necessary to highlight some of the constitutional accountability provisions that apply to the Executive.

[35] Section 92 of the Constitution demands accountability from the Executive in these terms:

> **"Accountability and responsibilities**
>
> (1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.
>
> (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
>
> (3) Members of the Cabinet must—
>
> (a) act in accordance with the Constitution; and
>
> (b) provide Parliament with full and regular reports concerning matters under their control."

And section 93(2) of the Constitution provides:

"Deputy Ministers appointed in terms of subsection (1)(b) are accountable to Parliament for the exercise of their powers and the performance of their functions."

[36] The President, Deputy President, Ministers and their Deputies are thus enjoined by the supreme law of the land to be "accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions". Not only are they responsible for the proper exercise of the powers and carrying out of the functions assigned to the Executive but they are also required to act in line with the Constitution. Additionally, they are obliged to "provide Parliament with full and regular reports concerning matters under their control".

[37] In anticipation of a President and this constitutionally envisaged team's possible remissness in the execution of their constitutional mandate, provision was made to minimise or address that possibility. Those who represent the people in Parliament have thus been given the constitutional responsibility of ensuring that Members of the Executive honour their obligations to the people. Parliament that elects the President and of which the Deputy President, Ministers and their Deputies are Members,[41] not only passes legislation but also bears the added and crucial responsibility of "scrutinising and overseeing executive action".[42]

[38] Members of Parliament have to ensure that the will or interests of the people find expression through what the State and its organs do. This is so because Parliament "is elected to represent the people and to ensure government by the people under the Constitution".[43] This it seeks to achieve by, among other things, passing legislation to facilitate quality service delivery to the people, appropriating budgets for discharging constitutional obligations and holding the Executive and organs of State accountable for the execution of their constitutional responsibilities.

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[41] In terms of sections 91(3)(c) and 93(1)(b), respectively, the President may also appoint up to two Ministers and up to two Deputy Ministers from outside the National Assembly.

[42] Section 42(3) of the Constitution.

[43] Section 42(3) of the Constitution.

[39] Parliament's scrutiny and oversight role blends well with the obligations imposed on the Executive by section 92. It is provided for in section 55 of the Constitution:

> "**Powers of National Assembly**
>
> . . .
>
> (2) The National Assembly must provide for mechanisms—
>
> (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
>
> (b) to maintain oversight of—
>
> (i) the exercise of national executive authority, including the implementation of legislation; and
>
> (ii) any organ of state."

[40] The National Assembly indeed has the obligation to hold Members of the Executive accountable, put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of executive authority. There are parliamentary oversight and accountability mechanisms that are sufficiently notorious to be taken judicial notice of. Some of them are calling on Ministers to: regularly account to Portfolio Committees and *ad hoc* Committees; and avail themselves to respond to parliamentary questions as well as other question and answer sessions during a National Assembly sitting. It is also through the State of the Nation Address, Budget Speeches and question and answer sessions that the President and the rest of the Executive are held to account.

[41] These accountability and oversight mechanisms, are the regular or normal ones. There may come a time when these measures are not or appear not to be effective. That would be when the President and his or her team have, in the eyes of the elected representatives of the people to whom they are constitutionally obliged to account, disturbingly failed to fulfil their obligations. In other words, that stage would be reached where their apparent under-performance or disregard for their constitutional

obligations is viewed, by elected public representatives, as so concerning that serious or terminal consequences are thought to be most appropriate. And that takes the form of removal from office.

[42] The Constitution provides for two processes in terms of which the President may be removed from office. First, impeachment, which applies where there is a serious violation of the Constitution or the law, serious misconduct or an inability to perform the functions of the office.[44] Another related terminal consequence or supreme accountability tool, in-between general elections, is a motion of no confidence for which the Constitution provides as follows:

> "**102. Motions of no confidence**
>
> (1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
>
> (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign."

[43] A motion of no confidence constitutes a threat of the ultimate sanction the National Assembly can impose on the President and Cabinet should they fail or be perceived to have failed to carry out their constitutional obligations. It is one of the most effective accountability or consequence-enforcement tools designed to continuously remind the President and Cabinet of what could happen should regular mechanisms prove or appear to be ineffective. This measure would ordinarily be resorted to when the people's representatives have, in a manner of speaking, virtually given up on the President or Cabinet. It constitutes one of the severest political consequences imaginable – a sword that hangs over the head of the President to force him or her to always do the right thing. But, that threat will remain virtually

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[44] Section 89 of the Constitution.

inconsequential in the absence of an effective operationalising mechanism to give it the fatal bite, whenever necessary.

[44] It was with this appreciation of the invaluable role of a motion of no confidence in mind and the necessity for its efficacy that the following observations were made in *Mazibuko*:

> "A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action. . . . The ever present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects her or him."[45]

[45] A motion of no confidence is, in some respects, potentially more devastating than impeachment. It does not necessarily require any serious wrongdoing, though this is implied. It may be passed by an ordinary, as opposed to a two-thirds majority of Members of the National Assembly. Unlike an impeachment that targets only the President, a motion of no confidence does not spare the Deputy President, Ministers and Deputy Ministers of adverse consequences. And the Constitution does not say when or on what grounds it would be fitting to seek refuge in a motion of no confidence.

[46] As to when and why, a point could conceivably be reached where serious fault-lines in the area of accountability, good governance and objective suitability for the highest office have since become apparent. Those concerns might not necessarily rise to the level of grounds required for impeachment. But, the lingering expectation of the President delivering on the constitutional mandate entrusted to him or her might have become increasingly dim.

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[45] *Mazibuko* above n 31 at para 43.

[47] In the final analysis, the mechanism of a motion of no confidence is all about ensuring that our constitutional project is well managed; is not imperilled; the best interests of the nation enjoy priority in whatever important step is taken; and our nation is governed only by those deserving of governance responsibilities. To determine, through a motion of no confidence, the continued suitability for office of those who govern, is a crucial consequence-management or good-governance issue. This is so because the needs of the people must never be allowed to be neglected without appropriate and most effective consequences. So, a motion of no confidence is fundamentally about guaranteeing or reinforcing the effectiveness of existing mechanisms, in-between the general elections, by allowing Members of Parliament as representatives of the people to express and act firmly on their dissatisfaction with the Executive's performance.

[48] When the stage is reached or a firm view is formed, by some Members of the National Assembly, that the possibility of removing the President or Cabinet from office through a motion of no confidence be explored, would it be constitutionally permissible for the Speaker, on behalf of the National Assembly, to prescribe a secret ballot as the voting procedure? On what bases may this Court conclude that the Speaker does have the power to order voting by secret ballot?

Does the Speaker have the power to prescribe a secret ballot?

[49] The Speaker[46] was asked by some Members of the Assembly to make a determination that voting in the motion of no confidence in the President be conducted by secret ballot. She holds the view that neither the Constitution nor any rule gives her that power. She cites *Tlouamma* as a further impediment to the option of a secret ballot. We are thus called upon to determine whether the Constitution and Rules of the National Assembly require, permit or prohibit that voting in a motion of no confidence in the President be by secret ballot.

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[46] The National Assembly has delegated its power to determine the appropriate procedure where express provision has not been made: see rules 6 and 26 of the Rules of the National Assembly.

[50] Section 102(2) provides that the National Assembly is to take a decision in a motion of no confidence through a vote. Neither the sections nor the rules relied on by the parties, to support the contention that a secret ballot is required, provide expressly for any voting procedure in a motion of no confidence.[47] A reflection on some constitutional provisions that provide for voting in line with the interpretative guidelines laid down by *Hyundai* and *Matatiele* is thus necessary.[48]

[51] Section 19(3)(a) of the Constitution provides that "[e]very adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret". Our Constitution has chosen a secret ballot as the voting procedure for the general elections.

[52] The President may, in terms of section 50(1) of the Constitution, dissolve the National Assembly if it has through a majority vote of its Members adopted a resolution for its dissolution. No provision is made for the voting procedure.

[53] Section 52 of the Constitution provides:

> "**Speaker and Deputy Speaker**
>
> (1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
>
> . . .
>
> (3) The procedure set out in Part A of Schedule 3 applies to the election of the Speaker and the Deputy Speaker.
>
> (4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

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[47] Sections 102, 89, 42(3), 55(2) and 57 of the Constitution; see also rules 6, 26, 102, 103, and 104 of the Rules of the National Assembly.

[48] See [29] to [30].

(5) In terms of its rules and orders, the National Assembly may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker."

[54] This section is about the election of the Speaker and Deputy Speaker at the first sitting of the Assembly and whenever the need arises to do so. Focusing on voting, which is central to this application, it is required in three different instances. First, when the Speaker or Deputy is being elected. Second, implicitly when a resolution for the removal of the Speaker or Deputy Speaker is to be adopted. Third, when other presiding officers are being elected.

[55] No procedure is spelt out for the removal process. Similarly, the election of other presiding officers in terms of subsection 5 is simply required to take place in terms of the Rules and Orders of the Assembly but the voting mechanism is not expressly provided for. Section 52(3) does however prescribe the voting procedure set out in Part A of Schedule 3 for the election of the Speaker and Deputy. Similarly, section 86 of the Constitution prescribes the voting procedure in Part A of Schedule 3. This section provides for the election of the President as follows:

"(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.

(2) . . . . The procedure set out in Part A of Schedule 3 applies to the election of the President."

[56] The relevant part of the Part A of Schedule 3 voting procedure reads:

"**Part A Election Procedures for Constitutional Office-Bearers**

Application

1. The procedure set out in this Schedule applies whenever—

(a) the National Assembly meets to elect the President, or the Speaker or Deputy Speaker of the Assembly;

(b) the National Council of Provinces meets to elect its Chairperson or a Deputy Chairperson; or

(c) a provincial legislature meets to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.

. . .

Election procedure

6. If more than one candidate is nominated—

(a) a vote must be taken at the meeting by secret ballot;

(b) each member present, or if it is a meeting of the National Council of Provinces, each province represented, at the meeting may cast one vote; and

(c) the person presiding must declare elected the candidate who receives a majority of the votes."

The election of the President and other constitutional office-bearers requires an ordinary majority of Members present and a secret ballot.

[57] Several important observations emerge from these sections that provide for voting. The procedure to be followed for the election of the President and several constitutional office-bearers has been specifically provided for. It is voting by secret ballot and whoever secures a majority of votes is to be declared elected. As regards the removal from office either through an impeachment[49] or a motion of no confidence,[50] the Constitution is silent on the procedure.

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[49] Voting is also provided for in section 89 of the Constitution in these terms:

"Removal of President

(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office."

[50] Section 102 of the Constitution.

[58] The Constitution could have provided for a vote by secret ballot or an open ballot. It did neither. Why did the Constitution leave the procedure open? Section 57(1) provides the answer:

> "The National Assembly may—
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."

[59] To pass a motion of no confidence in the President requires a vote supported by a majority of National Assembly Members. Absent an expression of choice by the Constitution, the National Assembly is at large to exercise its section 57(1) powers to decide on the appropriate voting procedure in terms of which to decide the motion. And the choice lies between an open or secret ballot. The National Assembly therefore has the power to determine whether voting on a motion of no confidence would be by open ballot or secret ballot. The purpose for leaving the voting procedure open could only have been for the Assembly itself to determine, in terms of its section 57 powers, what would best advance our constitutional vision or project.

[60] Both possibilities of an open or secret ballot are constitutionally permissible. Otherwise, if Members always had to vote openly and in obedience to enforceable party instructions, provision would not have been made for a secret ballot when the President, Speaker, Chairperson of the National Council of Provinces and their Deputies are elected.[51] And the Constitution would have made it clear that voting would always be by open ballot.

[61] If the will of political parties were to always prevail, the Constitution would probably have required political parties to determine which way they want to vote on issues and through their Chief Whips signify support or opposition by submitting the

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[51] Sections 86, 52 and 64 of the Constitution read with Part A of Schedule 3 to the Constitution.

list of Members who would be present when voting takes place. But, because it is individual Members who really have to vote, provisions are couched in the language that recognises the possibility of majorities supporting the removal of the President and the Speaker. Conceptually, those majorities could only be possible if Members of the ruling party are also at liberty to vote in a way that does not always have to be predetermined by their parties. And this of course assumes that the ruling party would generally be opposed to the removal of their own.

[62] Additionally, constitutions of comparable democracies prescribe a vote by secret ballot only for the general elections, the election of the President, the equivalent of the Speaker and her counterpart in the second House. As for the voting procedure to be followed for removal from office, no provision has been made.[52]

[63] What these legislative bodies have, however, done is to provide for a secret ballot either in legislation or their rules of procedure.[53] They did so because, just as our Parliament has the power to determine its procedures in terms of section 57, they have the power to decide whether the removal process ought to be by an open or secret ballot. Attempts to find any comparable constitutional democracy where a court of law has prescribed the removal voting procedure for the legislature drew a blank. Understandably so, because considerations of separation of powers demand an ever-abiding consciousness of the constitutionally-sanctioned division of labour among the arms and a refrain from impermissible intrusions.

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[52] For example, the Constitution of the Republic of Korea requires a secret ballot for general elections for the National Assembly and the President explicitly in articles 41 and 67 respectively; however when it comes to impeachment of the President, article 65 is silent on the voting method and only requires it to be "approved by two thirds or more of the total members of the National Assembly", while it is article 130 of Chapter XI of the National Assembly Act of the Republic of Korea that indicates that "a secret vote shall be taken to determine whether a motion for impeachment is adopted". Similarly in Singapore, article 22L(4) of the Constitution of the Republic of Singapore, which deals with the impeachment of the President, only requires the motion to be adopted by "not less than half of the total number of Members of Parliament", but remains silent on the voting method. In Kenya, articles 144 and 145 of the Constitution which deal with the removal of the President on grounds of incapacity and by impeachment, both remain silent on the voting method. Further, in the German Basic Law, article 61 which deals with impeachment remains silent on the voting method and only says that "[a] decision to impeach requires a majority of two thirds of the members of the House of Representatives or of two thirds of the votes of the Senate". See also [72] regarding the voting system in the National Assembly of Zimbabwe.

[53] Id.

[64] It bears emphasis that the absence of a prior determination of the voting procedure by our Constitution for a motion of no confidence means that it neither prohibits nor prescribes an open ballot or a secret ballot. The effect of this is to leave it open to the National Assembly, when the time comes to vote on that motion, to decide on the appropriate voting procedure. This can only reinforce the conclusion that the Assembly has the power to make that determination. It is for it to decide on the voting procedure necessary for the efficiency and effectiveness of the institution in holding the Executive accountable. In sum, how best and in terms of which voting procedure to hold the President accountable in the particular instance is the responsibility constitutionally-allocated to the National Assembly.

[65] The Assembly has made rules in terms of its section 57 powers. Those rules make provision for the determination of the voting procedure for a motion of no confidence tabled at a particular time. Rule 102 says that '[u]nless the Constitution provides otherwise, voting takes place in accordance with Rules 103 or 104". Rule 103 provides:

> "(1) At a sitting of the House held in a Chamber where an electronic voting system is in operation, unless the presiding officer directs otherwise, questions are decided by the utilisation of such system in accordance with a procedure predetermined by the Speaker and directives as announced by the presiding officer.
>
> (2) Members may vote only from the seats allocated to them individually in the Chamber.
>
> (3) Members vote by pressing the 'Yes', 'No' or 'Abstain' button on the electronic consoles at their seats when directed by the presiding officer to cast their votes.
>
> (4) A member who is unable to cast his or her vote, must draw this to the attention of the Chair and may in person or through a whip of his or her party inform the Secretary at the Table of his or her vote.
>
> (5) When all members have cast their votes, the presiding officer must immediately announce the result of the division.
>
> (6) Members' names and votes must be printed in the Minutes of Proceedings."

[66] And rule 104 reads:

> "(1) Where no electronic voting system is in operation, a manual voting system may be used in accordance with a procedure predetermined by the Speaker and directives to be announced by the presiding officer.
>
> (2) When members' votes have been counted, the presiding officer must immediately announce the result of the division.
>
> (3) If the manual voting procedure *permits*, members' names and votes must be printed in the Minutes of Proceedings."

[67] These rules provide for a voting system and procedure that allows for details of a Member and how she voted to be known. So known that the Minutes of Proceedings would be able to capture the names and the exact vote of each Member. But, read together, sub-rules (1) and (3) of rule 104 empower the Speaker to predetermine a manual voting system that may not permit a recordal or disclosure of the names and votes of Members. That is an indiscriminate manual secret ballot procedure. Indiscriminate because it is not limited to the election of the President, Speaker or Deputy Speaker. It is not incident-specific and must thus apply just as well to any incident of voting for which the Speaker may prescribe a secret ballot including the removal of the President. The National Assembly has, through its Rules, in effect empowered the Speaker to decide how a particular motion of no confidence in the President is to be conducted.

[68] In sum, rule 104(1) and (3) empowers the Speaker to have even a motion of no confidence in the President voted on by secret ballot. But, when a secret ballot would be appropriate, is an eventuality that has not been expressly provided for and which then falls on the Speaker to determine. That is her judgement call to make, having due regard to what would be the best procedure to ensure that Members exercise their oversight powers most effectively. And that is something she may "predetermine" as envisaged in rule 104(1).

[69] Our decision that the power to prescribe the voting procedure in a motion of no confidence reposes in the Speaker, accords with the dictates of separation of powers. It affirms the functional independence of Parliament to freely exercise its section 57 powers.

The exercise of the power to determine the procedure

[70] The proper exercise of the power to prescribe a voting procedure in a motion of no confidence proceedings would partly depend on why the Constitution prescribes a secret ballot for the general elections and a contested election of the President and the Speaker.

[71] Beginning with European electoral instruments, article 5 of its Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States provides:

> "The Parties hereto proceed from the assumption that observance of the principle of secret balloting means exclusion of any control over voters' expression of will, provision for equal conditions for free choice."[54]

[72] In *Botswana Democratic Party* the Court of Appeal of the Republic of Botswana noted that the secret ballot voting system in Parliament—

> "is rather an arrangement put in place by the National Assembly for the *effective exercise of the Members' right to vote without outside influence or coercion which could render the right an empty one*."[55]

And this was also explained by the Supreme Court of Zimbabwe in these terms:

> "*The legislature chose the secret ballot for its optimum benefits* . . . . The prescription of *a secret ballot* as the method for the election of the Speaker [by members of the

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[54] Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States, 7 October 2002.

[55] *Botswana Democratic Party v Umbrella for Democratic Change* Case No CACGB-114-14 at para 76.

> legislature] *is based on the acceptance of the principle that it promotes and protects freedom of expression of choice* of a preferred candidate *without undue influence, intimidation and fear of disapproval by others."*[56]

[73] As is the case with general elections where a secret ballot is deemed necessary to enhance the freeness and fairness of the elections, so it is with the election of the President by the National Assembly. This allows Members to exercise their vote freely and effectively, in accordance with the conscience of each, without undue influence, intimidation or fear of disapproval by others.

[74] The frustration or disappointment of the losing presidential hopeful and his or her supporters could conceivably have a wide range of prejudicial consequences for Members who are known to have contributed to the loss. To allow Members of the National Assembly to vote with their conscience and choose who they truly believe to be the best presidential material for our country, without any fear of reprisals, a secret ballot has been identified as the best voting mechanism.

[75] Conversely, a Member of Parliament could be exposed to a range of reasonably foreseeable prejudicial consequences when called upon to pronounce through a vote on the President's accountability or continued suitability for the highest office. But of course that potential risk would also depend on the motivation for the motion of no confidence. Is it on grounds that impugn competence, faithfulness to the Republic or commitment to upholding constitutional obligations or on some fairly innocuous or less divisive or less sensitive grounds?

[76] The appropriateness of a voting procedure for that motion is particularly important since our electoral system is structured in such a way that it is, broadly speaking, a party but not a Member of Parliament that gets voted into Parliament. A political party virtually determines who goes to Parliament[57] and who is no longer

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[56] *Moyo v Zvoma* Case No SC 28/10, quoted with approval in *Botswana Democratic Party* id at para 55.
[57] Section 27 of the Electoral Act 73 of 1998.

allowed to represent it in Parliament.[58] Members' fate or future in office depends largely on the party. The Deputy President, Ministers and Deputy Ministers who are also Members of Parliament, are presidential appointees. The ruling party has a great influence on, or dictates, who gets appointed or elected as senior office-bearers in Parliament. Almost invariably the President – although not a Member of Parliament – is the leader of the ruling party.[59] It would be quite surprising if the senior office-bearers in Parliament were not appointed or elected with a significant input by the President and other senior party officials. There are therefore institutional and other risks that Members, particularly of any ruling party, are likely to get exposed to when they openly question or challenge the suitability of their leader(s) for the position of President. I say leaders advisedly because the logical trend has been to give the highest positions in governance structures to most senior leaders.

[77] In the *Certification* case, this Court addressed the conflict that arises from some Members' continued membership of the National Assembly, after their appointment to Cabinet:

> "An objection was taken to various provisions of the [New Text] that are said to violate [Chapter] VI. This [Chapter] reads:
>
> > 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'
>
> The principal objection is directed at the provisions of the [New Text] which provide for members of executive government also to be members of legislatures at all three levels of government. It was further submitted that this failure to effect full separation of powers enhances the power of executive government (particularly in the case of the President and provincial Premier), thereby undercutting the representative basis of the democratic order.
>
> . . .

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[58] Section 47(3) of the Constitution. This is not to suggest that a political party may remove a Member at whim.

[59] In fact, it was only for a very brief period since the dawn of our democracy that this was not the case.

> It was also contended that the requirements of accountability and responsiveness in [Chapter] VI were breached. The argument was that legislators would have to obey the instructions of the party leadership even if the party concerned had unequivocally abandoned its electoral manifesto and directed its [Members of Parliament] to vote, speak and act against the policies expressed in that manifesto; or if the party imposed the whip in relation to a policy which legislators sincerely and reasonably believed to be wrong. The end result, so it was further submitted, would amount to a subversion of the accountability and responsiveness of legislators to the electorate. We do not agree. Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy."[60]

[78] The most effective extra-parliamentary mechanism for holding the people's elected representatives accountable, is a general election. It is in this context that this Court said "it is parties that the electorate vote for and parties which must be accountable to the electorate". Also, that a party's unacceptable abandonment of its manifesto is likely to result in electoral defeat. A factor that is relevant to the Speaker's decision-making in relation to a democratically-permissible voting procedure is that "an individual member remains free to follow the dictates of personal conscience".

[79] Central to the freedom "to follow the dictates of personal conscience" is the oath of office. Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws.[61] Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve

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[60] *Certification* case above n 2 at paras 106 and 186.

[61] Section 48 of the Constitution read with item 4 of Schedule 2.

the people and do only what is in their best interests must prevail. This is so not only because they were elected through their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution. The requirement that their names be submitted to the Electoral Commission before the elections is crucial.[62] The people vote for a particular party knowing in advance which candidates are on that party's list and whether they can trust them.

[80] When the risk that inheres in voting in defiance of the instructions of one's party is evaluated, it must be counter-balanced with the apparent difficulty of being removed from the Assembly. Openness is one of our foundational values.[63] And the Assembly's internal arrangements, proceedings and procedures must have due regard to the need to uphold the value of transparency in carrying out the business of the Assembly.[64] The electorate is at times entitled to know how their representatives carry out even some of their most sensitive obligations, such as passing a motion of no confidence. They are not supposed to always operate under the cover of secrecy. Considerations of transparency and openness sometimes demand a display of courage and the resoluteness to boldly advance the best interests of those they represent no matter the consequences, including the risk of dismissal for non-compliance with the party's instructions. These factors must also be reflected upon by the Speaker when considering whether voting is to be by secret or open ballot.

[81] Some consequences are adverse or injurious not so much to individuals, as they are to our constitutional democracy. Crass dishonesty, in the form of bribe-taking or other illegitimate methods of gaining undeserved majorities, must not be discounted from the Speaker's decision-making process. Anybody, including Members of Parliament or of the Judiciary anywhere in the world, could potentially be "bought". When that happens in a motion of no confidence, the outcome could betray the people's best interests. This possibility must not be lightly or naively taken out of the

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[62] Section 57(A) of the Electoral Act.

[63] Section 1(d) of the Constitution.

[64] Section 57(1) of the Constitution.

equation as a necessarily far removed and negligible possibility when the stakes are too high. For, when money or oiled hands determine the voting outcome, particularly in a matter of such monumental importance, then no conscience or oath finds expression.

[82] The correct exercise of Parliament's powers in relation to a motion of no confidence in the President, must therefore have the effect of ensuring that the voting process is not a fear or money-inspired sham but a genuine motion for the effective enforcement of accountability. When that is so, the distant but real possibility of being removed from office for good reason would serve the original and essential purpose of encouraging public office-bearers to be accountable and fulfil their constitutional obligations.

[83] Each Member must, depending on the grounds and circumstances of the motion, be able to do what would in reality advance our constitutional project of improving the lives of all citizens, freeing their potential and generally ensuring accountability for the way things are done in their name and purportedly for their benefit. So, the centrality of accountability, good governance and the effectiveness of mechanisms created to effectuate this objective, must enjoy proper recognition in the determination of the appropriate voting procedure for a particular motion of no confidence in the President. That voting procedure is situation-specific. Some motions of no confidence might require a secret ballot but others not, depending on a conspectus of circumstances that ought reasonably and legitimately to dictate the appropriate procedure to follow in a particular situation.[65]

[84] What then is to be done to safeguard the responsibility of Members of Parliament to vote according to their conscience when it is necessary to enforce accountability effectively and properly, without undermining the need to let them toe the party line when it is undoubtedly appropriate to do so? A way must be found to

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[65] This is the meaning that flows from a contextual and purposive interpretation envisaged in *Hyundai* and *Matatiele*.

draw a line between allowing voting according to Members' true conscience and the important responsibilities or obligations Members have to their parties, which would at times be in conflict.

[85] The power to decide whether a motion of no confidence is to be resolved through an open or secret ballot cannot be used illegitimately or in a manner that has no regard for the surrounding circumstances that ought to inform its exercise. It is neither for the benefit of the Speaker nor his or her party. This power must be exercised to achieve the purpose of a motion of no confidence which is primarily about guaranteeing the effectiveness of regular mechanisms. The purpose of that motion is also to enhance the enforcement of accountability by allowing Members of Parliament as representatives of the people to express and act firmly on their dissatisfaction about the Executive's performance in-between general elections. It is fundamentally for the advancement of good governance through quality service delivery, accountability, the strengthening of our democracy and the realisation of the aspirations of the people of South Africa. The exercise of the power to determine the voting procedure must thus always be geared at achieving the purpose for which that power exists. The procedure in terms of which the voting right is allowed to be exercised must brighten and enhance the prospects of the purpose for which it was given being better served or advanced.

[86] More importantly, the power that vests in the Speaker to determine the voting procedure in a motion of no confidence, belongs to the people and must thus not be exercised arbitrarily or whimsically. Nor is it open-ended and unguided. It is exercisable subject to constraints. The primary constraint being that it must be used for the purpose it was given to the Speaker – facilitation of the effectiveness of Parliament's accountability mechanisms. Other constraints include the need to allow Members to honour their constitutional obligations, regard being had to their sworn faithfulness to the Republic and irrevocable commitment to do what the Constitution and the laws require of them, for the common good of all South Africans.

[87] The Speaker is chosen from amongst Members of the National Assembly.[66] That gives rise to the same responsibility to balance party interests with those of the people. It is as difficult and onerous a dual responsibility as it is for Members, perhaps even more so, given the independence and impartiality the position requires. But Parliament's efficacy in its constitutional oversight of the Executive vitally depends on the Speaker's proper exercise of this enormous responsibility. The Speaker must thus ensure that his or her decision strengthens that particular tenet of our democracy and does not undermine it.

[88] There must always be a proper and rational basis for whatever choice the Speaker makes in the exercise of the constitutional power to determine the voting procedure. Due regard must always be had to real possibilities of corruption as well as the prevailing circumstances and whether they allow Members to exercise their vote in a manner that does not expose them to illegitimate hardships. Whether the prevailing atmosphere is generally peaceful or toxified and highly charged, is one of the important aspects of that decision-making process.

Conclusion

[89] In conclusion, when approached by the UDM to have the motion of no confidence in the President voted on by secret ballot, the Speaker said that neither the Constitution nor the Rules of the National Assembly allow her to authorise a vote by secret ballot. To this extent she was mistaken. The only real constraint that stood in her way was the *Tlouamma* decision.

[90] Our interpretation of the relevant provisions of the Constitution and the rules makes it clear that the Speaker does have the power to authorise a vote by a secret ballot in motion of no confidence proceedings against the President, in appropriate circumstances. The exercise of that power must be duly guided by the

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[66] Section 52(1) of the Constitution.

need to enable effective accountability, what is in the best interests of the people and obedience to the Constitution.

[91] To the extent that *Tlouamma* might have been understood to have held that a secret ballot procedure is not at all constitutionally permissible, that understanding is incorrect. The Speaker's decision was invalid and must be set aside.

Remedy

[92] This Court has been asked to direct the Speaker "to make all the necessary arrangements to ensure that the motion of no confidence . . . is decided by secret ballot, including designating a new date for the motion to be debated". But no legal basis exists for that radical and separation of powers-insensitive move. The Speaker has made it abundantly clear that she is not averse to a motion of no confidence in the President being decided upon by a secret ballot. She only lamented the perceived constitutional and regulatory reality that she lacked the power to authorise voting by secret ballot. Meaning, now that it has been explained that she has the power to do that which she is not averse to, she has the properly-guided latitude to prescribe what she considers to be the appropriate voting procedure in the circumstances.

[93] It may be necessary to add that her counsel reiterated during the hearing that the Speaker is not really opposed to a secret ballot. The President's counsel also said that the Constitution neither requires nor prohibits but in reality permits a secret ballot. He went on to say a secret ballot does not necessarily hold adverse consequences for the President. It would thus be most inappropriate to order the Speaker to have the motion of no confidence in the President conducted by secret ballot, as if she ever said that she would not do so even if she had the power to do so and circumstances plainly cry out for it. To order a secret ballot would trench separation of powers.

[94] Whether the proceedings are to be by secret ballot is a power that rests firmly in the hands of the Speaker, but exercisable subject to crucial factors that are appropriately seasoned with considerations of rationality. This Court cannot assume that she will not act in line with the legal position and conditionalities as now clarified by this Court. No legal or proper basis exists for that.

[95] The Speaker's decision that she lacks the constitutional power to prescribe a secret ballot in a motion of no confidence in the President is to be set aside. The UDM's prayer for the order that prescribes a secret ballot as the voting procedure will be referred back to the Speaker to decide.

Costs

[96] All parties to this application have recorded success against the Speaker and the President. The unsuccessful parties are therefore to pay the costs of the applicant and all other participating respondents.

Order

[97] In the result the following order is made:

1. The United Democratic Movement is granted direct access.
2. It is declared that the Speaker of the National Assembly has the constitutional power to prescribe that voting in a motion of no confidence in the President of the Republic of South Africa be conducted by secret ballot.
3. The Speaker's decision of 6 April 2017 that she does not have the power to prescribe that voting in the motion of no confidence in the President be conducted by secret ballot is set aside.
4. The United Democratic Movement's request for a motion of no confidence in the President to be decided by secret ballot is remitted to the Speaker for her to make a fresh decision.

5. The Speaker and the President must pay the costs of the United Democratic Movement, the Economic Freedom Fighters, the Inkatha Freedom Party and the Congress of the People, including costs of two counsel where applicable.

For the Applicant:	D Mpofu SC, K Pillay SC, S Budlender and N Muvangua instructed by Mabuza Attorneys
For the First Respondent:	M T K Moerane SC and R T Tshetlo instructed by the State Attorney
For the Second Respondent:	I A M Semenya SC, M Sikhakhane SC and M Sello instructed by the State Attorney
For the Fifth Respondent:	T Ngcukaitobi, F Hobden and J Mnisi instructed by Kwinana & Partners Inc
For the Sixth Respondent:	A Katz SC and S Pudifin-Jones instructed by Laurens De Klerk Attorneys
For the Eighth Respondent:	L H Adams instructed by Mabuza Attorneys
For the First Amicus Curiae (Council for the Advancement of the South African Constitution):	G Budlender SC, M Adhikari and M Mbikiwa instructed by the Legal Resources Centre
For the Second Amicus Curiae (Unemployed Peoples' Movement):	N Bawa SC and M Bishop instructed by the Legal Resources Centre
For the Third Amicus Curiae (Institute for Security Studies):	N H Maenetje SC, R Tulk and Y S Ntloko instructed by Webber Wentzel Attorneys
For the Fourth Amicus Curiae (Shosholoza Progressive Party):	D Unterhalter SC, M Musandiwa and M Finn instructed by Irene Rome Attorneys & Conveyancers

11

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no. 23576/2015

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE : YES/ NO

2. OF INTEREST TO OTHER JUDGES: YES/NO

3. REVISED

15/9/16
DATE

SIGNATURE

GAUTENG DIVISION, PRETORIA

15/9/2016

IN THE MATTER BETWEEN:

THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA Applicant

and

NOMCGOBO JIBA 1st Respondent

LAWRENCE SITHEMBISO MRWEBI 2ND Respondent

SIBONGILE MZIYATHI 3RD Respondent

JUDGMENT

LEGODI J:

HEARD ON: 30 May - 1 June 2016

JUDGMENT HANDED DOWN ON: 15 September 2016

[1] 'An important requirement for admission as an attorney or advocate is to be a 'fit and proper' person. Lawyers are also struck from the respective rolls of advocates or attorneys if they cease to be "fit and proper". The requirements of being "fit and proper" person is not defined or described in the legislation. It is left to the subjective interpretation of and application by seniors in the profession and the ultimately the court. In the apartheid years, this requirement was applied arbitrarily, but today the question may be asked why some lawyers who have been found to be a "fit and proper" do not act as such. The pre-admission character screening of lawyers seems not to be effective any more. Post admission moral development is imperative'[1].

[2] A successful practitioner, an attorney or an advocate, should possess and display certain qualities, most of which cannot be acquired through learning. Having these qualities could indicate that a person is indeed a "fit and proper" person for the profession. An appropriate academic training may, however, play a vital part in improving them- as they are "by nature at least latent."

[3] The following are listed as the least of qualities a lawyer should possess:

'Integrity- meaning impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain,

- Dignity- practitioners should conduct themselves in a dignified manner and should also maintain the dignity of the court.
- The possession of knowledge and technical skills,
- A capacity for hard work,
- Respect for legal order and
- A sense of equality or fairness'[2].

[4] This case is about whether the respondents, Ms Nomgcobo Jiba (first respondent),referred to in these proceedings as "Jiba", an advocate who currently holds the position of Deputy National Director of the Public prosecutions, Mr Lawrence Sithembiso Mrwebi (second respondent), referred to in these proceedings as "Mrwebi", an advocate who holds the position of special director of public prosecutions and head

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[1] M slabbert, Professor Department of Juris prudence, University of South Africa (Slabbm @ Unisa.ac.).
[2] Du Plessis, " The ideal legal practitioner" (from academic angle) 1981 De Rebus at 424-427.

of the crime unit within the prosecuting authority and Mr Sibongile Mzinyati, third respondent (Mzinyathi), an advocate and a director of public prosecutions North Gauteng, are "fit and proper" persons to remain on a roll of admitted advocates in terms of Admission of Advocates Act no 74 of 1964.

[5] The application has been instituted by General Council of the Bar of South Africa ("GCB"), a voluntary association with legal personality functioning in terms of its constitution with its constituent members comprising of 10 societies of advocates throughout South Africa. GCB wants this court to consider acting against the respondents as contemplated in section 7(2) of Admission of Advocates Act. The section provides as follows:

> *"(2) Subject to the provisions of any other law, an application under paragraphs (a) (b) (c) or (d) of subsection (1) for the suspension of any person from practice as an advocate or for the striking off the name of any person from the roll of advocates, may be made by the General Council of Bar of South Africa, by the Bar , or Society of Advocates for the division which made the order for his or her admission to practice as an advocate or is ordinarily resident, and, in the case of an application made to a division under paragraph(c) of subsection (1) also by the State attorney referred to in the State Attorney Act 1957 (Act no 56 of 1957)".*

[6] During August 2014 and following the handing down of a judgment by the Supreme Court of Appeal on 1 April 2014 in the matter of Freedom Under Law v National Director of Public Prosecutions and others[3] (Mdluli's case), GCB received a request from the office of the National Prosecuting Authority (NPA) to consider bringing an application against the three respondents in terms of section 7 (2) of the Admission of Advocates Act quoted in paragraph 5 above. At a scheduled meeting in November 2014, GCB considered the request and decided to proceed to prepare the present application which was instituted on 1 April 2015 coincidentally exactly a year after the SCA's judgment in Mdluli's case.

[7] The gist of the complaints against the three respondents is based on their conduct in the handling of Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 254 GNP; NDPP v Freedom Under Law (see footnote 3) a case referred to in this proceedings as Mdluli or FUL case and adverse

[3] 2014(4) SA 298 SCA.

remarks made by both the high and supreme courts in that case. Other complaints are levelled against Jiba only and are founded on her handling of the following reported matters and adverse remarks made therein:

7.1 *Democratic Alliance v Acting National Director of Public Prosecutions, [2013] 4 All SA 610 (GNP), Zuma v Democratic Alliance and Others [2014] 4 SA 35 (SCA), a case which ultimately became to be known as a "Spy Tape" case and will be referred to as such in these proceedings.*

7.2 *Booysen v Acting National Director of Public Prosecutions and Others [2013] 3 All SA 391 KZD."*

[8] The structure of this judgment will be as follows:

8.1 The test

8.2 Constitutional imperative and legislative frame-work,

8.3 Points in limine,

8.4 Reasons for the order refusing Jiba's fourth affidavit,

8.5 Booysen case,

8.6 Spy tapes case and

8.7 Mdluli case.

THE TEST

[9] Section 7 (1) (d) of the Admission of Advocates Act authorises a court to remove an advocate from the roll of advocates, if satisfied that he or she is not a "fit and proper" person to continue to practice as an advocate. The test is a contemplation of three-staged inquiry, as is also the case in applying the provisions of section 22 (1) (d) of Attorneys Act 53 of 1979. First, the court must decide if the alleged conduct complained of has been established on a preponderance of probabilities. This is a factual inquiry. Secondly, it must consider if the person concerned is in the discretion of the court not a

fit and proper person to continue to practice. This involves a weighing up of the conduct complained of against the conduct expected of a fit and proper person to practice. This is a value judgment consideration. Thirdly, the court must inquire whether in all of the circumstances the person in question is to be removed from the roll or whether an order of suspension from practice would suffice. This is also a matter for the discretion of the court. In deciding on what course to follow, the court is not first and foremost imposing a penalty. Rather, the main consideration is the protection of the public[4].

CONSTITUTIONAL IMPERATIVE AND LEGISLATIVE FRAME WORK

[10] It is important to start by mentioning that all the complaints raised against the respondents arise from the handling of three review proceedings instituted against the National Prosecuting Authority, in terms of which certain decisions, two of which, that is, in Mdluli and Spy Tapes cases related to the withdrawal of criminal charges and the other decision in Booysen case related to the institution of criminal proceedings. It is for this reason that a brief outlay of the legislative-frame work governing the authority and operation of the prosecuting authority is necessary.

[11] There is a single national prosecuting authority established in terms of section 179 of the Constitution as determined in National Prosecuting Authority Act[5] (the Act). The prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions to institute criminal proceedings.[6] National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice[7]. The National Director of Public Prosecutions must issue policy directions which must be observed in the prosecution process, may intervene in prosecuting process when policy directives are not complied with, and may review a decision to prosecute or not prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period determined by the National Director of Public Prosecutions from the following: the accused, the

[4] Malan and Another v The Law Society, Northern Provinces 2009 (ALL) SA 133 (SCA) para [7].
[5] Section 2 of Act no 32 of 1998, s 179 (1) of the Constitution 108 of 1996.
[6] S 179 (2) of Constitution
[7] S 179 (4).

complainant, any other person or party whom the National Director considers to be relevant[8].

[12] The "Act" is the brain-child of section 179 of the Constitution, in particular subsection (4) which requires of a national legislation to be enacted to ensure that members of the prosecuting authority exercise their duties without fear, favour or prejudice. Chapter 4 of the Act deals with powers, duties and functions of members of the prosecuting authority. Of relevance to the present proceedings, they have the power to institute and conduct criminal proceedings on behalf of the state and have the power to discontinue criminal proceedings[9]. On the other hand, and in accordance with section 179 of the Constitution, the National Director may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking and considering representations from the accused, the complainant, any other person or party whom the National Director considers relevant, within the period specified by the National Director[10]. This is a replica of what is provided for in section 179 of the Constitution. The hierarchy in the exercise of powers, duties, and functions under Chapter 4 runs from the national director, deputy national director, directors, deputy directors and down to the prosecutors[11]. Section 21 is also important as it obliges and authorises the National Director to determine prosecution policies, and issue policy directions which must be observed in the prosecution process.

[13] A special director should exercise the powers, carry out the duties and perform functions considered 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), they should be exercised, carried out and performed in consultation with the director of the area of jurisdiction concerned[12]. In the present case, the second respondent was such a "special director" and the third respondent such "director" concerning the withdrawal of the fraud and corruption charges against Mdluli. (My emphasis as it would appear later in this judgment).

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[8] S 179 (5) (b) (c) and (d).
[9] S 20 (1) (a) and (c) of Act 32 of 1998.
[10] S 22 (2) (c) Act 32 of 1998.
[11] Sections 22 to 25 of Act 1998.
[12] S 24 (3) of the Act.

[14] In terms of the legislative power to make or determine prosecution policies and to issue policy directives, the National Director of Public Prosecutions issued code of conduct inter alia, dealing with professional conduct, independence and impartiality by each member of the prosecuting authority in the exercise of their powers, duties and functions.

[15] Because of its relevance to the "fit and proper" person requirement, I find it necessary at the risk of prolonging this judgment, to repeat some of the directives contained in the code of conduct:

> *"Prosecutors must-*
>
> *(a) Be individuals of integrity whose conduct is objective, honest and sincere*
>
> *(b) Respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the Constitution.*
>
> *(c) Protect the public interest;*
>
> *(d) Strive to be and seen to be consistent, independent and impartial;*
>
> *(e) Conduct themselves professionally, with courtesy and respect to all, and in accordance with the law and the recognized standards and ethics of their profession;*
>
> *(f) ...*
>
> *(g) At all times maintain the honour and dignity of their profession..'*
>
> Independence.
>
> *"The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the prosecution policy and the policing directive and be free from political, public or judicial interference."*
>
> Impartiality
>
> *"The prosecutor should perform their duties without fear, favour or prejudice. In particular they should-*
>
> *(a) Carry out their functions impartially and not become personally involved in any matter;*
> *(b) Avoid taking decisions or involving themselves in matter where a conflict of interest existent or might possibly exist;*

(c) *Take into consideration the public interest as instinct from media or part as an interest and concerns, however vociferously these may be presented;*

(d) *Avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence or impartiality;*

(e) *Not seek or receive gifts, donations, favour or sponsorships that may comprise or may be perceived to compromise or may be perceived to compromise their professional integrity;*

(f) *Act with objectivity and pay due attention to the constitutional right to equality;*

(g) *Take into account all relevant circumstances and ensure that the reasonable inquiries are made about evidence irrespective of whether these inquiries are to the advantage or disadvantage of the alleged offender;*

(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 conviction, an appropriate sentence based on the evidence presented."*

[16] Three points summarised hereto were raised as preliminary issues. First, alleged failure to afford Jiba a fair hearing, second, that the application and relief sought offend against separation of powers and lastly that the present application is pre-mature. Counsel for Jiba was asked at the start of the hearing of this application as to whether he was persisting with the three issues. The response was that preliminary issues are not abandoned.

Alleged lack of affording Jiba proper hearing and separation of powers

[17] The preliminary issues are introduced in the Jiba answering affidavit as follows:

> *"13. Before dealing with my response to the allegations against me, set out in the founding affidavit, I wish to raise the following as points in limine. First, the appropriateness of bringing an application such as this against the National Director of Public Prosecutions in the office of the NPA. This raised an important constitutional issue involving the interpretation of the NPA Act and the inter-relationship between section 7 of the Admission of Advocates Act. Secondly, the issue of bringing this application, where there is no urgency and none has been alleged in the founding affidavit, without affording me the opportunity to be heard by the applicant. Both issues are interlinked in the circumstances of this matter"*

[18] In what I believe to be an elucidation of the statement above, Jiba in paragraphs 18 and 19 of her answering affidavit in these proceedings proceeds as follows:

> *"18. Thus, for the court to make an order striking my name from the roll of advocates, it has to make a finding first that I am not a fit and proper person to continue to practice as an advocate. Normally, with regard to practicing advocate at the bar an enquiry is conducted by the applicant with regard to the latter issue. The affected party is normally afforded a right of hearing. Oral evidence is led and witnesses cross-examined. Only if is the applicant is satisfied through the fair enquiry process that the affected party is indeed not fit and proper, would it bring an application to strike the name from the roll of advocates.*
>
> *19. In this instance applicant has opted to roll the two processes into one through a motion application, based on an affidavit which replete with hearsay and innuendo, which is prejudicial to me, without having afforded the opportunity to be heard. I wish to state that much of the prejudice hearsay and innuendo would have been eliminated if applicant had followed the normal process at least of conducting an investigation and first granting me a hearing to determine the truthfulness of the allegations that are being made against me and if indeed I am not a fit and proper person to practice as an advocate."*

[19] To put the gist of Jiba's criticism in perspective, it is necessary to refer to sections 12 and 7 of the National Prosecuting Authority Act and Admission of Advocates Act respectively. Her criticism is further articulated as follows in paragraph 28 of her answering affidavit in these proceedings:

> *"An order by this Honourable Court that my name be struck off the roll of advocates would with respect, undermine the process for the removal from office of a Deputy National Director provided for by the NPA Act by essentially disqualifying me from holding the position of Deputy National Director and rendering the enquiry moot. This is in circumstances where the question of whether I am fit and proper person to hold the office would already have been determined on the basis of affidavits and, in this case, hearsay evidence. This, with respect, would infringe the doctrine of separation of powers and my right to a fair hearing."*

[20] Section 12 of the Act deal with the term of office of National Director and deputy National directors of Public Prosecutions and subsections 5, 6 and 7 of section 12 deal with the removal or suspension thereof. Because of their importance, subsections are repeated hereunder:

> *"(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).*

(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 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.

(7) The President shall also remove the National Director or a Deputy National Director from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (a) , is presented to the President."

[21] There is a distinct difference between removal or suspension under section 12 of the Act and removal or suspension under Admission of Advocates Act. Subsection (2)

of section 7 of the latter Act was quoted earlier in paragraph 5 of this judgment. Subsection (1) provides as follows:

> *"(1) Subject to the provisions of any other law, a court of any division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates -*
>
> *(a) in the case of a person who was admitted to practise from the roll as an advocate in terms of sub-section (1) of section three or is deemed to have been so admitted -*
>
> *(i) if he has ceased to be a South African citizen; or*
>
> *(ii) in the case of a person who is not a South African citizen, other than a person contemplated in sub-paragraph*
>
> *(iii) if he has failed to obtain a certificate of naturalization in terms of the South African Citizenship Act, 1949 (Act No. 44 of 1949), within a period of six years from the date upon which before or after the commencement of this sub-paragraph he was admitted to the Republic for permanent residence therein or within such further period as the court either before or after the expiration of the said period for good cause may allow; or*
>
> *(Section 7(1)(a)(ii) substituted by section 2(a) of Act 60 of 1984)*
>
> *(iii)*
>
> *(b) ..*
>
> *(c) in the case of a person who was admitted to practise as an advocate in terms of section jive, if it appears to the court that he has ceased to reside or to practise as an advocate in the designated country or territory in which he resided and practised at the time of his admission to practise as an advocate of the Supreme Court or that that country or territory has ceased to be a designated country or territory for the purposes of the said section; or*
>
> *(d) if the court is satisfied that he is not a fit and proper person to continue to practise as an advocate; or*
>
> *(e) on his own application."*

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

> *"9. (1) Any person to be appointed as National Director, Deputy National Director must-*
>
> *(a) possess legal qualifications that would entitle him or her to practice in all courts in the Republic ; and*
>
> *(b) be fit and proper person, with the regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibility of the office concerned.*

[23] So, if you cease to be a fit and proper person under section 7 of Admission of Advocates, and you are removed from a roll of advocates, you cannot be entitled to practice in all courts in the Republic as contemplated in paragraph (a) of section 9 (1) of the Act. These processes can sometimes run parallel to each other but any choice of the two would not render the process unfair.

[24] The premature and or separation of powers contention should therefore be seen in the context of the above legislative framework and there can be no merit to the contention. Any suggestion that the proceedings should have been preceded by an inquiry instituted by the President as contemplated in the Act, should also be seen in context. It is worrying that Jiba or her counsel still found it necessary to persist with the argument despite the fact that the President had already put it on record in the matter between Democratic Alliance (DA) and Jiba instituted and recently finalised in the Cape High Court. In that case DA wanted court to suspend Jiba, but the President stated inter alia, as follows in a letter dated 1 September 2015 written on his behalf:

> *"...The President was subsequently been apprised of the matter by the Minister and has asked me to draw your attention to the following:*

- *That he is of the view that none of the jurisprudential grounds exists which warrant the suspension of advocate Jiba;*
- *That the process initiated by General Council of the Bar of South Africa ("the GCB") will result in a definitive outcome expressed in a court judgment ruling, as opposed to the hosting of an inquiry which will culminate in a recommendation to the President which will then require further processes to be implemented before a definitive decision;*
- *That the GCB in its wisdom has not sought suspension of Advocate Jiba in its application, pending the final determination of the matter, whilst this approach is not resolutive on the question of suspension, it indeed gives a particular insight from a professional body charged with the duty of upholding the conduct of Advocates in general;*

The President is equally of the view that the judgment of the Supreme Court of Appeal are replete with instances where the Court has expressed its approval with the nature of the proceedings as well as the test to be applied in examining the conduct of legal professionals. It must follow that the investigative acumen and process of the GCB, matched with the judicial process provides a better guarantee for ensuring the constitutional safeguards of all concerned.

In the circumstances, whilst the President remains concerned by the seriousness of the allegations, he cannot accede to your request, at this time. Lastly, the President as Head of the Executive has always resisted the invitation to comment on decisions taken by the NDP where there are either unhelpful or unwise…[13]»

[25] This must have sent a clear message to Jiba, who must have been aware of the President's response as quoted above long before the judgment was handed down on 23 May 2013 by Dolamo J. That being so, persistence with the premature and or separation of power point, in my view, displays unwillingness on the part of Jiba to concede to anything. She is fully aware that the President had pleaded in the Cape High Court that the matter in that court was premature in the light of the present proceedings. Despite this, she too wanted to suggest that the present proceedings are pre-mature for not allowing inquiry to take place as envisaged in section 12 of the Act or GCB for not instituting a disciplinary inquiry before approaching the court directly for removal or suspension contemplated in section 7 of the Admission of Advocates Act.

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[13] See Democratic Alliance v President of the Republic of South Africa and Others (17782/15)2016 ZAWCHC66 (23 May 2016) at Para 40

Persistence in this regard seems to be consistent with Jiba conduct in the handling of cases where she is involved as it would appear later in this judgment.

[26] Coming back to GCB's alleged failure to afford Jiba a fair hearing, it is important to mention that motion proceedings differ from action proceedings or disciplinary proceedings where oral evidence is heard and the opportunity to cross-examine witnesses afforded. With motion proceedings, which are often referred to as application proceedings, evidence is placed before the court in the form of affidavits sworn to by witnesses. The proceedings are commenced by way of a notice of motion accompanied by a founding affidavit setting out facts on which a claim is based, with all the supporting documentation being annexed to the affidavits. Motion proceedings are appropriate when the issue or issues to be resolved is purely a dispute of law and there is no material dispute of fact. One cannot proceed by way of motion proceedings where there is a material dispute of fact. In essence therefore, a party who is sued by way of motion proceedings can only complain if there are material issues which cannot be resolved on affidavits. When that happens, the court is better placed to decide whether there is real dispute of fact that cannot be resolved on affidavits. In the event of a dispute of fact that cannot be resolved on papers, the court may either dismiss the application; refer specific issues for oral evidence or for trial. The risk is on the party who elected to proceed by way of motion proceedings. In my view, neither of this finds application in the present case.

[27] It is not Jiba's case that there is a dispute of fact. The closest to this is that GCB's case is based on hearsay evidence. There is no merit to this. In any event, even if there was, this court is better placed to decide on which evidence to give a probative value.

[28] I am actually unable to understand Jiba's contention of the alleged failure by GCB to afford her proper hearing. For example, in paragraph 12 of her answering affidavit to these proceedings, she states:

> *"12 I am advised that applications of this nature are sui genesis and that I am required to assist the court in ascertaining the truth. I intend to do so..."*

Having said this, Jiba then indicated that in order to properly place her defence before this court, she will at all times refer to various documents, which she had been able to

access through her position as a Deputy National Director, stating that she is fully aware that the grounds upon which GCB relies for the relief sought, arise out of her conduct in her capacity as Acting National Director of Public Prosecutions.

[29] Clearly, Jiba cannot rely on failure to be afforded a proper hearing simply because an inquiry was not followed where oral evidence could be led and cross examination allowed. She had everything at her disposal to deal with the allegations against her and no form of prejudice can be claimed to have occurred. For this, the so called *points in limine* are destined to fail. Before I turn to deal with the complaints raised in respect of each case mentioned in paragraphs 8.2, 8.3 and 8.4 of this judgment, I hereunder give reasons for the order refusing leave to file further answering affidavits.

REASONS FOR THE ORDER REFUSING FOURTH AFFIDAVIT

[30] On 18 August 2015 GCB filed a replying affidavit in these proceedings. Subsequent thereto on 15 September 2015 Jiba filed the fourth affidavit referred to as a supplementary answering affidavit. It is this affidavit which formed the subject of the leave to file additional affidavit. For two reasons, the fourth affidavit was filed and Jiba states the reasons as follows:

> *"4. ...First, in order to supplement any response to the founding affidavit of Adv. Idris Jeremy Muller SC ("ADV Muller") deposed to on behalf of the General Council of the Bar ("the GCB") the applicant in these proceedings, in the light of certain information which has come to hand subsequent to the filing of my answering affidavit. Secondly, in support of the notice of application to which this affidavit is attached, for leave to file supplementary answering affidavit."*

[31] Effectively, the suggestion is that new information came to light post the filing of the answering and replying affidavits respectively. It is in the interest of the administration of justice that well known and well established general rules regarding the number of sets of proper sequence of affidavits in motion proceedings be ordinarily observed. That is not to say that these general rules must always be lightly applied. Some form of flexibility controlled by the presiding judge exercising his discretion in relation to the facts of the case before him, must also necessarily be permitted. Where

an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the court. He or she must both advance his explanation for why the affidavit it is out of time and satisfy the court that, although the affidavit is late, it should, having regard to all the instances of the case, nevertheless be received. Attempted definition of the ambit of discretion is neither not desirable... It is sufficient for the purposes - to say that on any approach to the problem, he inadequately or otherwise of the explanation for the late tendering of the affidavit will always be an important factor of enquiry[14].

[32] The rule of practice that an applicant must generally speaking, stand or fall by his founding papers, is not one cast in stone but has been bent from time to time, because of the existence of a judicial discretion which permits the filing of further affidavits so as to give effect to a solitary practice and fundamental consideration in the administration of justice, that a matter should be adjudicated upon all the facts relevant to the issues in dispute. Despite the cogency of this rule of practice, it has been frequently stated that it does not operate to preclude the introduction of further affidavit when consideration of fairness and justice to both parties dictate that this should be done. The rule remains subject to the discretionary power of the court and mere fact that the matter sought to be introduced in the new affidavits should properly have been included in the founding affidavit and not in reply, does not negative the existence of that discretionary power[15].

[33] The principle enunciated in the preceding case law, should apply to a respondent who wishes to file further affidavit in response to replying affidavit or new information discovered thereafter. Most importantly, all facts sought to be introduced should be relevant to the issue in dispute. In the present case, relevant facts must speak to the issue whether the first respondent (Jiba) or any of the respondents for that matter, is fit and proper to remain on a roll of advocates. Bearing this in mind, it is important to have regard to the facts which Jiba wanted to introduce in the fourth affidavit.

New information

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[14] James Brown v Hamer (Pty) Ltd (Previously named Gilbert Haner & Co Ltd v Simmons No 1963 (4) SA 656 A at 660 D-H

[15] Tranvaal Racing club v Jockey Club of South Africa 1958 (3) SA 599 (W); Dawood v Mahamed 1979 (2) SA 361 (D).

[34] What Jiba refers to as "new information", is a letter dated 23 July 2013, marked as Annexure NJIA to her "supplementary affidavit". The essence of the letter is articulated by Jiba as follows:

> *"25. As appears from the correspondence it concerns all alleged agreement by NPA to pay through the office of the State Attorney, 75% of the applicant's attorney and client cost of instituting and prosecuting this application. There are also several demands from the applicant's attorneys of record to Mr Matubatuba in the office of the State Attorney to settle the accounts of counsel who are acting on behalf of the GCB in this application.*
>
> *26. As a matter of professional courtesy to the individual counsel involved, the amounts of these accounts referred to in the letter from the applicant's attorney of record dated 30 June 2015, have been blocked out. I also do not attach the copies of these accounts but they can be made available to this Honourable court if necessary. Suffice to state the amounts involved are substantial.*
>
> *27 The content of this correspondence is extremely concerning and I respectfully submit, makes it clear that this application forms part of a direct attempt by certain members in the NPA to remove me for political reasons..."*

[35] The removal from a roll of advocates "for political reasons" appears to be Jiba's theme in introducing the letter in question. This appears from the preceding paragraphs of her affidavit in which she states inter alia:

> *"7. Adv. Muller was at pains in the founding affidavit expressly to state that notwithstanding the applicant is aware of reports of disputes and political manoeuvring between different factions within and outside the NPA, that this application for the striking off my name from the roll of advocates, is not part of any campaign to remove me from the NPA. I refer the court to paragraph 7.7 of the founding."*

[36] 'Political manoeuvring' in the quotation above appears to be borrowed words from paragraph 7.8 of the founding affidavit wherein GCB states:

> *"7.8 The GCB is also alive to allegations which have been reported in the media to the effect that some or all of these developments are a manifestation of political manoeuvring by factions or individuals within and outside of the NPA. Beyond what has been reported in the media, the GCB has no knowledge of these allegations or their veracity."*

[37] So, right at the onset, GCB made it known that it was aware of the allegations of in-fighting within the National Prosecuting Authority and GCB continues in its founding papers by clarifying its position as follows:

"7.9 I mention these matters, because this application may be characterised by some as another facet of the developments which appear to be taking place both within and outside the NPA. It is not, and it should not be viewed as, any such thing. As indicated, the application was indeed prompted by a request from the NPA. Having considered the NPA's request then GCB formed the view that, on the evidence available to it, the respondents' conduct obliged it to act in terms of section 7 (2) of the Admission of Advocates Act and bring these facts to this court's attention, so that the court could consider whether one or more of the respondents is a fit and proper person to continue to practice as an advocate as contemplated in section 7 (1) (d) of the Act. It is for this reason that the GCB resolved to prepare this application."

[38] What is referred to as "new information" should have been viewed in this context by Jiba. Properly considered, there was never a need to seek to introduce the letter of 25 July 2015. It was common cause or put differently, it was not in dispute that there was in-fighting within the NPA. The agreement to pay 75 % of GCB's attorney and client costs in instituting and prosecuting the application has no material relevance to the question whether the complaints forming the subject of the application are established and if so, whether the complaints are of such a nature that they make any of the respondents unfit persons to continue to practice or remain on a roll of advocates.

[39] The statement '*this correspondence and the alleged agreement between the NPA and the GCB and or its attorneys of record, further confirm my suspicions that this forms part of a political agenda to remove me from the NPA. I submit that this new information is highly material for the placing of this application by GCB in its proper context*', is irrelevant to the factual findings this court has been called upon to pronounce on. The question in the present proceedings is whether any of the complaints made against the respondents, if proved, would make any one of them to cease to be fit and proper persons to remain on a roll of advocates. It is on the basis of this that leave to file further answering affidavit was refused.

[40] However, one could not turn a blind eye on the fact that public funds might have been improperly utilized by paying 75% of GCB's legal costs for having instituted the present proceedings as if it was doing the national prosecuting authority a favour. GCB instituted the present proceedings as is entitled to do so in terms of section 7 of the

Admission of Advocates Act. Counsel for GCB was quizzed as to why the agreement and expenditure thereof if any should not be referred to the Audit-General to investigate possible contraventions of Departmental Financial Instruction (DFI) and the provisions of Public Finance Management Act. To this enquiry, the court was assured by Adv. Burger SC on behalf GCB that no cent of public funds was spent or is intended to be spent or recouped by GCB for having instituted the present proceedings based on the alleged agreement with the NPA. Consequently, the intended referral to the Audit-General will not be made. I now turn to deal with the complaints raised as the basis for the present proceedings.

BOOYSEN CASE AND COMPLAINTS AGAINST JIBA IN CONNECTION THERETO

[41] '...Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of section 35(5) of the Constitution. Allowing such litigation will often place prosecutor between a rock and a hard place. They must, on the one hand, resist preliminary challenges to investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure that prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court deciding the pertinent issues is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard; however. The courts' doors should never be completely closed to litigants... But in ordinary course of events, and where the purpose of the litigation appears merely to be avoidance of the application of section 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interest of all concerned. If that approach is generally followed the state would be sufficiently constrained from acting unlawfully by the application of section 35(5) and by the possibility of civil and criminal liability'[16].

[42] The office of the National Director of Public Prosecutions is closely related to the functions of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice[17]. Courts are not overly eager to limit or interfere with the legitimate exercise of prosecuting authority. However, a prosecuting authority's

[16] Thint (Pty) Ltd v National Director of Public Prosecution & Others 2009 (1) SA 1 CC para 64.
[17] Democratic Alliance V President of the Republic of South Africa & Others 2013(1) SA 248 (CC) at [26]

discretion is not immune from the scrutiny of a court which can intervene where such discretion is improperly exercised[18].

[43] Courts have on rare occasions expressed their disapproval of the fact that a prosecution was instituted[19]. Courts do not interfere with the prosecuting authority's bona fide exercise of its discretion because prosecuting authority has the power to decide to prosecute and, once the accused is on trial, he or she will have the fullest opportunity to put his defence to the court, cross-examine prosecution witnesses and to reply on his right not to be convicted unless the prosecution can prove his guilt beyond reasonable based on admissible evidence and prevented in terms of a regular procedure[20]. Courts can intervene where mala fide is alleged, or where it is alleged that the prosecuting authority never applied its mind to the matter or acted from ulterior motive [21]. (My emphasis).

[44] The complaints against Jiba, in her capacity as the then Acting National Director of Public Prosecutions in Booysen case, arose from the exercise of her statutory power to authorise the charging of Major-General Booysen (Booysen) with contravention of section 2(1) (e) and (f) of the Prevention of Organised Crimes Act no.121 of 1998 ("POCA"). A person shall only be charged with committing an offence contemplated in subsection (1) of section 2 POCA if prosecution thereof is authorised in writing by the National Director[22]. Any person who whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity, manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participated in the conduct, directly or indirectly, of such enterprise affairs through a pattern of racketeering activities shall be guilty of an offence[23].

[45] On 18 August 2012 Jiba, Acting as a National Director of Public Prosecutions, issued written authorisation to have Booysen charged with contraventions of section 2(1) (e) and (f) referred to in paragraph 44 above. Booysen successfully challenged the

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[18] Minister of Police & Another V Du Plessis 2014 (1) SACR 217 (SCA) at [31]
[19] S v F 1989 (1) SA 460 (ZH), S v Bester 1971 (4) SA 281(T)
[20] Commentary on the Criminal Procedure Act by Du Tiot, De Jager, Paizes, Skeen and Van Der Merwe at 1-29.
[21] Mitchell V Attorney-General, Natal 1992 (2) SACR 68 (N)
[22] Section 2(4) of POCA
[23] Paragraph (e) and (f) of the section 2(1) of POCA.

authorisation in Kwa-Zulu Natal Division before Govern J. In his replying affidavit, before Govern J, Booysen stated that Jiba was: *"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".*

[46] What is quoted above is the gist of the complaint against Jiba in the handling of Booysen case. In its founding papers, GCB articulates the conduct complained of as follows:

> *"On the evidence of her conduct in the Booysen matter as (with respect, correctly) described by Govern J in this judgment, Jiba signally failed to comply with the NPA's Code of Conduct. More pertinent to this application, the statements made by Jiba under oath is seeking to justify her decision to issue the POCA authorisations, were evidently untruthful. As such her conduct indicates that she is not a fit and proper person to practice as an advocate."*

[47] These averments seem to be based on the finding by Govern J which inter alia, included:

> *"[30] This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets. [Jiba] says that they are all statements made under oath. [Jiba] says in addition that they implicate Mr Booysen in one or more of the offences in question".*

[48] Then in paragraphs 31 and 34 of his judgment, Govern J made adverse remarks against Jiba as follows:

> *"[31] The submissions of Mr Booysen in his replying affidavit can be summarised as follows: two of the annexures are sworn statements made under the name of one Colonel Aiyer. They are annexures NJ2 and NJ4 respectively. Mr Booysen described these statements which concern 'office politics and submit that they in no way implicate him in any of the offences with which he has been charged. The second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the first impugned decision was taken. The documents referred to as a statement by Mr Danikas, annexure NJ3 is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it could be attributed to the named person and even if it was sworn statement as claimed by the NDPP, the contents do not cover the period clearly in the indictment except for one event which does not relate to Mr Booysen…*

[34] Mr Booyen was clearly within his rights to deal with 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 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 Booysen was not taken by the NDPP by way of a request or application to deliver further affidavit. In response to Mr Booysen's assertion mendacity on her part, there is 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 own version, the NDPP did not have before her annexures 4 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 offence in question..."

[49] Before dealing with information placed before Jiba for written authorisation in terms of section 2(1) of POCA, it is important to reflect whether the invitation by Booysen and the adverse remarks by Govern J were based on correct evaluation and understanding of Jiba's answering affidavit. The challenge or invitation by Booysen to Jiba, was contained in the replying affidavit and at the risk of prolonging this judgment, I repeat the contents thereof in part:

> *"...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."*

[50] The invitation was made after having made allegations of 'mendacity' in the same paragraph with reference to paragraph 21 of Jiba's answering affidavit in Booyesen matter and because of the relevance thereto, paragraphs 16.6, 16.7 and 17 of Jiba's answering affidavit in that case are repeated hereunder:

> *"16.6 The information under oath which was placed before me also indicated that the applicant knew or ought to have known that his subordinates were killing suspects as aforesaid instead of arresting them.*
>
> *16.7 The information further revealed that unlawful activities of killing suspects and\or civilians were, in certain instances motivated by the Applicant's and members of his Unit's desire to enrich themselves by means of State monetary award and\or*

certificates for excellent performance. In this regard, I annex a copy of an example of such a monetary award claim document as "NJ1" in which inter alia, the Applicant is recommended for such an award resulting from the death of suspects.

17. *Particular reference is made in this regard to the statement made by Colonel Rajendran Sanjeevi, Mr Aris Danikas and Mr Ndlondlo from which it is apparent that the applicant is well aware of the information that the Respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the Applicant) for the instrumental part that he played in these crimes. Additionally, Mr Danikas has revealed some of the information that he has provided to the Respondents and to the press and even posted video footage thereof on You-Tube. I annex copies of these statements as NJ2, NJ3, NJ4 and NJ5, respectively."*

[51] Having regard to what is quoted above, it does not seem the statement: *"Jiba says that they are all statements made under oath"*, is correct. Nowhere in Jiba's answering affidavit did she make such a statement, neither did she say any of annexures, NJ2, NJ3, NJ4, and NJ5 were under oath. 'Under oath' statements or information were made only in paragraphs 16 and 16.6 of the answering affidavit without suggesting that all of the annexures referred to in paragraph 17 of the answering affidavit in Booysen matter were made under oath. Therefore the statement: *'The documents referred to as a statement by Mr Danikas, annexure NJ3, is not a sworn statement'*, as stated in paragraph 31 of Govern J's judgment, has to be seen in context insofar as it was understood that Jiba averred that NJ3 was a sworn statement. The truth is, she never said NJ3 was a sworn statement and it could not reasonably have been so inferred particularly reading in the context of paragraph 16.7 of her answering affidavit in Booysen case quoted in paragraph 50 above.

[52] The fact that Jiba did not avail herself to the invitation to deal with the allegation of being "mendacious", meaning "not telling the truth", should also be seen in context. The allegation was made in the replying affidavit. This too, Govern J was mindful of. For the purpose of these proceedings, the criticism by Govern J should be seen in the context of what Jiba now has to say in these proceedings.

[53] When it was discovered that Booysen has raised certain issues in his replying affidavit, the prosecution team felt that it needed to respond thereto. On 14 August 2013 a meeting of the prosecution team was held. Subsequent to the meeting, a

memorandum was prepared and forwarded to the defence team led by Hodes SC, in terms of which it was expected that supplementary affidavit would be filed to explain the criticism against Jiba with regards to the annexures. On 19 August 2013 an email by Adv Mosing of NPA was sent to Adv Chauke Director of Public Prosecutions Johannesburg, enquiring what progress had been made with regard to filing of further affidavit to deal with Booysen's allegations. Subsequently, Jiba was advised by Adv. Mosing that counsel had indicated that no further actions were necessary.

[54] Based on the explanation above, it is clear that Jiba did not ignore the serious allegations of "mendacious" made by Booysen. By seeking to file further affidavit to explain the annexures after the replying affidavit was filed, is a clear indication that she was mindful of the need 'to explain and correct any inaccuracies' created by Booysen in his replying affidavit. Therefore the statement: '*Despite this, the invitation by Mr Booysen was not taken up by the NDPP by way of a request or application to deliver a further affidavit, in response to Mr Booysen's ascertain of mendacity on her part, there is a deafening silence*', made by Govern J in paragraph 34 of his judgment ought to be seen in the context of what is explained in paragraph 53 above.

[55] Similarly, the statement that '*as regards the inaccuracies, the NDPP referring to Jiba), 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…*', should be seen in the context of what is stated in paragraph 53, but even most importantly, in the context of her explanation now offered in the present proceedings.

[56] On 17 August 2012 Jiba approved the application for authorisation in terms of section 2(4) of POCA for contravention by Booysen of section 2(1)(e) and (f) of POCA. The provisions of section 2(1) (e) and (f) were referred to in paragraph 44 of this judgment. The information and advice that was placed before Jiba for the purpose of granting or refusing authorisation was prepared and compiled by Adv. Raymond K Mthenjwa and Adv. Gladstone Sello Maema, both deputy directors of public prosecutions, Adv Anthony Mosing, a senior deputy director of public prosecutions and the head of the special Projects Division, who acted as the liaison between Jiba and the prosecuting team.

[57] At the time Jiba deposed to the answering affidavit in Booysen's matter, the facts and the evidence against Booysen had been presented to her on many occasions and

she was acquainted with the case against Booysen. In her affidavit during proceedings before Govern J she referred to annexure NJ5, being the statement of Mr Ndlodlo and Annexure 6 being the statement of Booysen. These annexures apparently did not form part of the papers before Govern J and Jiba was not aware why that was not done. I revert to the essence of annexures NJ5 and NJ6 later when dealing with whether Jiba had information implicating Booysen when she issued the authorisation on 17 August 2012. NJ3 was the statement of Ari Danikas, which was obtained round about 18 April 2012 by General Mabula who led the Hawks investigation team against Booysen.. The drafted statement of Danikas was handed over to the prosecution team during June 2012 and formed part of the information she considered in authorising the prosecution of Booysen. Danikas was a police reservist in the Durban Organised Crime Unit based in Carto Manor and was at that time in Greece. He had security concerns and was unwilling to come on his own to South Africa. On or before 11 July 2012 Adv Maema asked General Mabula to leave the statement unsigned so that the information process outlined in the mutual legal assistance legislation, that is, sections 2 and 3 of International Cooperation in Criminal Matters Act 75 of 1996 be followed to formalise the statement, although the witness was willing to have it signed at the South African embassy. The prosecution was confident that the statement would ultimately be signed through the process outlined as contemplated in Act 75 of 1996, but it formed the basis of the briefings to be considered by her in issuing the authorisation. However, the process of signing the statement could not be finalised since the incumbent (Mr Mxolise Ntasana) at the time of deposing to the answering affidavit in the present proceedings, had instructed to halt the process.

[58] Whilst the statement in question did not relate to the specific incident covered in the indictment, it was however intended to corroborate the evidence in possession of the prosecution team that Booysen was involved in the various activities giving rise to the charges against him of similar facts evidence which is admissible in racketeering prosecutions.

[59] An explanation stated above is offered in these proceedings to set the record straight. Therefore the statement, *'the document referred to as a statement by Mr Danikas annexure NJ3... is not even signed by anyone. It is not dated. Even if it can be attributed to the named person and even if it was sworn statement as claimed by the NDPP the contents do not cover the period dealt with in the indictment except for one event which does not relate to Mr Booysen'*, as

stated by Govern J ought to be seen in the context of the explanation given by Jiba in these proceedings and the fact that Jiba never said annexure NJ3 was a sworn statement as stated earlier in this judgment. I need to caution. I should not be understood as seeking to review or upset Govern J's judgment. At the time, he did not have Jiba's responses as this court now has.

[60] Regarding the question how Jiba could have taken into account information on oath that objectively did not exist at the time the authorisation was made, the explanation by Jiba in these proceedings is as follows:

> *"217. There were also two statements by Colonel Aiger (reference to as Annexure NJ2 and NJ4). One was taken on 3 August 2012 setting out Booysen's managerial responsibilities, participation and interferences in the activities of a section of Durban Organised Crime Unit. The statement was obtained before 17 August 2012, being the date on which the authorities were granted by me. A second statement of Colonel Aiger was taken on 31 August 2012 following a consultation with the prosecution team during early July 2012. However the content of the statement was information already relayed to the prosecution team by Colonel Aiger at the consultation."*

[61] Therefore the statement: '*The second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 April 2012, some two weeks after the first impugned decision was taken'*, in paragraph 31 of Govern J's judgment, inasmuch as GCB seeks to rely on it for the complaint levelled against Jiba, should be considered in the light of explanation quoted in paragraph 60 above. I am unable to find any conduct on the part of Jiba that justifies an application contemplated in section 7 of the Admission of Advocates Act.

[62] As far as the allegation of lack of information implicating Booysen is concerned, an understanding of the applicable legislature framework, what was placed before Jiba and the core function of the prosecuting authority is necessary. The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated in subsection (2) of section 2 of the Act notwithstanding that such evidence might otherwise be inadmissible, provided that such

evidence would not render a trial unfair[24]. This should be seen in the context of the Preamble under POCA which inter alia, reads:

> *"AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular case, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of and related conduct in connection with enterprises which are involved in the pattern of racketeering activity.*
>
> *AND WHEREBY THE SOUTH AFRICAN common law and statutory law fail to deal effectively with organised crimes ... criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime ... and criminal gang activities.*
>
> *AND WHEREAS pervasive presence of criminal gangs in many communities is harmful to well-being of these communities, it is necessary to criminalise participation in or promotion of criminal activities."*

[63] In my view the provisions of section 2(1) (e) and (f) referred to in paragraph 44 of this judgment are meant for the criminalisation of such activities. The point I am making is this: Courts for the purpose of an exercise of its discretion in terms of section 2(2) referred to in paragraph [62] of this judgment, may rely on hearsay evidence, information and or documentation collected by the police and presented to it by the prosecution. If that is so, and courts are entitled to have regard to hearsay evidence during trial, so too should the National Director of Public Prosecutions (Jiba in Booysen's case) be entitled to rely on hearsay and similar facts evidence for the purpose of authorisation as contemplated in subsection (4) of section 2 of POCA. Otherwise, pervasive presence of criminal gangs will continue to rule with impunity and fear in many of our communities and resultantly pose harm to the well-being of many communities.

[64] As I said, one needs to be careful not to be understood as upsetting Govern J's judgment for having reviewed Jiba's decision to prosecute Booysen. That is not an issue before this court. The issue however is whether in granting authorisation in terms of section 2(4), Jiba was mala fide or had ulterior motive, in which event, the requirements of "*fit and proper person*" to remain on a roll of Advocates becomes relevant. For this purpose, further provisions of POCA are necessary to consider, also taking into account offences under section 2(1) (e) and (f).

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[24] See section 2 (2) of POCA

[65] 'Pattern of racketeering activity' means 'the planned, on-going, continues or repeated participation or involvement in any offence referred to in Schedule 1 and included at least two offences referred to in Schedule 1'. On the other hand, "enterprise" 'includes any individual partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact'[25].

[66] The essence of the information before Jiba, can be summed up as follows: In addition to what is stated in paragraphs 56, 57 and 60 of this judgment, Booysen was the head of Carto Manor Organised Crime Unit in the South African Police Services. Members of the police in his unit and under his command had allegedly committed crimes of serious nature including murders against suspects who were sometimes framed in the commission of offences. Booysen knew, approved and or ought to have known of the commission of these offences. In reward to the members' unlawful activities, Booysen motivated for incentive of R10 000.00 for each of the 26 members of the Carto Manor Crime Unit including Booysen himself. Booysen was also commended for outstanding services rendered in that he 'was part of a team, who through their commitment and dedication, arrested several crime and dangerous suspects for the murder of a police officer'.

[67] I cannot find any mala fides and or ulterior motive in the authorisation by Jiba as contemplated in POCA. POCA is like a cry out loud for declaration of war against serious, continuous and organised crimes. That needs specialised investigation and prosecution. Most importantly, POCA requires the freedom and space to be given to the members of the prosecuting authority in the exercise of their legislative power to investigate through members of their Investigating Directorate and under the watchful eye of a special director so appointed to prosecute without fear, favour and prejudice those implicated in the commission of serious crimes. Anything short of this, or anything which tends to impede on this constitutional and legislative imperative, for example, hauling Jiba to the proceedings in terms of Section 7 of the Admission of Advocates Act, ought to be based on very cogent, serious and exceptional circumstances.

[68] You do not want members of the prosecution authority to unduly watch their backs for fear of being dismissed or removed from the roll of advocates every time when they make mistakes in prosecuting and presenting cases in court, or every time when an

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[25] See definition under Section 1 of POCA

application for authorisation is made in terms of section 2(4) of POCA. An overriding factor for them for consideration should be to adhere to the rule of law and the Constitution. It suffices for now to conclude on Booysen matter by stating that no case has been made for removal or suspension from the roll of advocates. I now turn to deal with the other matter and basis of complaints thereto against Jiba.

SPY TAPES CASE

[69] The listening of telephone conversation recorded on tapes between Bulelani Nqcuka, the then National Director of Public Prosecutions and Mr McCarthy, the then Director of Public Persecutions for Durban and withdrawal on 1 April 2009 of several of criminal charges against Mr Jacob Zuma, (currently the President of the Republic of South Africa), became to be known in South Africa as a "Spy tape case." It was a case instituted by Democratic Alliance Party against the National Prosecuting Authority in terms of which the latter's decision to withdraw several charges against Mr Zuma was challenged. It is the handling of that case by Jiba in her capacity as the then Acting National Director of Public Prosecutions which forms the basis of the application and dispute in these proceedings. The case in question is also referred to in these proceedings as a "Spy tapes case."

[71] On 6 April 2009, the then acting National Director of Public Prosecutions, Adv. Mokotedi Mpshe, after having listened to the conversation aforesaid recorded on tape publicly announced the withdrawal of corruption and other several related charges against Mr Zuma.

[72] During April 2009 and subsequent to the withdrawal of the charges, the Democratic Alliance (DA), a registered political party and official opposition in South African national parliament instituted review proceedings in the North Gauteng High Court for an order reviewing, correcting and setting aside the decision to discontinue the prosecution against Mr Zuma and declaring the decision to be inconsistent with the Constitution of the Republic of South Africa. DA further required Mr Zuma and NPA to deliver to the registrar of the High Court, in terms of rule 53(1) of the Uniform Rules, the record on which the impugned decision was based, which included representations made by Mr Zuma for the withdrawal of the charges. The prosecuting authority, as the

decision maker refused to deliver the record contending that the record contained the said representations which had been made on confidential and without prejudice basis. It was further pointed out that Mr Zuma had declined to waive the conditions under which he had submitted his representations. Lastly, it was contended that the decision by the national prosecuting authority to discontinue a prosecution was not reviewable.

[73] In terms of Rule 53 (1) of the Uniform Rules,

> *"...all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-*
>
> *(a) Calling upon such person to show cause why such decision or proceedings should not be reviewed; and corrected or set aside and*
>
> *(b) Calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch within fifteen days after receipt of the notice of motion to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he has done so."*

[74] Jiba as acting National Director of Public Prosecutions at the time or her predecessor failed to despatch the record of the decision. This led to an application to compel in the high court Pretoria before Ranchod J. DA failed in its application to compel. However, on 20 March 2012 the SCA on appeal by DA, made an order of relevance, as follows:

> *"1.3 In the Rule 6(11) application, the first respondent (referring to NDPP) is directed to produce and lodge with the Registrar of this court the record of the decision. Such record shall exclude the written representations made on behalf of the third respondent (referring to Mr Zuma) and any consequence memorandum or report prepared in response thereto oral representations if the production thereof would breach any confidentiality attaching to representations (the reduced record). The record shall consist of the documents and materials relevance to the review, including the documents when making the decision and any documents informing such decision."(My emphasis).*

[75] The order was not complied with. Instead, on 12 April 2012 the state attorney on behalf of NPA headed by Jiba at the time wrote to DA's attorneys two days after the expiry of the 14 days set by the SCA and indicated that they were in the process of preparing copies of the reduced record as indicated in the order of the SCA, that a list of documents was supplied, which it was alleged, constituted the reduced record and that the list was not in breach of the confidentiality. Then in paragraphs 4 and 5 of the letter, it was recorded:

> *"4. Other material considered by the Acting NDPP at the time is subject to the confidentiality obligation and therefore cannot be discovered, unless it may transpire that Mr Zuma's team may at a later stage be willing to consent to a relaxation of the confidentiality in respect of particular documents or particular contents, in which event we will advise you accordingly.*
>
> *5. There are in addition certain tape recordings which are in the process of being transcribed, but that process has not been completed as yet, and will take some additional time. On completion thereof, we are obliged to give an opportunity to Mr Zuma's legal team to consider whether there is any objection to disclosure of such transcripts. On completion of that process, if there is no objection to disclosure, they will be made available as a supplement to the record."*

[76] During May 2012 the State Attorney supplied certain documents to DA's attorneys. On 9 May 2012 State Attorney then wrote again to DA's attorneys and informed them that Mr Zuma's legal representatives required a period of two to three weeks to consider the tape transcripts, but that they were not consenting to the release thereof pending further consultation with their client.

[77] The delay in not fully complying with the order quoted in paragraph 74 above led to DA approaching this court for an order, inter alia, directing that the record be produced and lodged with the Registrar of this court in terms of the SCA order which should include a copy of electronic recording and a transcript thereof as referred to by the Acting NDPP in the announcement of his decision of 6 April 2009, internal memoranda, reports, minutes of meetings dealing with the contents of the recording and or transcripts itself, insofar as these documents do not directly refer to written or oral representations. In addition, the DA sought an order that Jiba be held in contempt of the order of the SCA referred to in paragraph 74 above.

[78] The application was heard before Mathopo J who made an order in favour of the DA except for the contempt of the court relief. Mr Zuma appealed to SCA against Mathopo J's order. The latter's order inter alia, read:

> *"1. The First Respondent is directed to comply with the order of the Supreme Court of appeal in case no: 288/2011 dated 20 March 2012 ("the SCA order"), within five days of the date of this order.*
>
> *2. The record to be produced and lodged by the First Respondent with the Registrar of this court, in terms of the SCA order, shall include a copy of the electronic recordings and a transcript thereof referred to by the first respondent in the announcement of the first respondent's decision of 6 April 2009 as well as any internal memorandum, reports or minutes of meetings dealing with and or transcript itself, insofar as the SCA documents do not serve to breach the confidentiality of the thereof of respondents' written or oral representations."*

[79] On appeal to the SCA, its order of 20 March 2012 and that of Mathopo J were varied by additions as follows:

> *"1. ...*
>
> *2. ...*
>
> *3. With regard to memoranda, minutes and notes of meetings, referred to by the first respondent in paragraph 26 of her answering affidavit (the internal documentation):*
>
> *3.1 Within five days of this order, the first respondent shall cause to be delivered to the Honourable Mr Justice NV Hurt (Justice Hurt) copies of the internal documentation;*
>
> *3.2 On the copy of each document forming part of the internal documentation, Justice Hurt shall mark or order that part of the document which he considers the reveal the contents of third respondent's written or oral representations(the representations) to first respondent;*
>
> *3.3 The exercise referred to in paragraph 3.2 above shall be performed in accordance with any directives with any directives which the Honourable Justice Hurt may prescribe in order to fulfil his mandate;*
>
> *3.4 The ruling of Justice Hurt shall be final and binding on the parties; and*
>
> *3.5 Should Justice Hurt, for whatever reason, be unable to commence or complete the exercise referred to in this paragraph, the applicant and the third respondent shall attempt to reach agreement on another independent and impartial person to replace*

him and, if no agreement can be reached within five days of Justice Hurt becoming unavailable, then the chairperson of the General Council of the Bar of South Africa shall be requested to appoint such."

[80] Additions to the order were apparently initiated by the parties. It is the conduct of Jiba complained of in not complying with the order of 20 March 2012 and adverse remarks made by the Supreme Court of Appeal that GCB approached this court seeking the order to remove Jiba from a roll of Advocates. GCB having referred to specific paragraphs in the SCA's judgment, to which I refer later in this judgment, concluded in paragraph 17 of its founding affidavit as follows:

"17. In my submissions these observations by the SCA were, with respect, warranted and Jiba's conduct in the Zuma matter falls well short of the conduct required of an advocate of this Honourable Court and as contained in the Code of Conduct for members of the NPA. She did not assist the court at arriving at a just verdict, and she did not perform her duties as Acting NDPP fearlessly and vigorously in accordance with the highest standard of the legal profession; as the Code of Conduct requires. Moreover, the answering affidavit deposed to by her, and the attitude she evinced towards the High Court and the SCA, was less than objective, honest and sincere."

[81] Jiba in her answering affidavit to these proceedings correctly in my view articulated the essence of the complaints attributable to her in the Spy Tapes case as follows:

"241. The complaints against me in relation to the Democratic Alliance matter are as follows:

241.1 That I adopted a supine attitude to the SCA's directive;

241.2 That in my answering affidavit (in the contempt application) I did not adopt a position to the confidentially of the tapes or the transcripts but "resorted to a metaphorically shrugging of the shoulders"

241.3 That the SCA referred to my approach in the answering affidavit, in not taking a stance on the confidentiality of the material sought, as disingenuous;

241.4 That I did not take an independent view about confidentiality in the face of the order of the SCA, and that this conduct is not worthy of the office of the NDPP;

241.5 That I did not assist the court at arriving at a just verdict, and my attitude was less than objective".

[82] Very often when adverse remarks are made in legal proceedings, the person against whom the remarks are made is not given the opportunity to state his or her case to the impeding adverse remarks. It is for this reason that courts do not easily make adverse remarks. This is one of those cases. However, as I deal with each of the complaints levelled against Jiba in the "Spy Tapes case", I will also refer to her responses thereto and this will happen unfortunately at the risk of prolonging this judgment but, it is necessary to do so. Courts are of course willing to reconsider adverse remarks afresh given the responses by the person against whom they were made.

Supine attitude

[83] "Supine" is an English word which according to South African Concise Oxford Dictionary means "lying face upwards- with the palm of the hand upwards"- "failing to act as a result of moral weakness or indolence"- n. Latin verbal noun "used only in the accusative and ablative case, especially to denote purpose."

[84] The context in which Navsa ADP (as he then was) used the word might give relevance to the usage of words "supine attitude." During May 2012, DA's attorneys having received certain documents which did not include transcripts of tape recordings which were used as the basis of the withdrawal of the charges against Mr Zuma. At the end of June 2012 DA having not been satisfied with the documents provided and the response to the outstanding information from Jiba, wrote to the State Attorney and recorded:

"5. A copy of the transcript of the recordings ('the transcript") has not been furnished. The transcript itself and any consequent memorandum or report prepared in response thereto, are not covered by the limitation to the production of the record as per the order of the SCA for the following reasons:

5.1 Firstly, the recordings and\or the transcript could not possibly have been given in confidence to the first respondent because he quoted extensively

from these recordings when announcing his decision to discontinue the prosecution of the Third Respondent on 6 April 2009.

5.2 *Secondly, the limitation in the SCA order only relates to 'the written representations made on behalf of the Third Respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching to the representations (the reduced record). The recordings and\or the transcript are neither written, nor oral representation nor memorandum or report prepared in response thereto.*

5.3 *Thirdly, the limitation in the SCA order does not cover memoranda or reports prepared in response to oral representations bur merely in response to the written representations.*

5.4 *Fourthly, to the extent that internal NPA memoranda, report or minutes of meetings deal with the contents of the recordings and\or the transcript itself, as opposed to Third respondent's written or oral representations in respect thereof, they are not covered by the limitation in the SCA's order and should be produced. In other words in the internal debate regarding the effect of what is revealed in the recordings on the decision on whether or not to discontinue the prosecution, is not covered by the limitation to the extent that such debate does not refer to the representations themselves.*

6. *It is inconceivable there are no internal NPA memoranda reports or minutes of meeting dealing with the contents of the recordings and\or the transcript itself. We accordingly call on you to produce these documents, as well as the recordings and the transcripts themselves forthwith, failing which our client will take all the necessary steps to compel compliance with the order of the SCA. Naturally, costs will be sought against your client as well."*

[85] Then in its judgment handed down on 20 August 2014, the SCA stated:

"[15] The exhortation in the last paragraph of the letter, set out at the end of the preceding paragraph yielded no results. It is common cause that during telephone discussions in July 2012 between specific State Attorney and DA's legal representative, the former had indicated that the blame for the delay was attributable to Mr Zuma's attorneys. The NDPP itself adopted a supine attitude."

[86] Jiba in dealing with this criticism has now in these proceedings responded as follows:

"242. As the applicant points out, the Democratic Alliance matter arose from a decision of the then national Director of Public Prosecutions, Mr Mokotedi Mpshe ("Mr Mpshe"), to discontinue the criminal prosecution of President Zuma. The applicant's complaint goes to my response to the directive of the SCA of 20 March 2012. More particularly the applicant's complaint goes to my interpretation of the SCA's directive. I point out that at all times during the Democratic Alliance matter I was again represented by a team of experienced counsel, namely advocates P Kennedy SC and NH Maenetje (whom I am advised has subsequently taken silk) ("the Kennedy team").

243. The SCA directive is set out in paragraph 16.2 of the founding affidavit. As appears from the directive the record of decision (of the former National Director of Public Prosecutions) which I was required to produce, was to "exclude the written representations made on behalf of Mr Zuma and any consequent memorandum or report prepared in response thereto, or oral representations, if the production thereof would breach any confidentiality attaching to the representations".

244. As a result of the tape recordings which were in the process of being transcribed, the directive was not complied with within the stipulated 14 days. As the bulk of the representations, which were to be excluded from the reduced record, concerned the tape recordings, I was concerned that the content of these could potentially breach confidentiality relating to the representations. For that reason, and in order not to fall foul of the SCA directive, the decision was taken, on the advice of senior counsel representing me, to obtain the input of Mr Zuma's legal representatives as to whether there was any objection to the disclosure of the transcript of the tape recordings.

245. The applicant in the Democratic Alliance matter, the Democratic Alliance ("the DA") then brought an application to compel me to produce the record and for an order that I be held in contempt of court, as appears from the decision of Mathopo J, before whom the application was argued, a copy of which is attached hereto, marked "NJ21", the Democratic Alliance matter concerns the interpretation of the SCA's directive.

246. As appears further from paragraph 13 of the decision of Mathopo J, I abided the decision of the Court as regards the production of the transcripts. Although the Judge held that the proper construction of the SCA order confidentiality did not extend to the transcript (at paragraph 27), the court agreed that affording Mr Zuma an opportunity to raise his concerns was in line with the SCA order, and I was therefore not found to be in contempt of court (at paragraph 50).

247. *I draw to this Honourable Court's attention that at paragraph 32 of decision of Mathopo J, the learned Judge criticised me for adopting a neutral position with regard to the transcripts.*

248. *On appeal, (at the instance of Mr Zuma) the SCA similarly criticised me for adopting what is referred to as 'a supine attitude" to its directive. Indeed this is the basis of the applicant's complaint against me in this application. ...*

249. *I accept that the SCA has criticised me for not taking an "independent view" about confidentiality. I respectfully submit that this was a result of adopting a cautious approach, in order to ensure that I did not unwittingly infringe on the rights of either of the parties in the Democratic Alliance matter. I respectfully submit that this does not amount to conduct that this is less than objective, honest and sincere and does not render me not 'fit and proper to practice as an advocate."*

[87] Indeed the interpretation of the order of the SCA, the relevant part of which is quoted in paragraph 74 of this judgment, did not appear to have been an easy exercise. Its correct interpretation appears to have prompted the DA to widen and clarify it, so did Mathopo J and the SCA as per Navsa ADP. I say so for the following reasons:

87.1 DA in its application before Mathopo J sought relief in addition, as paraphrased in paragraph 77 supra and by so doing sought to widen and clarify SCA 's directive of 20 March 2012.

87.2 Mathopo J also had to deal with DA's application for contempt of court, and in finding that no case has been made for contempt of court against Jiba, in paragraph 50 of his judgment, stated:

"[50] The submissions advanced on behalf of the first respondent is that the delay if any, was occasioned by the third respondent's legal representative in considering whether to object to the transcript or not. Thus no fault could be attributed to the State attorney or first respondent because in terms of the SCA's order, the first respondent was obliged to afford the third respondent, an opportunity to indicate whether he has any objection or not. I agree with first respondent that affording the third respondent an opportunity to raise his concerns was in line with the SCA's order. This conduct in my view cannot be regarded as deliberate or wilful non-compliance with the order, it follows that the contempt of court application must be dismissed".
(My emphasis).

[88] The finding by Mathopo J as indicated above seems to be in line with what was stated in the Democratic Alliance v The Acting National Director of Public Prosecutions and Others[26] wherein it was said:

> *"[33] There was a debate before us about what the value would be to the reviewing court of a reduced record, namely, a record without Mr Zuma's representations. Concern was also expressed on behalf of Mr Zuma that there might be material in the record of decision which might adversely affect his rights and to which he might rightly object. The concern was met by an undertaking on behalf of the first respondent that, in the event of this court altering the decision of the court below, so as to order the production of the record of the decision sought to be reviewed, the NDPP 's office would inform Mr Zuma of its contents. Questions involving the extent of the record of the decision and its value to the court hearing the review application are speculative and premature. In the event of the order compelling production of record, the office of NDPP will be obliged to make available whatever was before Mr Mpshe when he made the decision to discontinue the prosecution. It will then fall to the reviewing court to assess its value in answering the questions posed in the review application. If the reduced record provides an incomplete picture it might well have the effect of the NDPP being at risk of not being able to justify the decision. This might be result of Mr Zuma's decision not to waive the confidentiality of the representations made by him. On the other hand, a reduced record might redound to the benefit of the NDPP and Mr Zuma".*

[89] That being the understanding of Mathopo J and undertaking given in the SCA as quoted in paragraphs 82.2 and 88 of this judgment respectively, the interpretation of the order of 20 March 2012 by the SCA has context as understood by Jiba and articulated in her answering affidavit quoted in paragraph 86 above.

[90] The additional order of the SCA quoted in paragraph 79 of this judgment, in my view, indicates how difficult it was to implement the order of 20 May 2012 without clarification and additions. Seeing this in context, Mathopo J was perhaps right in his conclusion in paragraph 50 of his judgment which conclusion has not been challenged or questioned.

[91] "Supine attitude" must therefore be seen in the context of the preceding paragraphs. Failure by Jiba not to respond to the articulation in the letter of 6 June 2012 from DA attorneys referred to in paragraph 84 of this judgment seems to have been dictated by two things: First, the delay by Mr Zuma's attorneys, an explanation which

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[26] 2012(3) SA 486 (SCA) at para 33

was accepted by Mathopo J as indicated in paragraph [50] of his judgment. Second, by Jiba's understanding of paragraph 2 of the order of 20 March 2012 which understanding was also shared by Mathopo J. The real question ultimately is whether her conduct was of such a nature that she had ceased to be a fit and proper person to remain on a roll of advocates. In the absence of mala fides and or ulterior motive on her part, I am unable to find against her on the "Supine attitude" complaint. I now turn to deal with other remarks made against her in the Spy tapes case.

Metaphorical shrugging of shoulders

[92] The word "shrugging" is described in the Oxford dictionary as 'raising one's shoulders slightly and momentarily to express doubt, ignorance, or indifference'. The context in which Navsa ADP used the words is important. I can do no better than giving the context by quoting what was said in paragraph 17 of the SCA judgment handed down on 28 August 2014:

"[17] The basis of the application, as foreshadowed in the letter from the DA's attorneys as set out above, was that in terms of the order in the first appeal, a copy of the transcript of the recordings ought to have been furnished and that the recordings could not possibly have been provided to the ANDPP confidentially, as that office quoted publicly and extensively from the recordings when announcing the decision to discontinue the prosecution of Mr Zuma. Furthermore, it was contended that the SCA order envisaged an embargo only on written representations made on behalf of Mr Zuma and any subsequent memorandum or report in relation thereto, if the production thereof would breach any confidentiality attaching to the representations. The recordings and/or transcripts, it was submitted, were neither written nor oral representations nor a memorandum or report related to the representations. In addition, it was asserted that memoranda or reports relating to internal debate within the office of the NDPP concerning the recordings were not covered by any limitation envisaged in the order in the first appeal. The DA was adamant that internal memoranda, reports or minutes of meetings addressing the transcripts must exist and are susceptible to disclosure. In the founding affidavit on behalf of the DA the following appears:

> *'The notion of an accused making representations to the First Respondent "in confidence", which representations then lead to the discontinuation of a prosecution, is already absurd. For the time being, the Applicant has elected to live with that absurdity. But the Applicant cannot accept and will not allow the NDPP to conceal the foundation of the decision, i.e. the recordings and the internal debate regarding them."*

[93] Then in paragraph 18, Navsa ADP mentioned the 'metaphorical shrugging of shoulders" as follows:

"It is important to note that the ANDPP's answering affidavit does not adopt a position in relation to the confidentiality of the tapes or transcripts. It resorts to a metaphorical shrugging of the shoulders, and places the reason for its non-compliance with the order of this court in the first appeal at the door of Mr Zuma's legal representatives, submitting that the present dispute was due to them not being timeously forthcoming with a final position on the disclosure of the tapes or the transcripts. The NDPP's office assumes the position that the lack of consent to the release of the tapes or transcripts was sufficient to forestall compliance with the order in the first appeal."

[94] What is quoted in paragraph 86 as a response to the criticism levelled against Jiba, in my view, serves also as a response to the "metaphorical shrugging of shoulders." The delay or forestalling of compliance with the SCA order of the 20 March 2012 should similarly be seen in the context of what I said with regards to the "supine attitude", particularly now seen in the light of Jiba's responses as quoted in paragraph 86 above. What Mathopo J said in paragraph 50 of his judgment is equally important. The explanation for the delay was accepted, but even most importantly, it was also the understanding of Mathopo J that in terms of the SCA order of 20 March 2012, Mr Zuma or his attorneys were to be contacted before making the tapes and the transcript available to DA. The submission made on behalf of Mr Zuma as articulated in the SCA judgment of 28 August 2014 in my view, is also relevant to Jiba's reason for taking the position as she did. Navsa ADP referred to the submission in his judgment as follows:

"In the high court, even though Mr Zuma had not filed an answering affidavit, counsel on his behalf submited that confidentiality, as envisaged in this court's order in the first appeal, extended to everything comprising representations made on Mr Zuma's behalf. It was contended that since the office of the NDPP did not itself take steps to obtain the recordings, but accessed them through the efforts of Mr Zuma, separating them from the representation would be illogical and irrational"[27].

94.1 It could not have been easy for Jiba to deal with the issue of confidentiality seen in the light of stance articulated by Mr Zuma's attorneys. Considering Jiba's responses in these proceedings to the adverse remarks made against her, I am unable to find that her stance to abide by the decision of the court in the proceedings before Mathopo J was "metaphorical shrugging of shoulders" and neither can I find mala fides on her part or

[27] 2014(4) ALL SA 35 SCA at para 22

that she was motivated by ulterior motive. I now turn to deal with the other complaints levelled against Jiba.

'Disingenuous, not worthy of office of NDPP, less objective and loath to take independent view'

[95] The words are randomly taken from the judgment of the SCA wherein Navsa ADP inter alia, stated:

> *"[41] One remaining aspect requires to be addressed, albeit briefly. As recently as April this year, this court in the 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 NDPP, Ms Jiba, provided an opposing affidavit in tenderised 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 institution such as 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 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 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 citizenry of this country".*

[96] Whilst these remarks were made in passing, but considered together with what was stated in paragraph 93 above, they serve as an indictment on Jiba. However, the criticism must be seen in the context of what has already been said in the preceding paragraphs. Again, the responses to the criticisms require this court to reconsider the remarks and in particular whether Jiba has ceased to be a fit and proper person to remain on a roll of advocates. 'Freedom Under Law' referred to in the quotation above in reference to Mdluli case and I deal later hereunder with the conduct of Jiba, Mrwebi and Mzinyathi in that case.

[97] As regards the hearsay information and failure to file confirmatory affidavit, Jiba of relevance, explains in paragraph 248 of her answering affidavit to the present proceedings as follows:

> *"...Navsa JA also criticised me, at paragraph 26 of his judgment, for referring to what I had been told by her Mpshe and not filing a confirmatory affidavit by him. With respect, a confirmatory affidavit was indeed filed by Mr Mpshe, and I attach a copy of it hereto marked "NJZ2". Although I cannot find a copy with a date stamp, it will be observed that this affidavit was signed by Mpshe and commissioned by Warrant officer Seleka in Sinoville Police Station on 3 April 2013, which was three months before the hearing of the matter before Mathopo J on 24 July 2013. It seems that this must have erroneously been omitted from the record of appeal to the SCA. I have no explanation for why this was the case as I took no part in the appeal nor was I responsible for the filing of the documents."*

[98] I have already dealt with failure to take an independent view on confidentiality in the face of the order of the SCA. Jiba, DA and Mathopo J in my view, sought to interpret the order of 20 March 2012. I am unable to find that Jiba's failure to take an independent view with the benefit of her responses in these proceedings can be seen as unworthy conduct to justify removal from the roll of advocates or suspension therefrom.

[99] By the time the matter was heard before Mathopo J, Mr Zuma's attorneys had already indicated what Mr Zuma's stance was, which is more accurately stated by Navsa ADP in paragraph 22 of his judgment quoted in paragraph 94 above. His failure to put Mr Zuma's attorneys on terms should also be seen in context, more so Jiba's replies to the complaint levelled against her in this regard. As she says, she did not want to 'fall foul of the SCA directive' and 'the decision was taken on the advice of a senior counsel' representing her, 'to obtain the input of Mr Zuma's legal representatives as to whether there was any objection to the disclosure of the transcript of the tapes recordings'.[28] I therefore find that no case has been established with regard to the Spy tapes matter. But that cannot be said with regard to Mdluli case (Freedom Under Law case) to which I now turn to consider.

MDLULI CASE (FUL)

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[28] See the quotation in paragraph 85above (in particular 244 of answering affidavit).

[100] Freedom Under Law (FUL) instituted review proceedings against the National Director of Public Prosecutions and others in terms of which FUL wanted the court (as per Murphy J) to review and set aside, inter alia, a decision of Mrwebi to discontinue the prosecution of Lt General Richard Mdluli (Mdluli) on corruption and fraud charges.

[101] Who is Mr Richard Mdluli? He was adequately profiled by Brand JA in his judgment handed down on 17 April 2014[29]. I can do no better than to paraphrase what was articulated by Brand JA: From about 1996 until 1998 one Mr Tefo Ramogibe (the deceased) and Mdluli were both involved in a relationship with Ms Tshidi Buthelezi (Buthelezi). The deceased and Buthelezi were secretly married during 1998. Mdluli was upset about this and addressed the issue on numerous occasions with Buthelezi, the deceased and members of their respective families. At that time Mdluli held the rank of senior superintendent and the position of the detective branch commander at the Vosloorus police station. Since 1 July 2009 Mdluli held the position of National Divisional Commissioner in the Police Services (SAPS), a position also described as head of Crime Intelligence Unit and at that time he assumed the rank of Lieutenant General.

[102] On 31 March 2011 Mdluli was arrested and charged with 18 criminal charges including the murder of the deceased. Many of these charges rested on allegations by relatives and friends of the deceased, Buthelezi and other persons associated with Mdluli including policemen under his command. The further allegations were that Mdluli brought pressure to bear upon these people through violence, assaults, threats and kidnapping and in one instance rape, with the view to compelling their co-operation in securing the termination of the relationship between the deceased and Buthelezi. On one occasion, Mdluli had allegedly taken the mother of the deceased to the Vooslorus police station where she found the deceased injured and bleeding. In the presence of the deceased's mother, Mdluli warned the deceased to stay away from Buthelezi. The deceased was killed few days thereafter: It is important to mention that the murder and other charges never proceeded to trial. Much of the original docket and certain exhibits were lost or disappeared. Information about discontinued investigation resurfaced after Mdluli was appointed the head of Crime Intelligence in 2009.

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[29] National Director of Public prosecutions and other V freedom Under Law 2014 (4) SA 298 SCA

[103] On 8 May 2011 Mdluli was suspended from office and disciplinary proceedings were instituted against him. After Mdluli's arrest and his suspension from office some members of crime Intelligence Unit came forward with information concerning alleged crimes committed by some of its members, including Mdluli. As a result of further information, instruction was given to investigate those allegations. Upon investigations, warrant for Mdluli's arrest on charges of fraud and corruption was authorised and executed on 20 September 2011.

[104] Fraud and corruption charges emanated from the alleged unlawful utilisation of funds held in the Secret Services account created in terms of the Secret Services Act no. 56 of 1978 for the private benefit of Mdluli and his wife. It was alleged that one of Mdluli's subordinates purchased two motor vehicles ostensibly for use by the Secret Services but structured the transactions in such a manner that a discount of R90 000.00 that should have been credited to the Secret Services account was utilised for Mdluli's benefit. Further allegations were that the two motor vehicles were registered in the name of Mdluli's wife and appropriated and used by the two of them exclusively.

[105] On 3 November 2011 Mdluli wrote a letter to the President of the Republic of South Africa, Honourable Mr Jacob Zuma, the Minister of Safety and Security and to the Commissioner of Police stating that the charges against him were the result of conspiracy among senior officers including the then Commissioner of Police, General Bheki Cele who suspended Mdluli and head of the Hawks, General Anwar Dramat. In the letter it was further stated by Mdluli:

> *"…In the event that I come back to work, I will assist the President to succeed next year."*

[106] "Next year", was reference to African National Congress (ANC) elective conference in Mangaung which was to take place towards the end of 2012. The allegations of conspiracy led to the appointment by the Minister of Safety and Security of a task team which later reported that there was no evidence of a conspiracy and that the police officers who had accused Mdluli of criminal conduct had not acted in bad faith. On 17 November 2011 Mdluli's legal representatives made representations to Mrwebi in his capacity as Special Director of Public Prosecutions and Head of Investigating Directorate, seeking the withdrawal of the fraud and corruption charges. The representations repeated what was said to President Zuma and others regarding conspiracy theory. The representations were also made with reference to the murder

and other related charges to Advocate KMA Chauke (Chauke), the DPP South Gauteng for the withdrawal of those charges. The fraud and corruption charges were withdrawn in a letter dated 4 December 2011, although it was contended by Mrwebi that the decision was actually taken on 5 December 2011. On 1 February 2012 Chauke decided to withdraw the murder and related charges. These decisions formed the subject of a dispute before Murphy J in the North Gauteng High Court in review proceedings brought by FUL.

[107] I found it necessary to give this lengthy back-ground about Mdluli in order to show the kind of personality, Jiba and Mrewbi in particular, had to deal with. Jiba, Mrewbi and Mzinyathi are respondents in the present proceedings all of them implicated in Mdluli case, complaints of which serve as the basis for GCB's application to remove them from a roll of advocates, the contention being that they have ceased to be fit and proper persons. I deal with the complaints against each one of them hereunder and in some respects those against Jiba overlapping with some of the complaints levelled against Mrwebi.

Complaints against Jiba in Mdluli case

[108] Allegations against Jiba in Mdluli case are in my view, correctly categorised in her answering affidavit to the present proceedings as follows:

108.1 That she did not file a full and complete rule 53 record notwithstanding an order compelling her to do so.

108.2 That she did not file an answering affidavit by the due date and had to be directed to do so by the Deputy Judge President and in addition that she did not file written heads of argument timeously;

108.3 That her reasons for the various delays were sparse and unconvincing;

108.4 That her conduct in particular is unbecoming a person of such high rank in the public service.

108.5 That she did not disclose to the court that on 13 April 2012, she had received a 24 page memoranda from Adv. Breytenbach and that she deliberately attempted to mislead the court.

108.6 That she did not make a full and frank disclosure in order to refute, explain or ameliorate serious allegations made against her.

108.7 That the SCA had also criticised her conduct.

[109] In dealing with the case against Jiba, I will pick up on each complaint made against her insofar as is material, her responses thereto and evaluation of the evidence on each of the complaints so considered material. I will do so without necessarily following the sequence of the complaints identified in paragraphs 108.1 to 108.7 above.

Failure to file record of decision timeously

[110] In paragraph [73] of this judgment I referred to the provisions of sub-rule (1) of Rule 53. Because of the importance of the provisions of Rule 53 to the topic under discussion, I find it necessary to repeat the rest of the provisions in their entirety:

> *"(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.*
>
> *(3) The registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.*
>
> *(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.*
>
> *(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he*

shall- (a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office of the registrar at which he will accept notice and service of all process in such proceedings; and (b) within thirty days after the expiry of the time referred to in sub-rule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.

(7) The provisions of rule 6 as to set down of applications shall mutatis mutandis apply to the set down of review proceedings."

[111] "The record despatched to him" in sub-rule (3) above is reference to the record contemplated in sub-rule (1) (b) quoted in paragraph [73] of this judgment. The objective of rule 53 is obvious. The time frames are to ensure that review proceedings are not unnecessarily delayed. Secondly, despatching to the Registrar the record of the proceedings sought to be corrected or set aside, together with such reasons as the decision maker is by law required to give, and notifying the applicant that this has been done and making such record available to the applicant, is to ensure that a party aggrieved by the decision is properly informed as to the route to follow. The rule serves as a tool to ensure that any challenge to the proceedings sought to be reviewed is well considered and properly pleaded. For this purpose, the applicant or aggrieved party is under Sub-rule (4) given an opportunity by delivery of a notice and accompanying affidavit, to amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit if need be. Similarly, the decision maker is in terms of Sub rule (5) (b) given the opportunity to deliver any affidavit he or she may desire in an answer to allegations made therein and any further reasons as contemplated in sub-rule (1) (b).

[112] Therefore compliance with Rule 53 regarding time frames and providing complete record, is not just a procedural process, but is substantive requirement which serves to ensure that the substance of the decision is properly put to the fore at an early stage. Any attempt to frustrate this, should be met with displeasure by our courts.

[113] On 15 May 2012 Jiba was served with court papers in the application brought by FUL and 6 June 2012 was the date on which Jiba and Mrwebi were to despatch to the registrar the record of the decision and to advise FUL that they have done so. Instead,

and without complying with the time frames, they briefed and consulted with Motimele SC and his team for the first time on 11 June 2012.

[114] Reasons for the delay is sought to be explained in paragraph 86 to 90 of Jiba's answering affidavit in these proceedings and are paraphrased as follows:

114.1 Motimele SC was briefed, inter alia, to advise on the interpretation of Rule 53 and the record of the decision as contemplated in Rule 53. The record of the decision was then allegedly prepared on the advice of Motimele SC. In paragraph 86 of the answering affidavit to these proceedings, Jiba inter alia, states:

"...It is important to note that no decision by me personally in my official capacity as an Acting NDPP was to be reviewed. My citation insofar as these decisions are concerned is, in my view, in official capacity as acting head of the NPA and not because I had made any decision."

114.1.1 I find the statement a bit startling, especially taking into account who is Jiba: She was appointed as Acting National Director of Public Prosecutions on 28 December 2011. Before that, she had gone through the ranks in the legal fraternity and within the prosecuting authority. In addition, she has a good academic record. In 1987 she completed Bluris degree, followed by LLB in 1989 obtained at Walter Sizulu University (then known as University of Transkei). In 1994 she obtained an industrial diploma from Damelin College. In 1996 she graduated with an LLM degree in commercial law. Her work professional career started in1988 in Peddie in the Eastern Cape where she was employed and worked as a prosecutor in a magistrate's court. In 1997 she resigned from the public service and commenced articles of clerkship with attorneys Qunta Ntsebeza in Cape Town. In 1998 she qualified as an attorney. In 1999 she moved to Pretoria to work at an accounting firm, Deloitte and Touche as a senior forensic consultant. Later that year, she joined the Investigating Directorate for Serious Economic Offences (IDSEO) in Pretoria as a senior state advocate. In 2001 the IDSEO was disbanded and the

Directorate for Directorate of Special Operations ("DSO") within the NPA was established. Later in 2001 she was appointed as a Deputy Director of Public Prosecutions. In 2006 she was appointed senior Deputy Director of Public Persecutions. She was then relocated to the specialised commercial crimes court in Pretoria in 2009. On 22 December 2010 she was then appointed to the position of a Deputy National Director of Public Prosecutions and then followed by her acting stint as a National Director of Public Prosecutions from December 2011.

114.1.2 So, she is clearly an astute lawyer who must know that as an Acting National Director of Public Prosecutions at all material times thereto, the buck had to stop with her and it was in that capacity that FUL cited and served her with the review proceedings. The Act is very clear:

> *'Subject to the provisions of the Constitution and NPA Act, any director shall subject to the control and the directions of the National Director, exercise the powers referred to in subsection s(1) in respect of-*
>
> *(a) the area of jurisdiction for which he or she has been appointed; and*
>
> *(b) such offences and in such courts, as he or she has been authorised in writing by the National Director or a person designated by the National Director*[30].

114.1.3 Powers referred to in subsection (1) are powers as contemplated in section 179 (2) of the Constitution and all other relevant sections of the Constitution to inter alia, discontinue criminal proceedings. Therefore, the statement: *"... no decision by me personally in my official capacity as an acting ANPP was to be reviewed'*, insomuch as it was intended to serve as an execuse for not providing the record of decision in accordance with the time periods set out in

[30] Section 21(3) of the Act

rule 53, is clearly not good enough and Jiba knew or ought to have known about this. Her failure to ensure that there was compliance was therefore not only unwarranted, but was, in my view, also deliberate and or reckless. She has a vast experience to know where her responsibility in the shoes of National Director of Public Prosecutions lies, otherwise she would not have been appointed to act in that position.

114.2 In paragraph 87 of her answering affidavit to these proceedings, she inter alia, states:

"It is also important to point out that the advice on what should be contained in the record was given and accepted at a time when the reviewability of prosecutorial decisions to prosecute or not to prosecute was still largely uncertain and had not been pronounced upon definitively by the court..."

114.2.1 Just starting with the latter statement regarding *'uncertain and had not been pronounced upon definitively by the court...'* regarding the reviewability of prosecutorial decisions, one is forced to refer to what was articulated in our case law before the challenged decisions of Mrwebi and Chauke to drop charges against Mdluli were taken. On 20 March 2012 in the case of Democratic Alliance v The Acting National Director of Public Prosecutions[31], of relevance, it was held:

"[27] Whilst there appears to be justification for the contention that the decision to discontinue a prosecution is of the same genus as a decision to institute or continue a prosecution, which is excluded from the definition of administrative action in terms of Section 1 of (ff) of PAJA, it is not necessary to finally decide that question. Before us it was conceded on behalf of the first and third respondents that the decision to discontinue a prosecution was subject to rule of law. That concession in my view was rightly made. As recently as 1 December 2011, in Democratic Alliance v President of the Republic of South

[31] Democratic Alliance v The Acting National Director of Public Prosecutions (288/11) [2012] ZASCA (20 March 2012); 2012 (3) SA 486 SCA.

Africa and Others 2012(1) SA 417 (SCA) this court noticed that the office of the NDPP was integral to the rule of law and to our success as democracy. In that case, this court stated emphatically that the exercise of public power, even if it does not constitute administrative action, must comply with the constitution. The Constitutional Court has respectively emphasised this point."

114.2.2 Now, in Mdluli case, FUL pleaded its cause of action on the basis that the withdrawal of the charges against or discontinuance of the prosecution of Mdluli was an exercise of public power to be performed in accordance with the rule of law and the supreme law of the land (the Constitution). The challenge by FUL was that the withdrawal of the fraud and corruption charges against Mdluli in the face of prima facie case was in conflict with the rule of law and the Constitution based on the facts briefly stated in paragraph 104 of this judgment.

114.2.3 Jiba was the Acting Director of Public Prosecutions when the judgment quoted in part in paragraph 114.2.1 above was handed down on 20 March 2012. She was therefore fully aware of what was stated therein or ought to have known, in particular the concession that whatever the prosecution authority does, must comply with the rule of law and the Constitution. So, for her to allege that when she deposed to her answering affidavit in Mdluli case on 2 July 2013, she moved from the premise that the decisions of Mrwebi and Chauke were not reviewable, could not have been made in good faith seen in the context of the concession made as repeated in the quotation referred to in paragraph 114.2.1 above and the pleaded cause of the review of the decision of Mrwebi. Therefore the delay and reasons for not providing the record of the decision was completely unjustified and deliberate.

114.2.4. I can do no better than repeating, at the risk of prolonging this judgment, what Navsa JA said in his judgment handed down on 20 March 2012:

> *"[32] The office of the NDPP exercises public power and is subject to the constraints set out in the authorities referred to above. Having made the concession that the decision to discontinue the prosecution was subject to a rule of law review, it was nevertheless submitted on behalf of the first and third respondent that such a review would be a narrow one, on limited grounds. In light of primary concession made on behalf of the respondents, it is for present purposes not necessary to debate the extent to which a decision to discontinue a prosecution is reviewable…" (My emphasis).*

114.2.5 "*On limited grounds*", should for the present purposes be seen in the context of the pleaded failure to comply with the rule of law and the Constitution by withdrawing corruption and fraud the charges against Mdluli in the face of prima facie evidence.

114.2.6 Now coming back to the other part of the quotation in paragraph 114.2 above, Jiba did not need an '*advice on what should be contained in the record.*' She knew or ought to have known and briefed fully on why Mrwebi took the decision to discontinue the fraud and corruption charges against Mdluli. She knew or ought to have known what evidence and documentation Mrwebi relied upon for the decision, for example, what was contained in the docket. So, it was incumbent on Jiba and Mwerbi to advise whoever they had briefed on the matter of the reasons for the decision to discontinue fraud and corruption charges against Mdluli and if they had done so, they would not have speculated or be uncertain about which documents and or information was necessary to form part of the record. In any event, Rule 53 is very clear. The decision maker is required to provide the aggrieved party via the Registrar the record of decision or proceedings sought to be corrected or set aside together with such reasons as he or she is by law required or desire to give or make as contemplated in sub-rule (1) (b). If Jiba was worried about confidentiality, for example, representations by

Mdluli, she could have resorted to and dealt with the matter by way of an undertaking postulated in the matter of Democratic Alliance v Zuma and Others, the relevant portion of which the SCA in dealing with the topic: "*Production of Record*" stated as quoted in paragraph [88] of this judgment.

114.2.6 It cannot be difficult for any decision maker to know the reasons, information and or documentation relied upon for any challenged decision under rule 53. For this, Jiba and or Mwerbi's suggestion that the advice given to them about the record of the decision was the reason for the delay in complying with the provisions of Rule 53, has no legal basis. The delay was their own making and was completely unreasonable, unwarranted and viewed in context, signified bad faith on the part of Jiba and Mrwebi, bearing in mind that court papers in Mdluli case were served on them on 15 May 2012, that is, two months after the SCA handed down its judgment on 20 March 20012 in DA case against Mr Zuma.

Failure to provide complete record

[115] The complaint is raised in GCB founding affidavit as follows:

"8.13 Rule 53 was not complied with. The "record" filed in the murder and related charges case comprised a copy of the charge sheet and three letters compiled with a two page document entitled "Reasons for decision". The "record" filed in the case of theft and corruption charges comprised a copy of the charge sheet, three internal memoranda, a fax and two letters together with a document entitled 'brief reasons for the withdrawal of charges preferred against, LTG Mdluli and another dated 5 July 2012, comprising13 pages.

8.14 As a result of the respondent's failure to file a proper record, FUL brought an application in terms of Rule 30 A in order to compel them to do so. Such an order was granted by Prinsloo J on 3 August 2012... The order was not complied with."

[116] Jiba in paragraph 87 of her answering affidavit in these proceedings seems to attribute the incomplete record on account of protection of *'the identity of informers and other privileged information, which an accused person is ordinarily not entitled to have sight of in criminal proceedings and that such documents fall outside of "PART A" of the docket that an accused person is entitled to have access to. In addition, there was uncertainty as to whether in the situation of a decision to withdraw charges, representations made by the accused (as had been received from Mdluli) should form part of a rule 53 record."*

[117] I should be worried about Jiba's generalisation instead of being specific and helpful. Starting with Mdluli representations, Jiba is not saying Mdluli claimed confidentiality in his representations for the withdrawal of the charges against him. If Jiba was unclear about Mdluli's stance on his representations, the least she could have done was to establish from Mdluli if his representations could be provided as part of the record of the decision in terms of rule 53. Complete record of the decision and subsequent reasons for the decision if any, may discourage the aggrieved party to pursue a challenge to any decision taken by a public body.

[118] What is referred to as Part A of the docket, would ordinarily be instructions by the prosecuting team and memoranda if any in the investigation process. That may not necessarily constitute evidence admissible in a court of law and may not form the basis to determine the presence or absence of prima facie evidence. Jiba because of her generalisation and avoidance is unhelpful in this regard. For example, which "privileged information" is he talking about? It is not consistent with an officer of the court whose main concern should be to assist the court in arriving at a just decision. The identity of the informers, and other privileged information as alleged in paragraph 87 of Jiba's answering affidavit, should in any event be seen in context. The information that led to the corruption and the fraud charges been preferred against Mdluli did not come from the informers, but rather from fellow colleagues of Mdluli. That being so; and taking into account the general nature of Jiba's attempt to deal with the complaint against her, something which is not different from what she said previously, caused adverse remarks to be made. Murphy J referred to it as "sparse", but despite these remarks, Jiba did not find it necessary to take the court into her confidence and deal with the allegations in some more details given the opportunity to do so in the present proceedings. Clearly the points taken by Jiba in this regard had no merit from the start. For this, she must be found to have acted contrary to the oath she took when she was admitted as an

advocate and in a way flouted the rules of game of the high position she holds and or held in the prosecuting authority at all material times hereto.

Failure to comply with the directive by Deputy Judge President

[119] On 8 October 2012 FUL delivered supplementary affidavit in terms of rule 53 (4) and on 14 March 2013 it filed a further supplementary affidavit. By that time, no single answering affidavit was delivered. As a result, on 3 June 2013 FUL's attorneys wrote to the Deputy Judge President Ledwaba to arrange a date for the hearing of the application. On 5 June 2013 a directive was issued directing Jiba and Mrewbi to file answering affidavit by not later than 24 June 2013. On 7June 2013 the state attorney Mr JE Ngoetjana who was handling FUL case on behalf of Jiba and Mrwebi was removed from the case and Mothimele SC, Notshe SC and Adv S Phaswane who had been on brief all along were then withdrawn from the case. This was after Ledwaba DJP had given directive on 5 June 2013 to file answering affidavit by Monday 24 June 2013.

[120] According to Jiba, on 18 June 2013, that is, eleven days after the mandate of Motimele SC was terminated and 15 days after DJP Ledwaba had given directive to file answering affidavits by the 24 June 2013, Motau SC team was briefed to replace Motimele team. He was instructed to draft answering affidavit, an application for condonation, consult with Jiba and her team, to prepare heads of argument and argue the matter. On Friday 21 June 2013 Motau SC team sent a draft answering affidavit to be considered and deposed to by Jiba after consultation. Jiba and Mrwebi were also requested to return the draft affidavit and comments if any by mid-morning on Sunday 23 June 2013. The request and the deadline set by the Deputy Judge President were not adhered to, neither was the request by Motau SC team. Instead, on 25 June 2013, a day after the expiry of the deadline set by the Deputy Judge President for the filing of the answering affidavit and two days after Motau SC's request was not met, Motau SC received an email to which two draft affidavits by Jiba and Mrwebi were attached. This was contrary to the one answering affidavit which was proposed by Motau SC to be deposed to by Jiba as the head of the prosecuting authority at the time and presumably with confirmatory affidavit/s to be made by Mrwebi and those who might have been referred to in the answering affidavit.

COMMISSION OF INQUIRY
INTO STATE CAPTURE

[121] Jiba in paragraph 79.2 of her answering affidavit in these proceedings correctly set out one of the complaints levelled against her by GCB as follows:

> *"79.2 That I did not file answering affidavit by the deadline directed by the Deputy Judge President"*

[122] One would have expected that she will offer an explanation. However, that was not to be. The complaint is sufficiently set out in paragraph 8.19 of the founding affidavit in these proceedings to which the answer is offered by Jiba as follows:

> *"AD paragraph 8.19*
>
> *155. Save to deny that the draft answering affidavit prepared by Motau SC team was sent to me on 21 June 2013, and that the email of the 25 June 2013 (annexure "GCBB") came from my office I admit the remainder of the content of this paragraph. The reasons why two separate affidavits were prepared and why the LAD did not agree with the approach of the Motau SC team that I should be the main deponent to the answering affidavit, is dealt with above."*

[123] The quotation above was preceded by the following statement in paragraph 101 of Jiba's answering affidavit in the present proceedings:

> *"...Indeed as stated by the applicant in paragraph 8.19, the Motau SC team prepared a draft answering affidavit prior to any consultation with representatives from NPA. I deny however that this draft was sent to me personally. As appears from annexure "GCB12" this email was not sent to me. I further deny that the email dated 25 June 2013 (i.e annexure "GCB13") was sent from my office. It was in fact sent on my behalf by Adv Chita from the LAD."*

[124] Jiba cannot escape the criticism by seeking to attribute the blame to LAD and the emails not having been sent to her personally. The context is this:

124.1 The directive which was given on the 5 June 2013 to file answering affidavit by 24 June 2013 was followed by a meeting on 7 June 2013 between Jiba, her team and acting deputy state attorney Mr Chouw and Mr Tshivase. Then in paragraph 97 of the answering affidavit in the present proceedings, Jiba states:

> *"After discussion we agreed that since the legal team for the NPA had failed to file the answering affidavit within time periods required by the rules, their mandate should be terminated and they should be replaced".*

124.1.1 'The legal team for the NPA,' she is referring to Motimele team. So, Jiba knew at least by 7 June 2012 about the directive given by the Deputy Judge President. From that date onwards, she had a flickering red light pointing towards the deadline of the 24 June 2013 set by the Deputy Judge President. But, she did nothing until on18 June 2013 when Motau SC was briefed. In the present proceedings she does not explain what has happened between 5 and 18 June 2013.

124.1.2 Insofar as she might have wanted to blame LAD, she was mistaken, because the final responsibility rested on her, and she had a duty to ensure that the flickering of red light did not to go beyond 24 June 2013. That however, did not worry Jiba as it would appear later hereunder. As explained by Jiba, the Legal Affairs Division ('LAD') is a division within the NPA tasked with handling of all matters pertaining to the civil litigation involving the NPA. It is headed by a Deputy National Director of Public Prosecutions who at all relevant times hereto was Adv. Nomvula Mokhatla and was assisted *inter alia, by* Deputy Directors, Senior State Advocates and Senior Prosecutors. When court papers against the NPA are received, they are referred to LAD and the Deputy National Director heading LAD. Thereafter, they are referred to a member of their team who would then prepare a memorandum on steps to be taken and that would then be discussed with the Deputy National Director. A consultation will then be arranged to brief and advise the National Director and for the present proceedings (Jiba) who was the Acting National Director at the time. It will then be decided how LAD intends to handle the matter and thereafter the state attorney will be briefed. (My emphasis).

124.2 Jiba did not seem to be worried by the flickering of the red light. Despite the request to return the draft answering affidavit by Sunday morning of 23

June 2013, with such comments as Jiba and Mr Mrwebi might wish to make, the request was not heeded to. The fact that an email of 21 June 2013 to which the draft affidavit was attached, was not sent to Jiba personally, is not an excuse. It should be concluded from the email of the 26 June 2013 sent by Motau SC to the State Attorney that Jiba knew or ought to have known of the contents of the email of 21 June 2013 before 24 June 2013:

124.2.1 The following is recorded by Motau SC in the email of 26 June 2013:

> *"A draft was produced and circulated on Friday with a request that comments, if any, be sent to us by mid-morning of Sunday, 23rd of June 2013. The requested comments were not received as stipulated. We received an email to the effect that an affidavit be prepared in the name of Adv. Mrwebi, which we advised has been incorrect. This despite, we note that the same outcome is sought to be achieved by dividing the affidavits as proposed".*

124.2.2 The latter statement quoted above was prompted by an email of 25 June 2013 to Motau SC from the state attorney in which it was recorded: *"Please find the draft amended affidavit for your attention. We have separated the affidavit of Jiba from that of Adv. Mrwebi".*

124.2.3 Clearly, the statement, *"we have received an email to the effect that an affidavit be prepared in the name of Adv Mrwebi, which we have advised has been incorrect"*; is reference to a stand-alone email before the email of 25 June 2013 to which 'separated affidavits of Adv. Jiba from that of Adv. Mrwebi' were attached. Jiba must have indicated before 25 June 2013 or per the email of 25 June 2013 that she did not want to depose to any affidavit. Most importantly, she must have known of the request by Motau SC to comment on the draft answering affidavit and to have it returned by not later than Sunday 23 June 2013.

124.2.4 It is actually worrying that an officer of the court, who occupied and continues to occupy a very important high profile public office within the prosecuting authority by virtue of being an admitted advocate, would adopt that kind of an attitude. Wishing to wash her hands at every given opportunity prevailing has a bearing on her fitness to remain on a roll of advocates. What is even more worrying is Jiba's failure to deal with the statement by Motau SC as quoted in paragraph 124.2.1 above. Reference to the email of 26 June 2013 addressed to the State Attorney by Motau SC and the quotation in paragraph 124.2.1 is dealt by Jiba as follows:

"AD PARAGRAPH 8.20

156. I deny that the email dated 26 June 2013 was addressed to myself or the second respondent. It was sent to Adv. Chita and Adv. Mokhatla of the LAD".

124.2.4 As to whom the email was sent, is really not the issue. The issue is how Jiba dealt with the directive by the Deputy Judge President. I return later to the other issues recorded in the email of 26 June 2013 sent to the State Attorney by Motau SC. Jiba did not seem to be concerned with the snail pace at which the matter was being dealt with. This constituted a wanting conduct on her part which cumulatively considered with other complaints relating to her handling of Mdluli case, should justify a removal from a roll of advocates

Failure to heed to Motau's advice

[125] It is advisable for any person who is a party to any legal proceedings to get someone who would be impartial, objective and independent to handle a particular litigation, if that affects you personally. Lawyers do not normally defend themselves in

legal proceedings. They get another lawyer to advise and defend them and understandably, so. Seeking to defend yourself can cloud and blur issues as your own interest is at stake. It is for this reason that I want to believe that Jiba and her team on 18 June 2013 briefed Motau SC. It does not happen often that a client will easily litigate contrary to the advice given by counsel or attorney on brief. Any such conduct contrary to the advice would be unprecedented to constitute a reason for a legal representative on brief to withdraw.

[126] Jiba correctly paraphrased the complaint relevant to the topic under discussion as follows:

> *"79.3 That I persisted, despite the advice of Adv. Motau SC and his team to the contrary, with filing a substantive confirmatory affidavit which was alleged untenable given the evidence that had been given under -oath by the second and third respondents at the Breytenbach disciplinary inquiry".*

[127] The original draft answering affidavit was provided to Jiba and her team on 21 June 2013, although Jiba seeks to deny that it ever came to her attention until 26 July 2013. It was to be considered and commented upon. Jiba and her team suggested that Mrwebi be the one to depose to the answering affidavit. Motau SC advised against this. Despite the advice, on 25 June 2013 separated affidavits were brought to the attention of Motau SC. On 26 June 2013 Motau SC after having met with Jiba at an unscheduled meeting on that day, responded to the proposed separated affidavits and similarly advised against the move and suggested that the issue be discussed during consultation which was still to be arranged. Instead of consultation, Jiba and her team decided to instruct the state attorney to deliver the separated affidavits, which were served and filed with the Registrar on 4 July 2013 as per instruction of the prosecuting authority headed by Jiba at the time.

[128] To give a proper perspective to the complaint, I can do no better than to quote the relevant averments in the founding affidavit and the answer thereto by Jiba. In the founding affidavit GCB states:

"8.24. It appears that the State Attorney who was handling the matter at the time, Mr Sebelemetsa, was not present at the unscheduled consultation of 26 June 2013. In an email dated 3 September 2013, he set out his chronology of what had transpired. I attached hereto as annexure "GCB15" a copy of that email. In the email he states that as a result of

the fact that by Monday, 24 June 2013, no comments had been received from Jiba and Mrwebi on the contents of the draft answering affidavit which Motau SC and his team had drafted, he (Mr Sebelemetsa) received numerous calls from counsel as to what they should do since the affidavit had to be filed by 24 June 2013. Mr Sebelemetsa thereupon enquired from "the client" and was told that there were many averments (like the disclosure of internal memos) in the draft prepared by Motau SC and his team with which they did not agree. I infer that "the client" is a reference to Jiba and Mrwebi. Without further input from the State Attorney or counsel, Mr Sebelemetsa on 2 or 3 July 2013 received a "signed copy" of an answering affidavit by Mrwebi , a supporting affidavit by Jiba and a confirmatory affidavit by the South Gauteng Director of Public Prosecutions, Adv Chauke. Mr Sebelemetsa states in his email that ".. the mandate from client was that I must proceed to serve and file the said affidavit". Again, I assume that this is a reference to Jiba and Mrwebi. On the face of it, both affidavits were commissioned on 2 July 2012 (although the date "2 June 2012" was, I assume, incorrectly written in handwriting on the affidavit of Jiba. The date stamp however confirms that it was commissioned on 2 July 2012). Mr Sebelementsa then discussed the matter with Mr Tshivase and was told to file the affidavit since the time was already up for their filing. He was also told to forward copies to counsel. He proceeded to serve and file same on 4 July 2013. (My emphasis).

[129] Jiba in her own wisdom decided to respond as follows:

"AD PARAGRAPH 8.24

160. I admit that Mr Sebelemetsa was not present at the "unscheduled consultation". As I pointed out above, I was at chambers in connection with an unrelated matter and decided on the spur of the moment to stop at Adv Motau SC's chamers to introduce myself.

161. As I have also mentioned above the email by Mr Sebelemetsa dated 3 September 2013 (annexure "GCB15") was addressed to the Hodes SC team in order to assist them in preparing an application for condonation.

162. I deny that the reference to "the client" should be read as a reference to me personally. I never instructed Mr Sebelemetsa personally. All instructions received from him would have come from members of the LAD,usually Adv Chita or Adv Mokhatla. Adv Muller's assumptions are, with respect, incorrect.

163. I have dealt with the serving and filing of the affidavit deposed to myself and by the second respondent and the reasons therefor, above."

[130 Earlier in this judgment I mentioned Jiba's washing of hands in dealing with the complaints against her. The answer quoted above is no different from that attitude. *"All instructions received from him (referring to state attorney) would have come from members of the LAD, usually Adv Chita or Adv Mokhatla"*, is intended to suggest that Jiba instructs or instructed no one, but rather that LAD does or did. She is again mistaken and this appears to be once more an attempt to run away from her responsibilities as the head of the prosecuting authority, but even most importantly as an officer of the court.

[131] Jiba in her answering affidavit paraphrased in paragraph 124.1.2 of this judgment, explains how matters against the NPA are brought to the attention of the National Director of Public Prosecutions. For this, it cannot be expected that the instruction to file one affidavit by Mrwebi and later separated affidavits contrary to the advice of Motau SC would have been conveyed to the state attorney by LAD without the knowledge and approval of Jiba. In any event, she should have known on her own initiative taking into account the fact she had a red light flickering towards 24 June 2013 since a directive to this effect was made by the Deputy Judge President on 5 June 2013.

[132] There are actually serious worrying features in Jiba's response as quoted in paragraph 129 above. Clearly, the suggestion is that she had no knowledge of the instruction to file separated affidavits. *"I never instructed Mr Sebelemetsa personally"*, should be seen in the context of the events preceding the filing and service of the separated affidavits on 4 July 2013:

132.1 On 24 June 2013, Motau SC out of concern to miss the deadline set by the Deputy Judge President, made several calls to Sebelenetsa (state attorney). Subsequent to this, the state attorney enquired from 'the client' and was told that there were many averments in the draft prepared by Motau SC they did not agree with. Jiba was proposed by Motau SC to be the deponent to the answering affidavit. It is highly unlikely and improbable that LAD, either through Adv Chita and or Adv. D Mokhatla would receive a draft answering affidavit, decide to have it deposed to by Mrwebi against the advice of Motau SC and then instruct the state attorney to file and serve separated affidavits without discussing their strategy with Jiba. Seen in the context of what is stated in paragraph

124.1.2, the state attorney could not have been instructed by LAD to file separated affidavits without LAD having obtained the go ahead from Jiba. For this reason, her attempt to distance herself from the decision to file separated affidavits is not consistent with the conduct befitting an officer of the court.

132.2 In paragraph 102 of the answering affidavit to these proceedings, Jiba states:

"On 26 June 2013 I happened to be at chambers with Adv Andrew Chauke (Adv Chauke), the Director of Public Prosecutions for south Gauteng (and the person who withdrew the murder charges against Mdluli) for an unrelated matter and decided to stop in to introduce myself to Adv. Motau SC. This was the "unscheduled consultation" referred to in paragraph 8.21 of the founding affidavit. This was however not a full consultation and the merits of the matter was certainly not discussed. Adv Motau SC did mention that draft answering affidavit has been sent and I informed him that I had not received this affidavit. He undertook to send same but I never received it."

133.2.1 With the greatest respect to Jiba, this is a duck and dive tactic. Two things had happened before the so-called "unscheduled consultation" of 26 June 2013: First, on 24 June 2013 Motau SC contacted the state attorney several times to enquire about the draft answering affidavit sent on 21 June 2013. The response by the NPA regarding the enquiry by the state attorney was that *"there were many averments (like the disclosure of internal memos) in the draft prepared by Motau SC and his team with which they did not agree"*. The correctness of this statement by the state attorney (Mr Sebelemetsa) as indicated in his email dated 3 September 2013 is not denied or placed in dispute by Jiba. That being so, Jiba knew or must have known before 24 June 2013 about the draft answering affidavit which was supposed to be deposed to by her. Her statement: "I had not received this affidavit", suggesting as on 26 June 2013, cannot be true. As I said, it is highly

unlikely and improbable that Adv Chita and Adv Mokhatla of LAD would have expressed a view about *"many averments... they did not agree with"* without consultation and approval of Jiba. The suggestion in these proceedings that she did not receive or was not told about the draft answering affidavit by the time she decided to introduce herself to Adv Motau SC on 26 June 2013 and that therefore she did not ignore Motau SC's advice's, cannot be true and is misleading.

134.2.2 Whilst still on the decision to introduce herself to Adv Motau, I find it particularly discontenting that instead of being concerned about whether the deadline set by the Deputy Judge President has been adhered to, she was more interested in introducing herself to Adv Motau SC. That consultation, should never have been "unscheduled consultation"; neither should it have been a brief consultation nor at the spur of the moment consultation. Merits of the matter should have been discussed in detail. Everything to the matter was at stake. There was a deadline of 24 June 2013 already missed to file an answering affidavit which was set by the Deputy Judge President on 5 June 2013. Jiba knew about this because according to her on 7 June 2013 *'due to the alleged concerns and frustrations expressed with regard to the delays in filing answering affidavits, a meeting was held with the state attorney and after the discussion it was agreed that since Motimele SC and his team had failed to file the answering affidavit within the time periods required, their mandate should be terminated and that they should be replaced*'. This was stated in paragraphs 96 to 97 of Jiba's answering affidavit. With this knowledge and not having deposed to any affidavit to meet the deadline set by the Deputy Judge President, it was incumbent on Jiba to be

more concerned with the deadline than just introducing herself and then states in these proceedings: "*This was however not a full consultation and the merits of the matter was certainly not discussed*".

134.2.3 The other thing which had happened before 26 June 2013 was conveyed in the email of 25 June 2013 from the state attorney. In the email, *inter alia*, was stated: "*Please find the draft amended affidavit for your attention. We have separated the affidavit of Adv Jiba from that of Adv Mrwebi*".

134.2.4 Therefore the statement: "*I informed him that I had not received it*" in paragraph 102 of her affidavit referring to the meeting of 26 June 2013 with Motau SC, could only have been a lie. How can the state attorney prepare separated affidavits of Jiba and Mrwebi at least on 25 July 2013 without Jiba having been told of the draft affidavit prepared and sent by Motau SC on 21 June 2013? The story is far-fetched and improbable. In other words, Motau SC was misled too. This conduct is so serious that Jiba cannot remain on a roll of advocates. This brings me to the other discontenting issue.

134.2.5 The statement: "*he undertook to send same, but I did not receive it*", referring to Motau SC and the draft answering affidavit, does not make Jiba's case any better. In fact it makes it worse. If she did not receive it, what did she do? She had then introduced herself to Motau SC. She therefore had the opportunity to enquire from Motau SC about the answering affidavit when she did not allegedly receive it. On the same date, that is, 26 June 2013, Motau SC in response to the proposed separated

affidavits as per the email of 25 June 2013 recorded: and I do this at the risk of repetition and prolonging this judgment:

"... This despite we note that the same outcome is sought to be achieved by dividing the affidavits as proposed. I do not want us to waste time in dealing with this aspect it shall be one of the agenda items to be discussed at the consultation which is still to be confirmed. In the meantime, may we request that comments and outstanding information be furnished using our original affidavit. We also request that a condonation affidavit be furnished to explain the failure to comply with the filing period as set out in the directives issued by the DJP.

Upon receipt of your comments and the outstanding information using our original draft affidavit as a working document, we shall set a date and time for a consultation to deal with issues in the following sequence:

1. *Comments to our original answering affidavit and our reaction thereto,*
2. *The permissibility or otherwise of the proposed splitting of affidavits,*
3. *Our comments on the condonation affidavit to be prepared by the NPA accounting for each day that passes without having filed the answering affidavit in terms of the directive,*
4. *We propose that a period of five hours be set aside for such a consultation".*

134.2.6 In dealing with what is stated above which is quoted in paragraph 8.21 of GCB's founding affidavit, Jiba in one paragraph stated:

"AD PARAGRAPH 8.21

157. I have dealt with the unscheduled consultation above. I reiterate that the merits of the application were not discussed in any detail with the Adv. Motau

SC. It is indeed correct that I advised Adv Motau SC that I had not seen his draft answering affidavit. As mentioned above, he undertook to forward it to me, however I never received it".

134.2.7 It was not about the brief consultation of 26 June 2013, neither is it about whether merits of the application were discussed in any detail. The issue was rather how she dealt with the information in the email of 25 June 2013 from Motau SC quoted in part in paragraph 134.2.5 above. In addition, how she dealt with the draft answering affidavit after her consultation with Motau SC on 26 June 2013.

134.3 After consultation with Jiba on 26 June 2013, Motau SC again forwarded to Jiba and Mrwebi the original draft affidavit and again advised that the way forward would be a per the steps outlined in paragraphs 1 to 4 of Adv. Motau SC's email of 26 June 2013 quoted in paragraph 134.2.5 above. These averments are contained in paragraph 8.2.2 of the founding affidavit to which Jiba in these proceedings responds as follows:

"158. I deny each and every allegation contained in this paragraph as if specifically traversed. No such affidavit was ever sent to me or if it was sent, I never received it. I wish to state that none of the emails referred to in the deponent's founding affidavit were ever sent to my email address of that of my PA. All were sent to the LAD staff in particular Adv Chita and Adv Mokhatla and my PA, Khanya Lamola".

134.3.1 One is by now accustomed to this kind of responses by Jiba in these proceedings. But again, she misses the point and displays conduct which is not only unbefitting of an officer of the court, but also not befitting the conduct of a person holding such high public position in the prosecuting authority.

134.4 On her own version, on 26 June 2016 without discussing merits of the application in Mdluli case, she was told of the draft answering affidavit which was sent on 21 June 2013. It was an officer of the court talking to another officer of the court, the other one having been briefed to deal with

the opposition to an application against the prosecuting authority which was at the time headed by Jiba. Without reverting to Adv Motau SC subsequent to the meeting of 26 June 2013 and without terminating Motau SC's mandate, on 2 July 2013 the state attorney received a signed copy of the answering affidavit by Mrwebi, a signed supporting affidavit by Jiba and a confirmatory affidavit by Chauke, (the South Gauteng Director of Public Prosecutions) with the instruction to proceed to serve and file the said affidavits and was also told to forward copies to Motau SC. The state attorney then proceeded to serve and file on 4 July 2013. As accustomed to, the response by Jiba to this is: *"I never instructed Mr Sebelemetsa personally"*.

134.5 It is clear that right at the outset, Jiba and her team did not like the advice given to them by Motau SC. Otherwise the separated affidavits would never have been signed, filed and served. Jiba knew or must have known that by so doing, she will be pushing Motau SC and his team out of the brief. Deposing to the separated affidavits, filing and serving them contrary to the advice of counsel on brief, was in my view, very serious and unprecedented. If she wanted to rely on people internally, that is, Adv. Chita and or Adv. Mokhatla, she should first have withdrawn their instruction to the state attorney and Motau SC as Jiba and her team decided to handle the matter on their own. But instead, she deposed to a separated affidavit and then caused the instruction to be given to the state attorney to serve and file the affidavits without reverting to Motau SC. This was deliberate and displayed an un-repented conduct then and now. She was steadfast to defy logic and advice for as long as her wishes were not accommodated. That is the kind of conduct making Jiba to cease to be a fit and proper person and to remain on a roll of advocates. The conduct is even more glaringly displayed when dealing with the next topic.

Jiba's failure to heed to the advice of advocate Halgryn SC

[135] Later in this judgment I will deal with Mrwebi's failure to heed to advocate Halgryn SC's advice from paragraphs 153 to 153.3.1. The application in FUL (Mdluli) case before

Murphy J was set down for hearing on 11 and 12 September 2013. On 5 July 2013 Motau SC and his team, as one would expect, withdrew as counsel for Jiba and Mrwebi. On 2 August 2013 a new legal team was briefed namely, Adv. Leon Halgryn SC and Adv. Johan Uys (Halgryn SC team). On 6 August 2012 Advocate Eulande Mahlangu was added to Halgryn SC team. A series of consultations were held on 5, 6, 7 and 8 August 2013 between the State Attorney, Jiba and her team. Halgryn SC team also studied the case dockets in both the murder and corruption charges. On Friday 10 August 2013, a further consultation took place between counsel and Jiba. Following the latter consultation, Halgryn SC team also withdrew from the brief. This was unprecedented happening indeed:

135.1 Three teams of counsel on brief in one matter, all withdrawing within a short space of time one after the other, was, in my view, a sign of unwillingness on the part of Jiba not to let go the decision to withdraw the charges against Mdluli. Halgryn SC provided Jiba with a document titled "*Confidential and privileged memorandum and opinion dated 12 August 2013*". This memorandum was provided to GCB by the Prosecuting Authority. It must therefore be accepted that confidentially and privilege with regard to the document has been waived.

135.2 In the memorandum, Halgryn SC expressed scathing criticism of the manner in which the proceedings were conducted to that date and stressed the fact that the record filed by Jiba and Mrwebi did not constitute the record of the proceedings as required in terms of Rule 53.

135.3 In a topic headed "*Fundamental flaws in the prosecution of the matter thus far*", Halgryn SC referred to the opposition of the application brought by FUL for the review and setting aside of Mrwebi's decision to withdraw the charges against Mdluili as a "*sinking ship*" and then in paragraphs 9 and 10 of his memo advised:

> "9. *These flaws in the prosecution of the matter thus far, (which we had very little difficulty in uncovering), on behalf of our clients are fundamental- so much so- that we are under no doubt that as matters now currently stand our clients are headed towards a certain judgment against them, with every potential of*

irreparable harm to the credibility and reputation of the National Prosecution Authority.

10. As the papers correctly stand there is simply no defence".

135.4 Then in paragraph 51 of the memorandum, Halgryn SC stated:

"If there is a decision to continue with the opposition of this matter, on the basis of attempting to justify the decisions to discontinue the prosecutions, with reference to the records/dockets, our client will regrettably have to find yet, another team of counsel to do so. We are unable to do so. None of the reasons advanced thus far makes any rational sense, let alone establish a defence".

135.5 I do not intend to traverse the content of a 21 page memorandum of Halgryn SC. It suffices to mention that anyone who might have thought that Jiba will be deterred in her tracks, one would have been mistaken. Secondly, it suffices to mention that Halgryn SC's prediction of the possible scathing criticism by the court was spot on. For example, Murphy J in his judgment *inter alia*, stated:

"[24] The reasons for the various delays, and late filing, are sparse and most unconvincing. However, in the interests of justice I was persuaded that the matter should proceed without further delay and condoned the non-compliance with the rules and directives of the DJP. Suffice to say that the conduct of the respondents is unbecoming of persons of such high rank in the public service and is 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 Constitution ethos and principles underpinning the office they hold". (The emphasis is mine as was also that of GCB in their founding affidavit).

135.6 I cannot agree more with the sentiments expressed by Murphy J both with regards to the delay, incomplete record and holding steadfast on the decision to discontinue the prosecution against Mdluli despite clear *'sinking ship'* and prima facie case in particular regarding the corruption and fraud charges against Mr Mdluli as indicated briefly in paragraph 104 of this judgment.

135.7 Jiba was not deterred in her tracks by the criticism made by her counsel, Adv. Halgryn SC. Instead, Jiba and Mrwebi insisted in defending the 'sinking ship' which ultimately caused Halgryn SC team to withdraw on 12 August 2013. Thereafter yet another set of counsel Hodes SC's team was briefed and a belated attempt was made to file supplementary affidavit. The application was heard on 11 September 2013 and judgment was handed down on 23 September 2013. The application by FUL was granted by Murphy J making a number of adverse remarks against Jiba including the one quoted in paragraph 135.5 above.

135.8 Attempts to justify her decision not to heed to the advice of Halgryn SC, in my view, just makes her situation worse. In her answering affidavit to the present proceedings, she seems to suggest that the assumption by Halgryn SC team that there was a prima facie case against Mr Mdluli of fraud and corruption charges was wrong. In paragraph 112 of her answering affidavit to these proceedings she states:

"... After I learnt that the charges were withdrawn, I called for a briefing from both the second respondent and Adv Chauke. I was satisfied with the reasons that were advanced for the withdrawal of the charges. With regard to the fraud and corruption charges, it was my understanding that the case was withdrawn to enable the police to finalise the investigations as at that time there was no evidence that linked Mdluli to the offences to which he was charged. To me there was nothing untoward about this".

135.9 For the following reasons such understanding could never have been honestly and truly made:

135.9.1 There was everything untoward about the decision to withdraw the charges. There was a clear prima facie case against Mdluli in the corruption and fraud charges.

135.9.2 Having been briefed by Mrwebi on her request about the merits or demerits of the decision to withdraw the charges, she would have known that Mrwebi, as a special director, was obliged to take the decision to withdraw the corruption and fraud charges in consultation with Mzinyathi as

contemplated in the Act. I deal with the relevant provisions in some more detail when I deal with the complaints against Mrwebi. It suffices for now to mention that it is striking that Jiba decided to be briefed by Mrwebi on the corruption and fraud charges to the exclusion of Mzinyathi.

135.9.3 Jiba having called for a meeting with Mrwebi to be briefed on the withdrawal of the fraud and corruption charges, she would have been told that on 8 December 2011 Mzinyathi sent an email to Mrwebi in which he recorded inter alia:

> *"Essentially the aspect I want to discuss is that I do not agree with your understanding (as expressed in your memorandum, that you can instruct prosecutors in the North Gauteng Division in respect of which I am appointed as the Director of Public Prosecutions irrespective of my views on the matter. As explained above in summarising our meeting of 5 December 2011, we did not discuss that you have prepared memorandums (already singed on 4 December 2011) in which you are giving the said instructions. Had you mentioned this aspect, I would have made my objections to your approach during our meeting. I am also concerned that you indicated in your memorandum to me that you will advise the attorneys of Mr Mdluli of your instructions that charges will be withdrawn. I hold the view that such advice to the attorneys would be premature as I do not share your views/nor do I support your instructions that the murder charge be withdrawn". (My emphasis)*

135.9.4 Jiba having consulted and briefed by Mrwebi on the withdrawal of the charges against Mdluli, would have been told that the provisional withdrawal of the fraud and corruption charges after the meeting of 9 December 2013 between Mrwebi, Mzinyathi and Breytenmbach was a damage control compromise as he (Mrwebi), had already notified Mdluli's lawyers about his decision to discontinue

the prosecution. I deal with this in some more detail when I deal with the complaints against Mrwebi.

135.9.5 In my view, Jiba was steadfast to do everything in her power to ensure that the charges against Mdluli were permanently withdrawn. This was despite the prima facie evidence against Mdluli and failure to withdraw the fraud and corruption charges in consultation with Mzinyathi. By so doing, was mala fide and displayed ulterior motive and thus offended against the rule of law and the Constitution. She must be found to be no longer fit and proper person to remain on a roll of advocates. This then brings me to another complaint against Jiba.

Jiba's failure to disclose to the court Breytenbach's memo and representations for the internal review of Mrwebi's decision.

[136] On 12 April 2012 Breytenbach sent a memorandum to Jiba in terms of which she requested Jiba to review the decision of Mrwebi to discontinue the prosecution of Mdluli on the fraud and corruption charges. The memo was received by Jiba on 13 April 2012. On 2 July 2013 Jiba deposed to an affidavit opposing the application by FUL in terms of which the decision by Mrwebi was sought to be reviewed. In paragraphs 21 to 25 of her answering affidavit in FUL application she stated:

"21. *The decisions of the third respondent (Mrwebi) and Adv Chauke (the South Gauteng DPP) on this matter have not been brought to my office for consideration in terms of regulatory framework.*

22. *In the light of the above I did not take any decision referred to in the applicant's founding affidavit. In terms of s 22(2)(b) of the NPA Act, I may intervene in any prosecution process when policy directives are not complied with. I may also in terms of section 22 (c) of the NPA Act review a decision to prosecute or not to prosecute after consulting the relevant director and after taking representations of the accused person within the time period specified by me, the complainant or any other party whom I consider to be relevant.*

23. *At this state there was no policy contravention and/or representations received by me to warrant my intervention.*

24. ...

25. *To descend to the arena without any representations being made to my office would prejudice the fifth respondent or any other interested party in this matter".*

136.1 GCB in paragraph 9.19 of its founding affidavit in these proceedings, inter alia, states: *"It is difficult to avoid the conclusion that her affidavit was an attempt by Jiba to deliberately to mislead the court"*. I tend to agree. Jiba probably when she deposed to her affidavit on 2 July 2013 and stated what is quoted in paragraph 136 above, particularly paragraphs 21, 22 and 25 never thought that one day the memorandum of Breytenbach will surface in court proceedings. It is not her version that she forgot about it when she deposed to her affidavit on 2 July 2013. Instead, she brings in a very startling defence, which in my view, only serves as a trap to herself and displays her again as an un-repented and dishonest person.

136.2 Her explanation in these proceedings is as follows:

"135. I deny that the memorandum received from Adv Breytenbach was from a person or party that I considered relevant or was obliged to consider relevant. It therefore did not constitute representations from a person contemplated by the provisions of section 22(2)(c) of the NPA Act, or at all. It was a document from a prosecutor who failed to execute tasks assigned to her by her superior. Pursuant to the suspension of Adv. Breytenbach another team of prosecutors was appointed to take the case forward, namely Adv. Becker and Adv Viljoen. There were memoranda submitted by these prosecutors in terms of which the opposite view was expressed. There was similarly no mention made of this in my affidavit. I deny that I was under any obligation to place the content of internal memoranda received from colleagues before court. (My emphasis).

136.2.1 Jiba is again mistaken. In my view, she was driven by the desire to bury the charges against Mduli once and for all. The provisions of section 22(2)(c) is clear and simple. Jiba being such an astute lawyer as profiled in paragraph 114.1.1 of this judgment, could never have made such a

mistake about the interpretation and application of the provisions of section 22(2)(c) of the NPA Act. At the risk of repeating myself, the section reads as follows:

> *"22. Powers, duties and functions of National Director*
>
> *1. ...*
>
> *2. In accordance with section 179 of the Constitution, the National Director-*
>
> *(a)...*
>
> *(b)...*
>
> *(c) may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking presentations within the period specified by the National Director, of that accused person, the complainant and any other person whom the National Director considers to be relevant".*

136.2.2 Breytenbach was not only such person who Jiba should have considered relevant, but was also the person best placed to provide Jiba with the relevant information regarding the prima facie evidence against Mdluli. For example, she was involved in the prosecution of Mdluli. On 9 December 2011 she was together with Mzinyathi when they confronted Mrwebi for having withdrawn the charges against Mdluli. On 13 April 2012 by virtue of her having had access to the contents of the docket, provided Jiba with a detailed 24 page memorandum setting out her view why Mrwebi's decision ought to be reviewed in terms of section 22(2)(c) of the Act. Jiba was therefore obliged to disclose the memorandum to the court and to consider the merits of the internal review provided for in section 22 (2) (c) quoted above. She however, chose to ignore Breytenbach and her detailed memorandum. I cannot believe that it was because she felt that Breytenbach was not *'any other person'* she was obliged to listen to and consider her memorandum. As I said, her motivation in adopting the attitude as she did

must be found in her willingness to protect Mdluli by all means. In so doing she offended against section 179 of the Constitution and the rule of law, something which has a direct relevance to the question whether she should remain on a roll of advocates. She was occupying the highest position in the prosecuting authority by virtue of the fact that she is an admitted advocate on a roll of advocates. Her conduct in bringing the image of the prosecuting authority into disrepute also questions her suitability to remain on a roll of advocates.

136.3 Failure by Jiba not to disclose Breytenbach's memo in the proceedings before Murphy J and failure to consider the request by Breytenbach for internal review of Mrwebi's decision was, in my view, deliberate and was intended to mislead Murphy J.

Jiba's failure to consider the contradictions in the evidence of Mrwebi

[137] During April 2012 Breytenbach was charged with misconduct and suspended by Jiba from work pending finalisation of her disciplinary enquiry. On 15 May 2012 FUL served on the prosecuting authority an application to set aside the decisions to withdraw charges against Mdluli. On 22 and 23 January 2013 Mrwebi and Mzinyathi respectively testified in the disciplinary enquiry of Bretenbach. On or about 26 June 2013 Motau SC and his team whilst waiting for the comments of Jiba and Mrwebi on the draft answering affidavit, received from NPA or State Attorney, certain further documentation from the NPA and or State Attorney including the transcript of Bretenbach's disciplinary hearing were received. Upon consideration of such documentation and the transcript, they noticed a series of contradictions between the evidence which had been given on behalf of Jiba in her capacity as Acting National Director of Public Prosecutions during Bretenbach's hearing and the contents of the two draft affidavits prepared by Jiba and Mrwebi. This information as distilled from paragraph 8.23 of the founding affidavit, is dealt with by Jiba in one sentence as follows: *"I have no direct knowledge of the contents of this paragraph"*:

137.1 Jiba cannot claim not to have known of the contradictions of the evidence adduced during the disciplinary enquiry and the relevance thereof to FUL's application and in particular the validity of the decision to withdraw the fraud and corruption charges against Mdluli. She cannot suspend Breytenbach for misconduct and thereafter pretend like she had nothing to do with Breytenbach disciplinary enquiry. Mrwebi in dealing with section 24 (3) of the Act made a concession during cross-examination in the disciplinary proceedings of Breytenbach, which unfolded as follows:

"Adv Trengrove: *No, you must understand that consult means little bit more than telling the guy what your views are. Correct?*

Adv Mrwebi: *Yes you are right, because I consulted with him, the point is that I consulted with him.*

Adv Trengrove: *By telling him what your views were.?*

Adv Mrwebi: *We did not strictly speaking at first, at first agree, that's the point.*

Adv Trengrove: *By the time you took this decision ...?*

Adv Mrwebi: *We were not the same mind."*

137.2 I revert later to the evidence of Mrwebi when I deal with the complaints against him. I have referred to this evidence just to show that when Jiba deposed to her affidavit opposing the setting aside of the decision of Mrwebi, knew or ought to have known as put by Halgryn SC that they were chasing a 'sinking ship'. The application was clearly unassailable for the following reason: A Special Director (Mrwebi) shall exercise the powers, carry out duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directives of the National Director: Provided that if such powers, duties and functions include any of the powers, duties and functions referred in section 20 (1), they shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned as contemplated in suction 24(3) of the Act.

[138] It is common cause that Mrwebi could only have discontinued the prosecution of Mdluli on the corruption and fraud charges in consultation with Mzinyathi. I dealt earlier in paragraph 135.9.3 above how Mzinyathi reacted angrily to the conduct of Mrwebi. The real point for the topic under discussion is that: Jiba on 2 July 2013 when she deposed to her answering affidavit, which affidavit she deposed contrary to the advice of her counsel (Motau SC), was aware that there was no defence to hold on the decision of Mrwebi regarding the discontinuance of the prosecution against Mdluli on the fraud and corruption charges. In this regard her conduct was wanting and inconsistent with the conduct of a lawyer who should remain on a roll of advocates. But Jiba was relentless in fighting the case brought by FUL and directly or indirectly dismissed team of advocates one after the other because she did not agree with their advices. That was done irrespective of the merits of the advices. By so doing, she ceased to be a fit and proper person to remain on a roll of advocates. I make the order accordingly later in this judgment.

COMPLAINTS AGAINST MRWEBI IN MDLULI (FUL)

[139] Mrwebi in his answering affidavit to the present proceedings categorises complaints levelled against him as follows:

139.1 That he sought to mislead the court by not placing before it a proper record of all the documents and facts relevant for the court to arrive at a proper decision;

139.2 That he persisted with the aforesaid conduct even after he had received the memoranda of Motau SC and Halgryn SC;

139.3 That he sought to mislead the court as to the fact or extent of consultation that allegedly took place between him and Mzinyathi;

139.4 That he made the decision to withdraw the charges before he had consulted with Mzinyathi;

139.5 That he persisted with his conduct even after it had been pointed out to him by both Motau SC and Halgryn SC that his version was demonstratively false.

[140] For the purposes of this judgment, I will not necessarily follow Mrwebi's categorisation of the complaints aforesaid. I will however deal with what I consider to be the essence of GCB's complaints against Mrwebi. In some instances, extensive quotations of his evidence in these proceedings, in FUL and disciplinary proceedings of Breytenbach might be necessary. Some of the complaints against Mrwebi have already been dealt with insofar as they overlap with those against Jiba.

Alleged mistake on the date Mrwebi took the decision to withdraw the charges

[141] Just to recap, Mrwebi was a special director appointed in terms of section 13(1)(c) of the Act, which provides that the President, after consultation with the Minister and the National Director – may appoint one or more Directors of Public Prosecutions, (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the Gazette. On the other hand, the President shall as contemplated in section 13(1)(b) in respect of any Investigating Directorate established in terms of section 7(IA), appoint a Director of Public Prosecutions as head of such an Investigating Directorate established by the President in the office of the National Director contemplated in section 7 to deal with offences or criminal offences or unlawful activities as set out in the proclamation issued in the Gazette for establishment of such Investigating Directorate . Mrwebi at all material hereto was the head of the Investigating Directorate and corruption and fraud charges are offences set out in the proclamation by the President as envisaged in section 7(1) of the Act.

141.1 In paragraphs 100 to 107 of this judgment I referred to the events which preceded the taking of the decision to discontinue fraud and corruption charges against Mdluli. On 4 December 2011 not less than two documents were issued under the signature of Mrwebi. Firstly, it was a letter addressed to the Mdluli's lawyers advising them of the withdrawal of the charges. Secondly, it was a document titled: "CONSULTATIVE NOTE IN TERMS OF SECTION 24(3) OF THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998 (NPA) ON REPRESENTATIONS OF LT. GENERAL MDLULI".

141.2 Mrwebi suggested during the disciplinary proceedings of Breytenbach, proceedings before Murphy J and in the present proceedings that his decision to withdraw the charges was not taken on 4 December 2011, but rather on 5 December 2011. I have very serious problems with this. For the following reasons the decision must have been taken on 4 December 2011 before Mrwebi met and allegedly consulted with Mzinyathi:

141.2.1 It was common cause that on the morning of 5 December 2011 Mrwebi visited the office of Mzinyathi regarding representations by Mdluli for the withdrawal of the charges against him. Mrwebi in his answering affidavit of 2 July 2013 dealing with the opposition to FUL application, and in seeking to explain himself, stated:

> *"25. Later the same day on 5 December 2011 I drafted and directed a memorandum to Adv Mzinyathi in which I recorded some of my views on the matter as well as the fact that I consulted him as required by section 24(3) of the NPA Act. The Regional Head of SCCU, Adv Breytenbach was copied merely for her information. I also directed correspondences incorrectly dated 4 December 2011 to Adv Breytenbach in which I advised of my decision that the matter must be withdrawn. A further correspondence was directed to the legal representative of Fifth Respondent also advising of my decision. The date appearing on these documents should be 5 December 2011 not 4 December 2011. This was clearly a mistake on my part."*

141.3 For the following reasons I do not think it was a mistake:

141.3.1 Firstly, the alleged mistake is not explained. There were at least three documents on which the date of 4 December 2011 was indicated. On each of these documents the date of 4 December 2011 is reflected twice, that is, on the first and last page. The third document which I have not mentioned yet, was a covering letter to the "consultative note". Repetition of the date about six times, without more, could not have been a mistake.

141.3.2 The consultative note and the covering letter to it, were both addressed to Breytenbach, Mzinyathi being the person copied. It is

not explained why the two documents dated 4 December 2011 were incorrectly directed to Adv. Breytenbach and incorrectly copied to Mzinyathi, particularly that Breytenbach was not part of consultation between Mrwebi and Mzinyathi on 5 December 2013.

141.3.3 On the morning of 5 December 2011 Mrwebi went to Mzinyathi's office to discuss Mdluli matter. Then in his 'consultative note' he concluded by seeking to explain what had happened during the discussion as follows:

"Because I believed that the IG's assistance would serve to address any short comings\defects about the evidence, I did not during the discussion with the DPP deem it necessary to go into much detail about the merits of the matter although there was brief reference to the merits during the discussions"

141.3.4 "IG" is reference to "Inspector General" in terms of Intelligence Services Oversight Act. Accepting that this is what had happened, there was no need to take a decision to withdraw the charges immediately after having deemed it *not 'necessary to go into much detail about the merits of the matter'* as that would not have constituted 'in consultation' with Mzinyathi.

141.3.5 According Mzinyathi, it was Mwrebi who approached him in his office. He informed him that he (Mrwebi) was dealing with the representations in connection with the matter of Mdluli. Mzinyathi then in paragraph 7 of his confirmatory affidavit dated 10 September 2013 in FUL case stated:

"...He further informed me that he was going to conduct some research on the Intelligence Serving Oversight. Act, No 40 of 1994. Thereafter he left my office."

141.3.6 So, because there was no basis to take the decision, no such decision could have been taken on 5 December 2011. It appears from the quotation above that when Mrwebi approached Mzinyanthi, he knew that he was going to raise the provisions of the Intelligence Services Oversight Act, whilst on the other hand he had already taken a

decision to withdraw the charges against Mdluli. The contents of "consultation note" dealing with what Mwerbi referred to in paragraph 24 of his opposing affidavit in FUL matter, as *'the views that IG can help in the matter as he/she has unlimited access to documents and information in possession of crime intelligence'*, in my view, was a well-planned mission calculated to give Mzinyathi the impression that a decision to withdraw the corruption and fraud charges against Mdluli was not taken when in actual fact that was fait accompli. I am satisfied that Mwerbi took the decision before he met with Mzinyathi on 5 December 2011.

141.3.7 This is also the understanding of Mzinyathi, which is articulated as follows in his affidavit to the present proceedings:

> *"71. I need to emphasise that on 5 December 2011, we did not discuss the fact that he had prepared memoranda, nor did he say he had prepared any, nor did he bring any along. I had no idea that as of the following day, I would suddenly get two memoranda of the nature that I have indicated herein above. I wish to make in unequivocally clear that if we had had such a discussion on the 5 December 2011, I would have raised my objections to his approach during that very meeting."*(My emphasis).

141.3.8 Just to conclude on the topic, what is recorded in the 'consultative note'; in my view, serves to support the conclusion I have reached. In paragraph 2 of the 'consultative note' Mrwebi refers to the representations received from Mdluli and then ends the paragraph in the last four lines by stating as follows:

> *"The purpose of this document is therefore to deal with and record a decision on the matter. It is the further aim that the document shall serve as a consultative document with the Director of Public Prosecutions North Gauteng as required by Section 24(3) of the NPA Act."* (My emphasis)

141.3.9 The two underlined sentences cannot go together. The latter sentence gives the impression that the Mzinyathi (the Director of Public

Prosecutions North Gauteng) was still to be consulted on the document, whilst the former announces a decision already taken by announcing that the "document is...to deal with and record a decision on the matter". In my view, it is very clear from the quotation above that the document in question could only have been written before the meeting of the 5 December 2011. The way it is coached, speaks to that conclusion. If the document was not there before he met with Mzinyathi, how 'a consultative document' which was not in existence could have been used as a 'further aim that the document shall serve as a consultative document', with Mzinyathi on 5 December 2011? In cross-examination during Breytenbach disciplinary proceedings, Mrwebi blamed the construction as quoted in paragraph 141.3.8 above on being an African. The answer to this effect was preceded by cross-examination of Mrwebi which unfolded as follows:

> *"ADV TRENGROVE: Can I take you through sentences one by one. You say the purpose of this document is to deal with and record a decision on the matter, Correct?*
>
> *ADV MWERBI: Yes.*
>
> *ADV TRENGROVE: So you had taken your decision by the time you issued this document.*
>
> *ADV MRWEBI: The decision, I had taken a decision, I had issued, I have taken a decision by the time I wrote this document.*
>
> *ADV THENGROVE: But then you say that the aim of this document is to serve as a consultative document with Advocate Mzinyathi.*
>
> *ADV MWERBI: Yes, that is correct Sir because I did not record, we had a verbal meeting with Advocate Mzinyathi, I was trying to capture the things that we discussed there with Mzinyathi, that was the idea of..., that's what I'm...*

ADV THENGROVE: I see, so this is not, not then to serve, because you say, it doesn't say: "I record, this is to record the meeting we've already had", this says: "This shall serve as a consultative document."

ADV MWERBI: As a record may be because the point is my intention Sir, you know you will excuse me, maybe my language is not very well. I'm an African Sir, my language is not very good maybe, my English language is not…

ADV TRENGROVE: Sorry?

ADV MRWEBI: My English language may not be very good…
ADV TRENGROVE: Yes neither is mine.

ADV MWERBI: Yes, but the point is, is the intention was to record the consultative discussions that I had with Mzinyathi on the matter".

141.4 With the quotation above, I am even more convinced that the document was prepared before the meeting of 5 December 2011. How can Mrwebi use the document as a "consultative document" with Mzinyathi when he allegedly produced it after he had consultation with Mzinyathi. This should find to have constituted a lie on the part of Mwerbi.

Mrwebi's failure to disclose 'consultative note' and to despatch a complete record

[142] Murphy J in paragraph 41 of his judgment said this concerning Mrwebi:

"Mrwebi determined to withdraw the fraud and corruption charges against Mdluli and prepared a memorandum and a consultative note setting out his reasons dated 4 December 2011. Mrwebi did not disclose these obvious relevant documents as part of his record of decision belatedly filed in terms of Rule 53.They came to light however as annexures to Breytenbach's founding affidavit in her application to the Labour Court".

142.1 The quotation above is referred to in paragraph 9.9 of the GCB's founding affidavit in these proceedings. It is one of the complaints for the case against

Mrwebi. In an answer specifically to paragraph 9.9 of GCB's founding affidavit, Mrwebi states:

"116. I have already dealt with the disclosure of the record in proceedings involving NPA and reiterate what I have already stated".

142.2 This statement was preceded by what Mrwebi stated in the present proceedings as follows:

"15... I must emphasise that this document was purely an internal memorandum meant for the attention of the NDP North Gauteng only and was in no way meant to be a complete recording of the reasons for the decision in the matter".

142.2.1 Mrwebi could never have come to the conclusion that a document which contains his reasons for the decision would remain to be *'purely an internal memorandum meant for the attention of the DPP North Gauteng only'*. Rule 53 (1) (b) is very clear. It required Mrwebi to despatch within 15 days upon receipt of notice of motion to the registrar the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required to give. So, in addition to the record of the proceedings, his consultative note which contained his reasons should have been filed. The consultative note did not have to be a complete record of the reasons for the decision in the matter before he was obliged to disclose or despatch it to the registrar as required by the Rules.

142.2.2 On 12 August 2013 Halgryn SC provided NDPP with his memorandum in which inter alia, he recorded:

> *"21. We have had regard to 'records' which were indeed filed (which comprise of a scant odd 67 pages) and if we compare it to the actual dockets (each of which comprise of 3 lever arch files there seems to be no logic behind the filing of the skimpy document*
>
> *22. It is palpably not the entire records and our clients are not only going to lose this case for reasons alone, but in the process will undoubtedly be the subject of scathing attacks in open court for failing to provide the full*

records/dockets, let alone be the subject of a highly critical judgment in which this aspect will receive much attention".

142.2.3 With the critical advice and possible scathing attacks on the skimpy compliance with the provisions of Rule 53, Mrwebi cannot hide, like Jiba attempted to do, behind the fact that LAD was doing everything and that he was just a by-standing person having nothing to do with the case. It was his decision which was challenged. He is a lawyer, an advocate admitted in 1988. During June/July 2012 he was informed of the challenges by FUL. He subsequently consulted with Motimele SC. Then in paragraph 24 of these proceedings, he states:

> *"After the aforesaid consultation, I was never contacted by any official in regard to the application of FUL until a year later, during July/August 2013 when I was again requested by the Legal Affairs Division to attend another consultation with counsel in Sandton. I duly attended the aforesaid consultation with Halgryn SC, Johan Uys and Eulande Mahlangu". (my emhasis*

142.3 Mrwebi has shot himself in the foot for this statement. The statement is for the following reasons false:

142.3.1 On 2 July 2013 Mrwebi deposed to an answering affidavit in FUL matter. At that time, Motau SC was still on brief and Halgryn SC with whom he consulted in August 2013 was not in the picture yet. The answering affidavit was according to his counsel finalised and deposed to on the advice of LAD. If that is so, his statement, "*After the aforesaid consultation, I was never contacted by any official in regard to the application of FUL until a year later, (during July/August 2013 ...)*, referring to consultation with Motimele SC on 11 June 2012, cannot be correct.

142.3.2 Between 21 and 25 June 2013 Motau SC by email was told that only Mrwebi should be deposing to an affidavit as the decision maker. When Motau SC did not accede to this, on 25 June 2013 state attorney and Motau SC were provided with separated affidavits of Mrwebi and Jiba. On 26 June 2013 Motau SC sent an email to the State Attorney objecting to the separated affidavits. Subsequent

thereto separated affidavits were commissioned on 2 July 2013 and filed on 4 July 2013. Now, Mrwebi wants this court to believe that all of this about him, had happened without his knowledge and approval until he was contacted during 'July/ August 2013' to consult with Halgryn SC who was briefed on 2 August 2013 and first consultation with him having taken place only on 5 August 2013. His version cannot be true.

142.3.3 Another worrying factor was Mrwebi's suggestion stated in his affidavit of 2 July 2013 as follows:

"3 Where I make submissions of a legal nature I do so on the advice of the NPA's legal representative".

142.3.4 The first question about the statement is which NPA's legal representative was he referring to? It could not have been Motau SC team because his advice was ignored by the NPA and then Mrwebi and Jiba on their own settled separated affidavits on or before 25 June 2013 and the instruction to serve and file same must have been given before the end of June 2013. So, if Mrwebi intended to suggest that he relied on the advice of NPA's legal representative referring to Motau SC team he would have been untruthful. If he sought to rely on LAD for such an advice, his suggestion that the last time he had anything to do with FUL application was 2012 and that he was then contacted to consult with Halgryn SC in July/ August 2013 similarly cannot be correct for the reason already mentioned above.

142.3.5 As I said, Halgryn SC team was briefed on 2 August 2013 and first consultation with him took place on 4 August 2013. So, by the time Mrwebi deposed to his answering affidavit on 2 July 2013, he had nothing to do with Halgryn SC team, but one thing for sure he knew of the draft answering affidavit. First, he proposed one affidavit by him and later separated affidavits.

142.4 In terms of the statement quoted in paragraph 143.2.3 above, Mrwebi is effectively seeking to suggest that he had nothing to do with the defiance

of Motau SC's advice. The tactic adopted by Mrwebi in these proceedings as was the tactic in FULmatter before Murphy J, is the same as the adopted by Jiba, i.e. 'the application was never served on me personally' and as stated in paragraph 32 of his affidavit in the present proceedings, "did not know or become aware that the complete record for purposes of review had not been disclosed".

143.4.1 If his statement is true that he never became aware that the complete record for the purposed of review had not been discovered what did he then do after he had become aware of the critical memorandum of Halgran SC in August 2013? The case was proceeded with and finalised before Murphy J. Seeing that it was his decision which was under attack, he was not expected to play a passive role. It was his duty to ensure that there was compliance with the Rules of court and advice by Halgryn SC. His attempt to blame LAD is of no help to his conduct complained of. Failure to disclose the consultative note and to provide complete record should be found to have been deliberate.

Mrwebi's failure to heed to the understanding he had with Mzinyathi

[144] According to Mzinyathi, on 5 December 2011 Mrwebi visited his office. Mrwebi informed him of the representations made by Mdluli and made Mzinyathi to believe that the meeting was a way of fulfilling the requirement for consultation contemplated in the relevant section 24 (3) of the Act which Mrwebi quoted to Mzinyathi. This version was never disputed by Mrwebi and therefore he would have known that Mzinyathi's attitude was that the decision to withdraw the fraud and corruption charges against Mdluli can only be taken if Mzinyathi agreed thereto.

[145] The discussion centred around section 7(7) of the Intelligence Services Oversight Act no. 40 of 1994 as according to Mrwebi, the section was critical in dealing with Mdluli's representations. They then parted on the understanding that Mrwebi was going to conduct some research on the regulations applicable to the intelligence environment

in which Mdluli worked. Section 7(7) has nothing to do with the prima facie case which was established as contained in the docket placed before Mrwebi.

[146] In paragraph 135.9.3 of this judgment I referred to what Mzinyathi 's reaction was to the decision taken by Mrwebi after the meeting of 5 December 2011, a version which is not placed in dispute by Mrwebi. To discuss with a colleague whom you are obliged in terms of the legislative framework to consult and agree with; and parted on the understanding that a decision will not be taken before a research is conducted, but, then thereafter took a decision contrary to the understanding, in my view, can only be ascribed to as a betrayal and consultation in bad faith by an officer of the court. This in my view is so serious that it should justify a removal from the roll of advocates.

Mrwebi's failure to take advice offered by Mzinyathi

[147] Mzinyathi knew on 6 December 2011 when he received two memorandums from Mrwebi that the latter has taken a decision to withdraw the charges against Mdluli on the corruption and fraud charges. The one memo was addressed to Mzinyathi and another one to Adv. Glynis Breytenbach. The one addressed to Mzinyathi was entitled "consultative note" in terms of section 24(3) of the National Prosecuting Authority Act, referred to earlier in this judgment. The one addressed to Breytenbach was headed "Decision regarding the representations of Lt. General Mdluli". In paragraph 28 of the memorandum addressed to Mzinyathi, Mrwebi stated: *"The prosecutor is accordingly instructed to withdraw the charges against both Lt-General Mdluli and Col. Barnard immediately"*. Furthermore, in paragraph 29 of the memo Mrwebi stated that Lt-General Mdluli's lawyers will be advised accordingly.

[148] In the memorandum to Breytenbach, Mrwebi stated:

> *"I refer to the attached consultative note in terms of section 24(3) of the National Prosecuting Authority Act, 32 of 1998 to the Director of Public Prosecutions, North Gauteng and which was copied to your office. For reasons stated in the said note, the charges against Lt-General Mdluli and Colonel Barnard must be withdrawn immediately".*

[149] That appeared to have infuriated Mzinyathi terribly. On the morning of 7 December 2011, Mzinyathi called Mrwebi and requested to meet with him during the

cause of that day. This was after Mzinyathi had a meeting with the prosecutors Mr Smith and Breytenbach that morning. Mrwebi was apparently in Bloemfontein and then, they agreed to meet on 9 December 2011.

[150] On 8 December 2011, Mzinyathi apparently out of anxiety sent an email to Mrwebi. The relevant portion of the email is quoted in paragraph 135.9.3 of this judgment. Of importance, it was clearly conveyed to Mrwebi that he (Mrwebi) cannot instruct prosecutors in the North Gauteng Division in respect of which Mzinyathi is appointed as a Director of Public Prosecutions.

[151] In the present proceedings, Mrwebi seeks to find an excuse in the following statement made by him in paragraph 17 of his answering affidavit:

> *"17. Even though the North Gauteng High Court as well as the Supreme Court of Appeal, subsequently ruled that the phrase "in consultation with" as contained in section 24(3) of the National Prosecuting Authority means that there must be concurrence between two functionaries, I was as at 05 December 2011 of the view that my consultation with Adv Mzinyathi, such as it was in full compliance with the provisions of section 24(3) of the National Prosecuting Act".*

[152] For the following reasons Mrwebi should be found not to be honest and candid with this court, as he was also not honest in the proceedings before Murphy J.

152.1 Firstly, he was warned in the email of 8 December 2011 that he cannot legally instruct prosecutors in the North Gauteng Division without Mzinyathi agreeing thereto;

152.2 Secondly, according to Mzinyathi on the 9 December 2011 when they met with Mrwebi, the latter was told that his withdrawal of the charges against Mdluli was contested by both of them, that is, Mzinyathi and Breytenbach. It has always been Mzinyathi's contention that a decision to withdraw the charges could not be taken without his concurrence. This version by Mzinyathi was never questioned by Mrwebi, nor did he at any stage raise it with Mzinyathi that the latter's concurrence was not required in terms of section 24(3) of the Act. Only in these proceedings did Mrwebi plead as quoted in paragraph 151 above.

152.3 On 22 January 2013 Mrwebi took the witness stand in the disciplinary proceedings of Breytenbach. Interpretation and application of the provisions of section 24(3) featured prominently particularly under cross-examination. For its importance, I find it necessary to quote the relevant portion of Mrwebi's evidence during cross-examination:

"ADV TRENGROVE: *Did he agree to stop the prosecution?*

ADV MRWEBI: *The decision was mine.*

ADV TRENGROVE: *Did he agree to stop the prosecution?*

ADV MRWEBI: *Okay let's say he did not agree to stop the prosecution.*

CHAIRPERSON: *Is that your answer?*

ADV MRWEBI: *That is my final answer.*

ADV TRENGROVE: *Which means that your decision was unlawful, correct?*

ADV MRWEBI: *I did not believe so, no.*

ADV TRENGROVE: *No there is no doubt about this legal rule.*

ADV MOKHARI: *It's a legal argument.*

ADV TRENGROVE: *There is no doubt about this legal argument and I simply say to the witness I agree with you that your view is correct, it accords with these cases, but let me do it on that basis. You understood the law to be, rightly or wrongly, that you required substantial agreement on the exercise of that power correct? We also know that Mr Mzinyathi did not agree with you that the prosecution be stopped, correct?*

ADV MRWEBI: *Mr Mzinyathi did not wholly agree with me in respect of issues that I raise.*

ADV TRENGROVE: *Mr Mzinyathi did not agree with you that the prosecution be stopped, correct?*

ADV MRWEBI: We left on the understanding that I am going to take a decision. To me that's sufficient agreement. We left on the understanding that I will go and take the decision based on what we have discussed. To me that would have ...

ADV TRENGROVE: Why don't you just answer the question?

ADV MRWEBI: No, no, no, there was no express agreement, expressly, expressly, in express terms

ADV TRENGROVE: The only view he expressed was that the prosecution should go on?

ADV MRWEBI: On the one part.

ADV TRENGROVE: On that issue?

ADV. MRWEBI: Yes.

ADV. TRENGROVE: Yes?

ADV. MRWEBI: Yes.

ADV TRENGROVE: On your understanding of the law thereof your decision was unlawfully taken?

ADV MRWEBI: I do not think it was sir.

ADV TRENGROVE: Because you did not have substantial agreement to stop the prosecution?

ADV MRWEBI: Because sir, I believe I had substantial agreement Sir.

ADV TRENGROVE: You believe you..?

ADV MRWEBI: I believe I had substantial agreement

ADV TRENGROVE: I see, so you believed that Adv Mzinyathi substantially agreed that the prosecution should be stopped?

ADV MRWEBI: Agreed with me, discuss the issue and these are the issues, then he said he will take the decision

ADV TRENGROVE: *Mr Mrwebi we will submit to the chair that this evidence is patently, dishonestly given. It can't be honest.*

ADV MRWEBI: That's your view Sir. I can't stop you from saying that".

152.3.1 What is quoted in paragraph 152.3 above was preceded by cross-examination of Mrwebi during the disciplinary hearing of Breytenbach which unfolded as follows:

"ADV TRENGROVE: Was there anybody else who shared your view? Any lawyer who shared your view?

ADV MRWEBI: I do not know, I do not know because I did not consult with anybody else.

ADV TRENGROVE: You don't know because you didn't consult anybody?

ADV MRWEBI: I don't know.

ADV TRENGROVE: I see. Now by the time you took this decision that the matter be withdraw, as you said, you did not yet know what Advocate Mzinyathi's view was, correct?

ADV MRWEBI: You know, the simple view of Advocate Mzenyathi was known, I would say it was known because I, this is what I picked up later on you know, because he says he believed there is a case, that's his view, that was his view, yet I told him the problems later.

ADV TRENGROVE: So at the time you took this decision to the best of your belief Advocate Mzinyathi was of the view that the prosecution should continue?

ADV. MRWEBI: Not necessarily.

TRENGROVE: Yes, but that's what I understand you to say Mrwebi?

ADV MRWEBI: Yes, you said there was ...Yes.

ADV TRENGROVE: I beg your pardon?

ADV MRWEBI: Well, maybe let's say yes.

ADV MRWEBI: Yes, what?

ADV MRWEBI: Yes it's what, he wanted the prosecution to continue.

CHAIRPERSON: He had that view?

ADV MRWEBI: Well, he did not say so. He did not say so.

ADV TRENGROVE: But your belief was …

ADV MRWEBI: His view was that you know, on his… In fact he says he did not get deeper into the matter but on the face of it, looks like you know we can, there is a case, that was his view".

152.3.2 Further in cross-examination, his evidence which preceded also what is quoted in 152.3 above unfolded:

ADV TRENGROVE: Did you and he agree to discontinue the prosecution on that day?

ADV MRWEBI: No, we agree on the problems, we did not agree to discontinue the prosecution on that day.

ADV TRENGROVE: You unilaterally decided to discontinue the prosecution without his agreement, correct?

ADV MRWEBI: I think I did so after I consulted him, as I thought I consulted him I was required.

ADV TRENGROVE: Just answer my question. You unilaterally stopped the prosecution with…

ADV MRWEBI: I did not think it was unilateral Sir.

ADV TRENGROVE: You unilaterally stopped the prosecution without his agreement, correct?

ADV MRWEBI: In certain respects, let's say in certain respects.

ADV TRENGROVE: You unilaterally stopped the prosecution without his agreement to stop the prosecution.

ADV MRWEBI: In certain respects.

ADV TRENGROVE: In … He did not agree to stop the prosecution at all. Correct?

ADV MRWEBI: No, in respect of certain issues.

ADV TRENGROVE: He did not agree to stop the prosecution at all.

ADV MRWEBI: In respect of certain issues.

ADV TRENGROVE: What do you mean by that?

ADV MRWEBI: He identified, he agreed with me in terms of the problems that there were that…"

152.3.3 I agree with the conclusion by Mr Trengrove as in the quotation under paragraph 152.3 of this judgment. That is, Mrwebi's evidence was 'patently, dishonestly given". Mr Mrwebi seems to have forgotten about the oath which he took as a witness, but also as an officer of the court when he was admitted as an advocate in 1988. He turned himself into an unreliable and dishonest witness. Unfortunately that finds its way into the present proceedings. His statement in paragraph 17 of his answering affidavit in these proceedings quoted in paragraph 151 above is not only a lie, but is intended to mislead this court. He clearly knew long before he deposed to his answering affidavit in FUL matter on 2 July 2013 that his decision would never have been lawful without the agreement, concurrence or substantial agreement with Mzinyathi. I am not sure if he thought this court will have no regard to his evidence adduced during the disciplinary proceedings of Breytenbach. There cannot be any excuse for his lies. He should be found to have ceased to be a fit and proper person to remain on a roll of advocates. He betrayed his oath of office as an advocate and in doing so, also brought the prosecuting authority into disrepute

Mrwebi's failure to heed to Hagryn SC's advice

[153] In paragraphs 135 to 135.9.5 of this judgment I dealt with Jiba's failure to adhere to Halgryn SC's advice. In some respects what is stated therein finds some relevance to the topic under discussion. On 12 August 2013 Halgryn SC provided his written opinion in which he clearly pointed out that the decision to withdraw the charges against Mdluli

will not stand in court. Despite the advice, Mrwebi and Jiba persisted in seeking to oppose the application brought by FUL. In paragraph 24 of his answering affidavit in the present proceedings, Mrwebi states that he consulted with Halgryn SC in August 2013. Then in paragraph 25 he concludes by saying: *"After the aforesaid consultation, I never interacted in any manner whatsoever with Halgryn SC or any other external legal practitioner in regard to the FUL matter":*

153.1 Mrwebi cannot wash his hands. First, he is the person who made the decision which was challenged. Secondly, he knew of the advice by Halgryn SC or ought to have known. *" I never interacted in any manner whatsoever with....or any other external legal practitioner"*, confirms that after consultation with Halgryn SC, he (Mrwebi) interacted with "internal legal practioner/s" seen in the light of what follows hereunder. Jiba in her answering affidavit to the present proceedings puts it this way:

> *"110. The approach suggested by Halgryn SC team at the consultation held on 8 August 2013 and prior consultations made a number of assumptions... His advice was that therefore that I should review the decision of the second respondent and Adv Chauke in terms of section 22(2)(c) of the NPA Act and give FUL an opportunity to amend their grounds for relief if they still disagree".*

153.2 Then in paragraph 111 of her answering affidavit in the present proceedings, Jiba says:

> *"I together with the NPA team could not agree with Halgran SC".*

153.3 Furthermore, in paragraph 137 of Jiba's answering affidavit in these proceedings and after having dealt with a range of oral advices given by Halgran SC during consultation, she concludes by saying:

> *"It was for these reasons that I was uncomfortable with the oral advice furnished to me by the Halgryn SC team. Indeed the entire team of representatives from the NPA disagreed with his advice. I therefore requested the Halgryn SC team to prepare a written memorandum of advice. The representatives of the NPA then also went away and reconstructed the respective dockets".*

153.3.1 Clearly none of the above would have happened without the decision maker's (Mrwebi's) involvement. The point is, Mrwebi's attempt to distance himself from the decision to defy Halgryn SC's advice, smacks him as untruthful and dishonest person in the handling of Mdiuli case up to the present proceedings. He should know as a decision maker and a person against whom serious allegations are made in the present proceedings, that he ought to take this court into his confidence than just stating that he never interacted with Halgryn SC or any other external legal practitioner' after consultation with Halgryn SC. The real issue is what he did with Halgryn SC's advice. He together with Jiba ignored solid and right advice given by Halgryn SC. That does not accord with a fit and proper requirement to remain on a roll of advocates. I now turn to deal with the other issue.

Mrwebi's withdrawal of corruption and fraud charges in the face of prima facie evidence

[154] There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, namely the National Prosecuting Authority Act. The prosecuting authority has the power inter alia, to institute criminal proceedings on behalf of the state and to carry out any necessary functions included to incidental to instituting criminal proceedings (section 179(1) and (2) of the Constitution).

154.1 Anyone within the prosecuting authority, who exercises this power, must do so in accordance with the rule of law and the Constitution. Short of this, would be in conflict with the Constitution and the national legislation. Failure to prosecute any case in the face of a prima facie evidence would offend against the law and the Constitution, being the supreme law of the Republic of South Africa.

154.2 It is not my understanding that Mrwebi suggested that there was no prima facie case on the corruption and fraud charges. In his 'consultative note' he expressed himself on the issue as follows and I do this at the risk of repetition:

> *"...Essentially my views related to the process that was followed in dealing with the matter particularly in view of the fact that the matter fell squarely within the mandate of the Inspector-General in terms of Intelligence Services Act 40 of 1994. I noted that it is only the Inspector General who by law is authorised to have full access to the Crime Intelligence documents and information and thus who can give a complete view of the matter as the investigative can never be complete without access to such documents and information. In my view, the process followed in this matter is possibly illegal as being in contravention of the said provisions of the Intelligence Services Oversight Act 40 of 1994".*

[156] For the following reasons there was no legal basis to come to the conclusion as quoted above and Mrwebi knew about it:

156.1 If the concern expressed above was genuine, instead of withdrawing the charges, Mrwebi could have allowed the prosecution team and the investigating officer to resort to utilisation of the provisions of section 205 of the Criminal Procedure Act, which allows the Director of Public Prosecutions or a public prosecutor authorised thereto in writing, to request a judge of a High Court, a regional court magistrate or a magistrate subject to the provisions of subsection (4) and section 15 of the Regulation 12 Interception of Communicative and Provisions of Communication – related Information Act 2002, to require the attendance before him or her or any other Judge, regional court magistrate or magistrate for examination by the Director of Public Prosecutions or the public prosecutor authorised thereto in writing, of person who is likely to give material or relevant information as to any alleged offence.

156.1.1 Therefore, Mrwebi could have advised the investigating and prosecution team in the matter to resort to section 205 of Act 51 of 1977 in order *'to have full access to...documents and information'* and to subpoena whoever *'can give a complete view of the matter'* by submitting documents and information during the proceedings in terms of section 205.

156.2 It looks like the raising of the Intelligence Services Oversight Act was just a shield behind the real intention of Mrwebi, the intention being the

withdrawal the charges despite prima facie case against Mdluli and with or without the concurrence of Mzinyathi.

156.3 Before Mzinyathi and Breytenbach met with Mrwebi on 9 December 2011, together with a member of the South African Police Services met with Inspector General of Intelligence's legal advisor, Ms Joy Governder who expressed the view that Inspector General of Intelligence (IGI) does not investigate criminal offences as such investigations are within the domain of the SAPS.

[157] On 19 March 2012 IGI ambassador, Adv FD Radebe prepared a memo which memo was later forwarded by Lt. Gen. Dramat to Jiba and Mrwebi on 23 March 2012. In the memo addressed to Lt. Gen, NS Mkhwanazi, Acting National Commissioner of Police at the time, it was recorded:

"1. We refer to your letter of the 22nd February 2012 wherein you requested an opinion on the reasons advanced by the National Prosecuting Authority for the withdrawal of the criminal charges against General Mdluli.

2, In response to the memorandum of Adv. Mrwebi of the 4 December 2011 we advise as follows:

2.1 The Inspector- General of Intelligence (IGI) derives her mandate from the Constitution of the Republic of South Africa, which provides for the monitoring of the intelligence oversight which much result in a report containing findings and recommendations;

2.2 Any investigation conducted by the Inspector-General is for the purposes of intelligence oversight which must result in a report containing findings and recommendations;

2.3 The mandate of the IGI does not extend to criminal investigations which are court driven and neither can IGI assist the police in conducting criminal investigations. The mandate of criminal investigations rests solely with the police;

As such we are of the opinion the reasons advanced by the NPA in support of the withdrawal of the criminal charges are inaccurate and legally flawed. We therefore recommend that this matter be referred back to the NPA for the institution of the criminal charges".

[158] How Mrwebi could have missed this simple mandate of IGI is mind boggling. His intention, in my view, was to withdraw the charges against Mdluli and never to reinstate them. The following facts seem to support the conclusion: The memorandum quoted above was brought to the attention of Mrwebi by Breytenbach in the company of Adv Ferreira. Mrwebi in paragraph 21 of his answering affidavit deposed to on 2 July 2013 in the FUL matter, stated:

> *"... The document from the IGI in the last paragraph thereof contained a recommendation that this matter must be referred back to the NPA for the investigation of criminal charges".*

[159] Then in paragraph 32 of the answering affidavit of 2 July 2013, Mrwebi introduced a revealing shift from his initial basic reason for the withdrawal of charges against Mdluli, and by so doing exposed himself in bad light. He stated inter alia:

> *"Later on 30 March 2012 I addressed to General Dramat, advising of the fact that any decision to instruct the withdrawal of the charges still stands and that the matter is closed..." (My emphasis)*

159.1 The statement above is in direct contrast to what Mrwebi said in the preceding paragraph 24 of his affidavit deposed to on 2 July 2013 wherein he stated:

> *"On 5 December 2011 I met Adv Mzinyathi, the DPP of Gauteng North to discuss the Mdluli matter. In the light of the views I held about the matter that the IG would not only help with access to documents and information as well as the fact that she/he would also assist with the issue of privilege my view as conveyed to the DPP related to the process that was followed by the police in dealing with the matter as well as the view that, in the nature of the matter, the IG can help in the matter as she/he has unlimited access to documents and information in possession of crime intelligence. Because I believe that the IG's assistance would serve to address any shortcomings or defects about the evidence..."*

159.1.1 A turn around on the statement quoted above is sought to be explained further in the same paragraph 32 of the answering affidavit of 2 July 2013 as follows:

> *"I want to clarify that I wrote in the fashion I did (referring to 'the withdrawal of the charges still stands and the matter is closed'), I did because since our agreement with the DPP, North Gauteng and Adv. Breytenbach on 9*

December 2011 nothing, as far as I was aware changed in terms of the status of the investigation in the matter, no new information was presented on which the earlier decision could be reconsidered and accordingly in my view what was the point of keeping the matter open in the books of NPA, hence my statement that 'the matter is closed'. This statement does not however, mean that should new evidence come to light it may be reopened and dealt with according law".

[160] *"I wrote in the fashion I did…", Mrwebi was referring to "the withdrawal of the charges still stands and the matter is closed."* Mrwebi was dishonest and sought to mislead the court in FUL matter. First, the charges were not withdrawn because there was lack of evidence. The brief summary of evidence in paragraph 104 above is quite clear that there was *prima facie evidence upon which* to proceed on the fraud and corruption charges about Mdluli. That was also the views of Mzinyathi to which Mrwebi conceded during the disciplinary hearing of Breytenbach. Secondly, the "consultative note" containing the reasons for the withdrawal of the charges focused on the views of the Inspector General. Lastly, the discussion of 9 December 2011 came after the horse had bolted because Mdluli's lawyers were already informed that the charges against Mdluli would be withdrawn.

160.1 Mzinyathi explained it on 23 January 2013 as follows during his cross-examination in the disciplinary proceedings against Breytenbach:

"ADV TRENGROVE: *So, by the time he met with you on the 9th December he said he was functus officio*, correct?

ADV MZINYATHI: Yes

ADV TRENGROVE: And we all know that *functus officio means that I have taken any decision and I no longer have power to reopen it, correct?*

ADV TRENGROVE: So that presented you with a fait accompli, the horse bolted, the case will have to be withdrawn;

ADV MZINYATHI: Indeed.

ADV TRENGROVE: And it was in the light of that fait accompli that you then had your discussion as to what now, correct?

ADV MZINYATHI: Yes.

ADV TRENGROVE: And I understand your evidence that you felt, and I'm told that Advocate Breytenbach agreed with you, whether she said so or not, that you did not want the spectacle of a public clash between various affidavits of the NPA, correct?

ADV MZINYATHI: Yes.

[161] So, the provisional withdrawal as agreed on 9 December 2011 had context and the context was not that there was insufficient evidence to prosecute Mdluli on the fraud and corruption charges. Refusing to reinstate the charges after the Intelligence had cleared the way for Mrwebi, bearing in mind that, that was his initial main concern, in my view, displayed how Mrwebi was determined to flout the rule of law and the Constitution by discontinuing the prosecution against Mdluli in the face prima facie evidence and in contravention of the provisions of section 24 (3) of the Act, that is, without concurring with Mzinyathi.

Insistence on 'in consultation' with Mzinyathi

[162] On 9 September 2013, that is, few days before the hearing of FUL application which was scheduled for 11 September 2013, Mrwebi delivered supplementary answering affidavit in an attempt to respond to FUL replying affidavit in which retired Judge Kriegler stated:

> *"83. The second is that Advocate Mrwebi still seeks to sit on two stools: whereas his cotemporaneous actions and documents clearly point to withdrawal of charges, i.e. an unequivocal withdrawal of proceedings against General Mdluli, he subsequently sought – and still seeks – to suggest a "provisional" withdrawal.*
>
> *84. The third is that Advocate Mrwebi still persists in generalising when seeking to justify his criticism of the case against the General and his disagreement with the Specialised Commercial Crimes Court prosecutor who had worked up the case with senior investigators and the prosecutor's two experienced supervisors, Advocates Brytenbach and Mzinyathi.*
>
> *85. Then, when the Inspector General of Intelligence ("the IGI") (the fourth respondent) intimated that Advocate Mrwebi was quite wrong in seeking to involve her office instead of the Police, he doggedly adhered to the manifestly position he had adopted from the outset".*

[163] I cannot agree more with the criticism. The 'fourth respondent' was with reference to the Inspector General of Intelligence. Mrwebi in seeking to tackle the criticism as he should, in my view, made his position worse by responding as follows:

> *"AD PARAGRAPHS 83 TO 85*
>
> *23. The allegations herein are denied. The Applicant has not made any basis for its bold allegation that I had made the decision to cease the prosecution of the firth respondent.*
>
> *24. I took the decision to withdraw the criminal case in consultation with Adv. Breytenbach and Mzinyathi ..."*

[164] There was no 'bold allegation' about it. In the preceding paragraphs, I particularly dealt with the concession and at times serious contradictions made by Mrwebi at every corner regarding the withdrawal of the charges against Mdluli on the corruption and fraud charges. He clearly discontinued the prosecution by all means in the face of a clear prima facie evidence and without concurring with Mzinyathi.

[165] But what has really brought down Mrwebi in the quotation above, is his alleged in consultation with Mzinyathi. For the first time since his decision on 4 December 2011, did he use the words 'in consultation' with Mzinyathi. By 9 September 2013 when he deposed to the supplementary affidavit in Mdluli/FUL case he had already conceded on 22 January 2013 during the disciplinary hearing against Breytenbach that he single-handedly took the decision to withdraw the charges against Mdluli. He later in the disciplinary proceedings moved to 'substantial agreement' with Mzinyathi, something branded by Advocate Trengrove SC as evidence which was 'patently, dishonestly given'.

[166] In paragraph 37 of his supplementary affidavit deposed to on 9 September 2013, he persisted with the evidence 'patently, dishonestly given' as follows:

> *"... The decision to withdraw charges was taken in consultation with Advocate Mzinyathi".*
>
> 166.1 Mrwebi clearly has made himself liable to cease to be a fit and proper person to remain on a roll of advocates.

Concluding words on Mrwebi and Jiba

[167] I cannot believe that two officers of the court (advocates) who hold such high positions in the prosecuting authority will stoop so low for the protection and defence of one individual who had been implicated in serious offences.

[168] In fact, taking into account the kind of personality (referring to Mdluli), Mrwebi and Jiba had to deal with, they should have stood firm and vigorous on the ground by persisting to prosecute Mdluli on fraud and corruption charges. By their conduct, they did not only bring the prosecuting authority and the legal profession into disrepute, but have also brought the good office of the President of the Republic of South Africa into disrepute by failing to prosecute Mdluli who inappropriately suggested that he was capable of assisting the President of the country to win the party presidential election in Mangaung during 2011 should the charges be dropped against him.

[169] It is this kind of behaviour that diminishes the image of our country and its institutions which are meant to be impartial, independent and transparent in the exercise of their legislative public powers. Retired Judge Johan Kriegler in his replying affidavit in FUL review proceedings had the occasion to put it this way:

> *"128. In serious matter of public interest, an accountable and transparent organ of state has a responsibility to keep the public informed and to make full and frank disclosure in order to refute, explain or ameliorate dangerous allegations..."*

169.1 POCA as a national legislation was introduced in our country and in its preamble, a concern is raised of the ineffectiveness of the ordinary laws of the country to deal with the surge of crimes like corruption and fraud. The Prosecuting Authority Act makes a provision for the establishment of the Investigating Directorate and special Director, (who was Mrwebi at all material times hereto) within the prosecuting authority, to deal with the surge of crimes like corruption and fraud, the mandate being to effectively investigate and prosecute these offences without fear, favour and prejudice.

[170] Mzinyathi, Breytenbach and other prosecuting officials who were involved in the investigation of charges against and prosecution of Mdluli, were like foot soldiers in a war-zoned area crying loud for the freedom and space to declare war and to fight against serious crimes that are crippling our country and threating investment. Jiba on the other hand, was like a commander-in-chief and in charge required to lead by example. But instead, she flouted every rule in the fight against crime. Her failure to intervene when she was required to do so, has failed the citizens of this country and in the process, brought the image of the

legal profession and prosecuting authority into disrepute. Both Mrwebi and Jiba should be found to have ceased to be fit and proper persons to remain on a roll of advocates.

COMPLAINTS AGAINST MZINYATHI

[171] GCB's complaint against Mzinyathi arose from his confirmatory affidavit deposed to on 10 September 2013. This was a confirmatory affidavit to Mrwebi's supplementary answering affidavit deposed to on 9 September 2013. Murphy J in his judgment in FUL matter handed down on 28 September 2013 inter alia, criticised Mzinyathi as follows:

> *"[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 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 11th hour the day before the hearing without any explanatory whatsoever for it being filed 6 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 herein thus saying in effect for the first time that he had indeed concurred in the decision.*
>
> *[53] Mzinyathi elaborated further in ragraph 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 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 e-mail 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 has been finally taken, but conceded to the characterization of the withdrawal as provisional as a compromise partially addressing his concerns.*

[54] *Taking into 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 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 of North Gauteng to the effect that he ultimately concurred, must regrettably be rejected as creditworthy. The affidavit is a belated transparent and unconvincing attempt to rewrite the script to avoid the charges of unlawfulness. The version in the supplementary founding affidavit, originally uncontested by Mzinyathi and corroborated by Mzinyathi's testimony at the disciplinary hearing, must be preferred and accepted as the truth".*

[171] In the present proceedings Mzinyathi deals with these criticisms and explains himself extensively in more than twenty page affidavit made out of several paragraphs. I do not intend to deal with his responses in detail. Mzinyathi in paragraph 13 of his confirmatory affidavit deposed to on 10 September 2013 stated:

"I have read the answering affidavit of Mrwebi and the first respondent and confirm the allegations made therein in so far as they relate to me".

[172] It is this statement that brought Mzinyathi in the firing line with Murphy J. This court now has the benefit of hearing Mzinyathi on the remarks made against him. I must immediately point out that I have not been able to find in Mzinyathi's confirmatory affidavit that at the meeting of 9 December 2011 *'he was persuaded that the matter was not ripe for trial and agree to the provisional withdrawal of the charges'*. What I read in his confirmatory affidavit of 10 September 2013 is that he *'...initially disagreed with Adv Mrwebi's decision that the matter should be withdrawn'*. The *'not ripe for trial'* statement in paragraph 10 of Mzinyathi confirmatory affidavit cannot be attributable to him as his statement, but rather that of Mrwebi and it reads: *"The other issue which he raised was that the investigation were incomplete and the matter was not ripe for trial. After extensive discussions we agreed that the matter should be withdrawn provisionally so that the investigating officers can work with the office of the Inspector General of Intelligence to conduct further investigations. Adv. Mrwebi informed Adv. Breytenbach that once the investigations were completed she could re-enroll the matter for trial"*, something which Mrwebi refused to do after the Inspector General advised that *'the matter be referred to the NPA for the institution of the criminal charges'* afresh against Mdluli as quoted in paragraph 157 of this judgment. What is clear from what was stated in paragraph 10 of Mzinyathi's confirmatory affidavit is that "*not ripe for trial*", was a statement made by Mrwebi to Mzinyathi and Mzinyathi did not own the

statement in his confirmatory affidavit. The agreement of 9 December 2013 to provisionally withdraw the fraud and corruption charges against Mdluli has context which is briefly referred to hereunder:

172.1 The statement quoted in paragraph 171 above was preceded in particular by paragraphs 7 to 9 in which Mzinyathi recorded:

"7. *On 5 December 2011, Adv, Lawrence Mrwebi approached my office and informed me that he was dealing with representations in connection with the matter of the Fifth Respondent, and that he needed to consult with me in this regard, He further informed me that he was going to conduct some research on the Intelligence Services Oversight Act No 40 1994. Thereafter he left my office.*

8. *Later I received a copy of a letter from the prosecutor, Adv. Smith in which Adv. Mrwebi instructed the prosecutor to withdraw charges against the Fifth Respondent. In response to the said instruction I wrote an email to Adv. Mrwebi in which I requested a meeting with him to discuss the matter.*

9. *On 9 December 2011, I and Adv. Breytenbach held a meeting with Adv.Mrwebi in his office, 2nd Floor, VGM Building 123 West Lake Avenue, Weavind Park in Silverton, the NPA Head Office. During our meeting, I initially disagreed with Adv Mrwebi decision that the matter should be withdrawn."*

[173] What is quoted above should be seen in the context of the email of 8 December 2011 quoted in part in paragraph 153.9.3 of this judgment, which email Mzinyathi sent to Mrwebi before their meeting of 9 December 2011. This email is also mentioned by Mzinyathi in the present proceedings. Mzinyathi in my view should be commended for standing firm against Mrwebi's withdrawal of the charges against Mdluli. His evidence during Breytenbach's disciplinary proceedings part of which is quoted in paragraph 160 above was consistent with his stand point about what had transpired on 5, 8 and 9 December 2011. That coupled with his detailed answering affidavit in the present proceedings tackling the adverse remarks made against him as quoted in paragraph 169 of this judgment, should bring the complaints against Mzinyathi to rest. Murphy J did not have the benefit of the detailed response which has now been placed before this court by Mzinyathi. The agreement on 9 December 2011 as indicated in paragraph 10 of Mzinyathi's confirmatory affidavit deposed to on 10 September 2013 to have the charges 'withdrawn provisionally' against Mdluli was not inconsistent with what Mzinyathi said during the disciplinary proceedings of Breytenbach as quoted in paragraph 160 of this judgment.

[174] GBC seems to have been mindful of the insufficient information against Mzinyathi to justify any of the reliefs sought. For example, in paragraph 20 of its founding affidavit, it states:

> *"Jiba and Mrwebi, in particular, appear to be entirely indifferent to the demands of the advocates profession and high standard required of them as officers of the court. They have fallen well short of their high duty to the court, which requires absolute honesty and integrity. The affidavits deposed by Jiba and Mrwebi in the FUL matter evince an attempt to mislead the court, at best and, indeed, appear to have been untruthful in material respects". (my emphasis).*

[175] Mzinyathi in my view, was consistent throughout. His confirmatory statement quoted in paragraph 171 above has to be considered in the light of what is stated in paragraph 173, all of which speak to the contextualisation of the statement in paragraphs 10 and 13 of his confirmatory affidavit. It is for this reason, amongst others, that this court did not deem it necessary for Mzinyathi to address the court in the present proceedings, neither did GCB insist to proceed against Mzinyathi after counsel for GCB was requested to indicate whether GCB still persists with its application against Mzinyathi.

COSTS

[176] Mzinyathi should be found to have substantially succeeded in his opposition for the relief sought by GCB. For this reason he should be entitled to costs up to the stage when counsel for GCB indicated that the latter will not persist with its relief against Mzinyathi. Similarly, GCB should be found to have substantially succeeded arising from my findings with regard to Jiba and Mrwebi conduct in their handling of Mdluli case.

[177] An order is hereby made as follows:

177.1 The case against Mzinyathi (third respondent) is hereby dismissed with costs, such costs to include the costs of two counsel up to the stage when the applicant (GCB) indicated that it will not persist against the third respondent.

177.2 The application against Jiba (first respondent) and Mrwebi (second respondent) with regard to their handling of Mdluli's (FUL) case is hereby granted and an order is hereby made as follows:

177.2.1 The names of Ms Nomgcobo Jiba (first respondent) and Mr Lawrence Sithembiso Mrwebi (second respondent) are hereby struck from the roll of advocates;

177.2.2 The first and second respondents to pay the costs of the application the one paying the other to be absolved and such costs to include the costs of two counsel.

M F LEGODI

JUDGE OF THE HIGH COURT

I agree

W.HUGHES

JUDGE OF THE HIGH COURT

For the Applicant:	Adv S Burger SC
	Adv N Mayosi
Instructed by:	Bernard Van Der Hoven Attorneys
For the 1st Respondent	Adv N Arendse SC
	Adv S Fergus
Instructed by:	Majavu Incorporated
For the 2nd Respondent	Adv RPA Ramawele
	Adv k Magano

Instructed by Attorneys:	AM Vilakazi Tau Attorneys
For the 3rd Respondent:	Adv DB Ntsebeza SC
	Adv SX Mapoma
Instructed by:	Magaga Incorporated

THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL DIVISION,

DURBAN

CASE NO. D6316/2019

In the matter between:

DEREK HANEKOM **APPLICANT**

and

JACOB GEDLEYIHLEKISA ZUMA **RESPONDENT**

ORDER

The order granted is as follows:

1. It is declared that the allegations made about the applicant, Derek Hanekom in the following statement posted as a tweet, are defamatory and false:

   'I'm not surprised by @Julius_S_Malema revelations regarding @Derek_Hanekom. It is part of the plan I mentioned at the Zondo Commission. @Derek_Hanekom is a known enemy agent.'

2. It is declared that the respondent, Jacob Gedleyihlekisa Zuma's publication of his tweet above was and continues to be unlawful.

3. The respondent is ordered to remove the tweet within 24 hours from all media platforms including by deleting it from his Twitter account.

4. The respondent is ordered, within 24 hours, to publish on Twitter from his Twitter account (@PresJGZuma) the following apology:

   'On 25 July 2019, I published a tweet which alleges that Derek Hanekom is a known enemy agent. I unconditionally withdraw this allegation and apologise for making it as it is false.'

5. The respondent is interdicted from publishing any statement that says or implies that the applicant is or was an enemy agent or an apartheid spy.

6. The interdict in the preceding paragraph does not bar the respondent from testifying truthfully, as he is required to, at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State.

7. The applicant is awarded damages against the respondent, the quantum of which is yet to be determined.

8. The determination of the quantum of damages of R500 000 claimed by the applicant against the respondent is referred for oral evidence.

9. The respondent is ordered to pay the applicant's costs, including the costs of two counsel.

10. The matter is adjourned sine die.

JUDGMENT

D. PILLAY J

Introduction

'Be vigilant, comrades. The enemy is vigilant. Beware the wedge driver! Men who creep from ear to ear, driving wedges among us; who go around creating splits and divisions. Beware the wedge driver! Watch his poisonous tongue.'

Oliver Tambo closing address, Morogoro Consultative Conference[1]

[1] Derek Hanekom applies urgently to interdict Jacob Gedleyihlekisa Zuma for publishing the following statement on his twitter account on 25 July 2019:

> 'I'm not surprised by @Julius_S_Malema revelations regarding @Derek_Hanekom. It is part of the plan I mentioned at the Zondo Commission. @Derek_Hanekom is a known enemy agent.'

[2] Mr Hanekom contends that Mr Zuma's tweet implies that he is an apartheid spy. As a result, Mr Hanekom receives abusive messages in which he is referred to as an 'askari' and an 'impimpi'. Both words are derogatory references to apartheid era spies. Threats to harm him and his wife put their personal safety at risk. He asserts that Mr Zuma's tweet is defamatory and false, resulting in an actionable injury to his reputation and dignity. For this, he claims an apology and compensation from Mr Zuma, and an interdict.

[3] Mr Zuma admits he published his tweet about Mr Hanekom. He was responding to the tweets of Julius Malema, the leader of the Economic Freedom Fighters (EFF)

[1] L Callinicos 'Oliver Tambo – Beyond the Engeli Mountains" (2004) at 336. This biography has a stamp of authority with the forward by President Thabo Mbeki. https://www.anc1912.org.za/myanc-close-ranks-be- vigilant-comrades-enemy-vigilant-beware-wedge-driver-men-who-creep-ear-ear; https://www.dailymaverick.co.za/article/2017-12-14-analysis-morogoro-conference-memorandums-wedge-drivers-and-the-saving-of-the-ancs-soul/; https://www.dailymaverick.co.za/opinionista/2018-09-20-petty-palace-politics-fly-in-the-face-of-the-need-for-unity/.

published on 23 July 2019 which read:

> 'Hanekom gave us the list of the ANC MPs who were going to vote with us in the vote of no confidence against Jacob Zuma.'

And

> 'Today he calls us fascists, but Derek Hanekom plotted with the EFF to bring down President Zuma. The same goes with Solly Mapaila (Deputy General Secretary of the SACP) too.'

[4] Mr Zuma denies ever claiming that Mr Hanekom was an apartheid spy. Nor can his tweet be reasonably construed as suggesting that Mr Hanekom is an apartheid spy. Notwithstanding, Mr Zuma may or may not claim that Mr Hanekom is an apartheid spy when he resumes his testimony at the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State chaired by Deputy Chief Justice Zondo (the Commission). Mr Zuma's stance is not to prove that Mr Hanekom is an apartheid spy – at least not in these proceedings. As Mr Hanekom seeks an interdict in order to 'muzzle' him from testify at the Commission, this application should be dismissed.

[5] Mr Zuma admits that he uses 'the medium of Twitter to engage with the public' and that he has 'significant followers'. His tweet transmitted automatically to over 323 000 Twitter followers, 1817 of whom commented and 2902 retweeted Mr Zuma's tweet.

Legal principles

[6] Defamation is the wrongful and intentional publication of defamatory words or conduct pertaining to a claimant. The four requirements to prove defamation are: a. wrongfulness, b. intention, c. publication and d. the defamatory words or conduct about the claimant.[2] Once a claimant establishes c. and d., then a. and b. are automatically presumed. That is, the publication is presumed to be both wrongful and intentional.[3] To avoid triggering this presumption, and consequently, liability for defamation, a defendant

[2] Khumalo v Holomisa 2002(5) SA 401 (CC) at para 18.
[3] Neethling, Potgieter, Visser 'Law of Delict' (1993) at 327.

must raise a defence which rebuts either the requirement of wrongfulness or intention.[4] Constitutionally, Mr Hanekom's rights to dignity (s 10) and freedom and security (s 12) are limited by Mr Zuma's right to freedom of expression under s 16 of the Constitution of the Republic of South Africa, 1996. And vice versa.

[7] The test for defamation meaning is whether, in the opinion of a reasonable person, the words have the tendency to undermine, subvert, or impair a person's good name, reputation, or esteem in the community.[5] This is a two-stage inquiry.

[8] First, what is the '*natural*' or '*ordinary*' meaning of the statement? For this, neither the meaning which the maker of the statement intended to convey, nor the meaning given to it by the persons to whom it was published, matters. So, whether they believed it to be true, or whether they then thought less of the plaintiff are irrelevant considerations.[6] The test is objective. How would a reasonable person of ordinary intelligence have understood the publication?[7] A reasonable readers are not naïve. They take into account not only what the words say, but also what they imply.[8] Second, based on the statement's natural or ordinary meaning, would it tend to lower the claimant in the estimation of right-thinking members of society generally?[9]

[9] To imply that someone is an apartheid spy or dishonest is automatically defamatory.[10] To call persons who hold high office spies, imputes to them that they lack 'the qualities that are required to be entrusted with the confidences of high office.' This 'would indeed tend to lower them in the estimation of people straddling all sectors of our society'. This is defamatory.[11]

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[4] Neethling, Potgieter, Visser 'Law of Delict' (1993) at 327; LTC Harms and JH Hugo 'Amler's Precedents of Pleadings' (1989) at 99.
[5] South African Associated Newspapers Ltd and Another v Yutar 1969 (2) SA 442 (A) at 451.
[6] Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae) 2011 (3) SA 274 (CC) para 89
[7] Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae) 2011 (3) SA 274 (CC) para 89
[8] Argus Printing and Publishing Co Ltd and Others v Esselen's Estate 1994 (2) SA 1 (A) at 21A-B.
[9] Mthembi-Mahanyele v Mail & Guardian Ltd and Another 2004 (6) SA 329 (SCA) paras 26-29.
[10] Mthembi-Mahanyele v Mail & Guardian Ltd and Another 2004 (6) SA 329 (SCA)
[11] Tsedu v Lekota 2009 ZASCA 11 para 17.

[10] Context is relevant for evaluating the requirements defamation.[12] When the context is political, a higher tolerance for robustness and rhetoric applies than in cases which do not implicate the public interest or the political.[13]

The issues

[11] Neither the facts nor the legal principles are in dispute. As it is common cause that Mr Zuma published his tweet, proof of the act, publication and intention are established.[14] Wrongfulness is not only presumed but also conceded, that is, if I find that Mr Zuma's tweet implies that Mr Hanekom is an apartheid spy. If I do, as Mr Hanekom requests I should, then the application must succeed. If I find the opposite, then the application must fail. Reduced to this binary, the issue is a determination of fact or inferences from facts. Justification would not arise. However, Mr. Zuma reserves the right to justify his tweet as being true, fair comment or falling within the limits of the right to freedom of expression in s 16 of the Constitution.

[12] What the case is about is the 'natural' or 'ordinary' meaning of Mr Zuma's tweet in the context. Would a notional reasonable right-thinking reader with normal intelligence understand Mr Zuma's tweet to mean that Mr Hanekom is an apartheid era spy acting against the ANC? It is common cause that the posts on social media do not represent the reasonable reader's understanding, but may go to assessing quantum, if that arises. Importantly, what this dispute is not about is whether, as a fact, Mr Hanekom is an apartheid spy. Nor does it call for a value, moral or political judgment about whether Mr Hanekom's or Mr Zuma's understandings of politics within the ANC should prevail. As a dispute presented for resolution through litigation, legal principles must apply.[15]

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[12] Waldis v Van Ulmenstein (2017 (4) SA 503 (WCC) para 11.
[13] Democratic Alliance v African National Congress and Another (CCT 76/14) [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) (19 January 2015); Islamic Unity Convention v Independent Broadcasting Authority and Others (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002)
[14] Neethling, Potgieter, Visser 'Law of Delict' (1993) at 319.
[15] M H Marshall, Chief Justice Supreme Judicial Court Massachusetts United States of America Bram Fischer Memorial Lecture - Legal Resources Trust Friday, November 13, 2009.

[13] The issue boils down to interpreting Mr Zuma's tweet in the political context in which he published it. As an interpretive exercise, it is possible to resolve the merits on the pleadings. I am indebted to both Counsel for narrowing down the issues thus. After summarising the case for each litigant, I analyse the phrase 'known enemy agent' in isolation, then in the context of the entire tweet and finally in the light of the reference in it to the Commission. I preface my analysis of Mr Zuma's tweet with a brief description of the political context in which this litigation presents. I quote extensively so that the litigants 'speak' for themselves, and their 'voices' and the tone in which they choose to express themselves in their affidavits, are not diluted or misrepresented by my paraphrasing.

Mr Hanekom's case

[14] Mr Hanekom became a member of the NEC of the ANC in 1994. He served as Minister of Agriculture and Land Affairs from 1994 to 1999, as Deputy Minister of Science and Technology from April 2004 to October 2012, as Minister of Science and Technology from 4 October 2012 to 25 May 2014, and as Minister of Tourism from 26 May 2014 to 30 March 2017 and 27 February 2018 to 25 May 2019. Additionally, he was a member of Parliament from 1999 to 2004 and from 30 March 2017 to 27 February 2018. Then he resigned as a member of Parliament. He is currently the chairperson of the board of the Ahmed Kathrada Foundation, an organisation formed to continue the legacy of the anti-apartheid struggle stalwart. He is also a recipient of an award of merit from the German President in recognition of his contribution to cooperation between Germany and South Africa as Minister of Science and Technology. All this vests Mr Hanekom as a politician with a reputation that has considerable currency.

[15] Mr Hanekom submits that the tweet, expressly or by implication, characterises him as a 'known enemy agent'; and that he is an apartheid spy in the context of Mr Zuma's evidence at the Commission. As an enemy agent or apartheid spy it follows that he 'conducted himself in a manner which is contrary to the best interests of the ANC

and the country; that he 'lacks integrity'; that he is 'untrustworthy'; and that he lies and deceives his comrades. These statements presented as fact are 'entirely and demonstrably false'. Mr Hanekom claims he is not and has never been a spy for the apartheid government. Furthermore, not only is the tweet false, 'it is inconceivable that Mr Zuma could have genuinely believed it to be true.' Mr Zuma is fully aware of Mr Hanekom's history as an anti-apartheid activist and loyal member of the ANC.

[16] Publication of Mr Zuma's tweet is widespread in social and print media. That is the nature of the Internet. Mr Zuma knew that the communication via Twitter would be 'instantaneous, borderless and far-reaching.' A person conducting an Internet search of Mr Hanekom's name 'anywhere in the world will see the statement and will understand that [he] was or still [is] an apartheid spy, lacks integrity and trustworthiness and conducts himself in a manner contrary to the law and best interests of the country.' The tweet continues to circulate widely and with additional comments and innuendo, to cause immense harm and damage to Mr Hanekom's reputation for as long as it remains published without censure.

[17] Axiomatically, without his integrity, his colleagues and the public he serves perceive him as 'untrustworthy and suspicious'. Mr Zuma's tweet undermines Mr Hanekom's legitimacy and authority as a senior and previously well-respected politician, as well as his legacy as an anti-apartheid activist. Unless the court grants the interdict, his reputation and integrity will remain severely impugned and his integrity as a member of the ANC will remain in question.

[18] The interdict is urgent. The public should be 'disabused of the lies that Mr Zuma is perpetrating'. Because the matter is high profile, the abuse takes place in the public eye. Comments on social media call Mr Hanekom 'askari' and 'impimpi'. Historically, these words were reserved for those who were suspected of being disloyal to the liberation struggle. They were often assassinated or at the very least ostracised. It is exceptionally dangerous to be referred to in these terms. Nor is it in the best interests of the people of South Africa to lose faith in the integrity of those who serve at the highest

echelons of government. Furthermore, his fundamental right to dignity has been infringed.

Mr Zuma's case

[19] Mr Zuma is a member of the ANC 'for decades'. He was the President of the ANC and of South Africa for two terms following the general elections in 2009 until he resigned on 14 February 2018.

[20] Mr Zuma contends that it is not he, but Mr Hanekom who 'deliberately and mischievously adds 'apartheid spy' to his 'reference to him as an enemy agent.' He emphasises:

> 'I never referred to Hanekom as an apartheid spy. I have not expressed any view about his role and history in the ANC. It is instructive that he deems it appropriate to prevent me from future statements I may or may not wish to make about him. His anxiety in this regard is indeed telling.'

[21] Mr Zuma admits that he placed his tweet within the context of his evidence in the Commission. Following Mr Malema's disclosure of Mr Hanekom's role in supporting enemies of the ANC, he said that Hanekom was a known enemy agent in the following context:

> 'Hanekom, a member of the ANC had worked with the EFF, an avid opposition political party that had ceaselessly campaigned to discredit the ANC and its President. This conduct of Hanekom – working with the enemies of the ANC to weaken it politically and ultimately cause its removal from power fits well within the pillars of the intelligence plan that I spoke about at the Zondo Commission. More importantly, his conduct fits the definition of enemy agent.'

[22] His evidence at the Commission 'is what it is'. He has never testified there that Mr Hanekom was an enemy agent. He said that 'there is an intelligence plan that [he is] aware of, which was specifically created to ensure that the ANC is ultimately hijacked by a person who had worked for the intelligence organizations to fight against the ANC.'

The plan included ensuring that 'the ANC was weakened and controlled by the interests represented by those intelligence organizations. There are people who do their work purporting to advance a good agenda but in truth being part and parcel of the plan.' The Commission was his 'graveyard' in which his enemies intended to bury him with 'lies and character assassination.'

[23] Mr Zuma advances as 'true' that Mr Hanekom was amongst those who deliberately sought to assassinate Mr Zuma's character and discredit his political role both in the ANC and the country. Mr Hanekom also used his position in the ANC and its information to support its enemies and those of Mr Zuma. A 'clear example of his role' is his support for the EFF to bolster its political opposition of the ANC. Mr Zuma accepts 'that the statement is defamatory, but it is true and was a fair comment.'

[24] As for Mr Hanekom's role in the liberation struggle, it does not mean that he did not act 'against the interests of the ANC when he deliberately worked with its enemies to discredit its support and encourage its removal from power. When he worked against the political interests of the ANC by actively seeking the help of the enemies of the ANC to topple its democratically elected President, Hanekom earned his crown as enemy agent.'

[25] Mr Zuma maintains that Mr Hanekom did work 'with the political enemies of the ANC when it was convenient for him. It is clear that he could use his ANC membership to bolster the strategies of political enemies of the ANC against it. In other words, he could work against his own political party, to sure that it was weakened and finally removed from power. That, on the objective and uncontested facts, is disloyalty to the ANC. It places him in the camp of the enemy of the ANC while he continues to declare himself as its loyal member.'

[26] Mr Hanekom deliberately misconstrued his tweet 'to suit his grand plan to muzzle [Mr Zuma] into silence' in case he makes any further revelations in other ANC forums or Commissions. Mr Hanekom may not use Mr Zuma's evidence at the Commission 'to

fight' him in this court before he has concluded his evidence. An interdict would 'muzzle the truth,' unfairly limit his right to share his political opinions about the actions of persons in the ANC 'who betray its historical mission'. Furthermore, the matter is 'self-evidently not urgent.'

[27] Mr Zuma seeks costs on a punitive scale against Mr Hanekom because Mr Hanekom 'is actually lying under oath and misleading this court' whereas he, Mr Zuma has 'demonstrated' that his tweet is 'true'.

Context

[28] Although the dispute is framed as a claim for defamation, a larger conflict casts a longer shadow beyond the legal and into the political. The ANC, through its highest decision-making structure, its NEC, resolved to recall Mr Zuma as President. Mr Hanekom actively supported that decision. Notwithstanding their common political home, both litigants find themselves on opposite sides of each other, not only in this application but also within the ANC. In the following extract, Mr Zuma's identifies each faction as those opposed to the wishes and objectives of the ANC and those who deployed him as Head of State:

> 'As my tweet demonstrates, my removal as Head of State was part of the broader plan by those opposed to the wishes and objectives of the party that deployed me as Head of State.' By his own admission, part of which is attached to this affidavit, Hanekom in conflict with positions of the ANC deemed it fit to plot my removal with enemies and opponents of the ANC. (my underlining)

[29] This litigation is a proxy for the internal conflict within the ANC. Repeatedly, Mr Zuma claims that Mr Hanekom undermines the ANC:

> 'Hanekom by his own admission held various meetings with those who sought to undermine the ANC by removing its elected President as Head of State.'
>
> 'The statement that I made against Hanekom is justified and is a consequence of Mr Malema's claim that he plotted to undermine the ANC and its leadership.' (my underlining)

[30] Repeatedly, Mr Zuma insinuates that Mr Hanekom is dishonest and untrustworthy:

> 'Mr Hanekom's allegations about his role in the ANC and the anti-apartheid struggle are entirely irrelevant for the court to determine the dispute in respect of his actual role.'
>
> 'His duplicitous character has been confirmed by his own admission that he had no difficulty working with the enemies or opponents of the ANC to remove its President when it had not adopted such a resolution.'
>
> 'Hanekom acted in an untrustworthy manner when he worked with the enemies of the ANC to topple it and undermine its leadership. He is rightly treated with suspicion for the role he played in toppling the ANC leadership and undermine the unity of the ANC.'
>
> 'Hanekom is the last person to talk about lying. His entire life as a duplicitous two-faced person is an embarrassing lie. He seeks to reinvent history and perpetuate a lie in the face of evidence that he acted in collaboration with parties acting to undermine the ANC.'
>
> (my underlining)

[31] Mr Zuma dismisses Mr Hanekom's struggle credentials with:

> 'It is true that I first met Hanekom in 1988 in his staged exile in Zimbabwe.'
>
> (my underlining)

[32] Mr. Zuma takes 'exception to Hanekom's constant reference to him as 'a liar' in his founding affidavit. He counters that it is people like Mr Hanekom who seek 'to suppress alternative views and facts by rubbishing those who may expose … liars or enablers of State capture, when in fact it is they who seek to conceal the true nature of State capture they have perpetrated since South Africa's political settlement in 1994.' (my underlining)

[33] This litigation is a conflict aggravator.[16] By launching this application, Mr Hanekom signals to Mr Zuma that invoking internal organisational remedies for dialogue is over. Nevertheless, on 29 July 2019, before launching this application, Mr Hanekom issued a demand for the relief he now claims in this application. Mr Zuma's attorneys acknowledged receipt of the demand on 30 July, indicating that they would revert when they had instructions. They did not. Once the deadline of 2 August passed, Mr Hanekom launched this application on 5 August. Still, Mr Zuma did not respond to clarify his tweet.

[34] Mr Zuma had a choice. He could have clarified his tweet to say, as he now does in his answering affidavit, that he was not suggesting that Mr Hanekom is an apartheid spy. Mr Zuma chose not to respond to the demand. It follows that Mr Zuma wanted his tweet to remain on his Twitter account. He too wants a litigated outcome. Neither litigant seems inclined to engage bilaterally or within the political structures of the ANC to find a negotiated solution. Pursuing dialogue through mediation is not even a remote possibility. Manifestly, mutual distrust has broken down the relationship irretrievably. The conflict is intractable. Both litigants are stoically positioned. Preferring the battlefield of litigation, both are prepared for lawfare.

[35] Lawfare is a consequence of the failure of dialogue and politics. As a shield, lawfare is used to protect the rule of law. As a weapon, lawfare is used to enforce rule by law. This duality 'can be a good and a bad thing.' It is good for litigation to factor in politics to advance constitutionalism; it is bad when litigation becomes the site of political contestation with politicians trying to usurp the judiciary to do their bidding.[17] However, it will be far worse without an effective judiciary to take up the slack flowing from failed politics and social discord. Escalating lawfare reflective of institutional dysfunctionality, social discord and ailing politics will, over time, constrain the capacity of litigation to remedy disorder efficiently.

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[16] M Anstey 'Negotiating Conflict – Insights and Skills for Negotiators and Peacemakers' (1991) at 43.
[17] Michelle le Roux and Dennis Davis 'Lawfare – Judging Politics in South Africa' (2019) p5, 20, 300.

[36] This litigation is a battle or skirmish in the overall war for dominance and control of the ANC by one or other faction. The conflict is intractable political contestation for which a legal resolution is sought. Interest in its outcome ramifies beyond the litigants and into the public domain. This is the context in which the defamation claim serves before the court. Mindfulness of this context facilitates the court's intervention with due regard for the three 'I's' – Independence, Impartiality and Integrity. One way or the other the courts will solve the dispute; but it would take much more to resolve the conflict.

The words in the phrase 'known enemy agent'

[37] Mr Zuma's stance is that 'enemy' refers to the EFF and other opposition parties and anyone who sought his removal as President of the country, including other members of the ANC. His tweet means that Mr Hanekom has 'connived and colluded with the enemies and opposition parties that sought to remove him as president of the Republic of South Africa.'

[38] By 'agents' he means those who 'by their very nature operate clandestinely'. It is precisely through 'seeming loyal' and committed that enables agents to be effective. Such persons, as agents of enemies, foes or adversaries of the ANC, are well known. Mr Zuma fortifies this interpretation when he adds in his supplementary affidavit, that as an enemy agent, Mr Hanekom was disloyal and undisciplined. He brought the ANC into disrepute, in violation of the constitution of the ANC. For this misconduct, Mr Hanekom falls to be disciplined. Thus far, Mr Hanekom has not been disciplined. That may still happen.

[39] As for 'known' Mr Zuma says:

> 'In the ANC it is known that a member that works with its enemies to weaken it, is an enemy agent. Whether or not it is harsh to do so it's a matter of perspective or choice of words. Nothing really turns on it.'

[40] Mr Sikhakhane argues that it 'would be a leap of logic' to equate 'known enemy agent' to mean an 'apartheid spy'; it is Mr Hanekom himself who makes this link. The

tweet is political speech that must be protected as such.

[41] Mr Hanekom's succinct response to Mr Zuma's use of 'enemy' to refer to opposition parties in a constitutional democracy is that it is 'indefensible'. The ordinary and natural meaning of the word 'agent' means acting on behalf of and in the interests of another or taking on the role of another. In the context it means that Mr Hanekom acted on behalf of the enemy, in their interests and against the interests of the ANC. He acts secretly, dishonestly and in violation of the constitution of the ANC. As a representative of the people on the ANC's NEC and in Parliament, this insinuation casts him as duplicitous and subversive. This alleged duplicity was allegedly known before he supported the removal of Mr Zuma as President. It was known to others besides Mr Zuma. It arises not from the recent or even single issue of discussing the removal of Mr Zuma as President. The phrase reaches into history. Historically, apartheid spies were generally referred to as enemy agents. This is false and defamatory. This implicates the reputation of Mr Hanekom.

[42] Unsurprisingly considering that both litigants gleaned their political culture and education within the ANC, there is little difference between their interpretations. As political actors they allow for some robustness in political speech. They agree that historically, apartheid spies were referred to as enemy agents. And it is the hurtful to be called an apartheid spy. This would render the tweet defamatory. But, says Mr Zuma, his tweet does not refer to apartheid spy and is therefore not defamatory.

[43] Notwithstanding his denial, Mr Zuma describes 'enemy agent' to be 'a member who works with its enemies to weaken it'. This description is known in the ANC. Historically, it referred to apartheid spies. 'Harsh' as Mr Zuma acknowledges it to be, he dismisses it as is 'a matter of perspective or choice of words.' In my view, to the reasonable reader, the historical connection to apartheid spies is the most obvious. This is the connection that Mr Zuma wants readers to make. Otherwise, he would have cured the innuendo or ambiguity when he received the demand.

[44] For justification, Mr Zuma has no evidence other than Mr Hanekom's admission. He says:

> 'The evidence that I have of Hanekom having worked with the political enemies of the ANC to discredit and weaken its support is his admitted contact.'

[45] Mr Hanekom's admission is that he met Mr Godrich Gardee, the Secretary–General of the EFF at the latter's request. He disclosed this meeting openly and publicly. He admits that he attended several meetings with other like-minded senior members of the ANC who also wanted Mr Zuma removed as head of State in the best interest of the ANC and South Africa. At two ANC NEC meetings held in 2016 and 2017, many ANC NEC members called on Mr Zuma to resign as President. Accordingly, he denies that he held various meetings with those who sought to undermine the ANC, that he met with other members of the EFF and that he 'connived and colluded with enemies and opposition parties'. He also denies 'in the strongest terms' that he ever received any financial reward or support for his role in removing Mr Zuma as President or for his support for President Cyril Ramaphosa's 2017 campaign.

[46] In my view, nothing from Mr Hanekom's admission lays a basis for Mr Zuma to label him as a 'known enemy agent' or apartheid spy. Dishonesty and duplicity embedded in the phrase makes it automatically defamatory. That Mr Zuma links his tweet to Mr Hanekom's admission and role in removing him as President is odd. The decision to remove Mr Zuma as President was that of the NEC. The practice of recalling a head of State is not new. Mr Zuma is well aware of this. Ironically, it is how he came to replace his predecessor, President Mbeki.

[47] Mr Zuma offers no evidence to support his tweet that Mr Hanekom is an agent of the EFF. The tone of Mr Malema's tweet and the inuendo that Mr Hanekom is fascist, is at odds with such a proposition. If Mr Hanekom is an agent of the EFF and acts in its interests, it would be foolhardy for Mr Malema to expose and disown a useful mole in the ANC. I find no evidence to support Mr Zuma's claim that Mr Hanekom is either an enemy of the ANC or an agent for the EFF or opposition parties.

[48] As indicated above, the litigants limited the dispute to the interpretation that a reasonable reader would give to Mr Zuma's tweet. They also agreed that if I find that a reasonable reader of the tweet would infer a reference to apartheid spy then that would settle the dispute. Before making conclusive findings in this regard, the phrase has to be interpreted in the context of Mr Zuma's tweet.

Phrase in the tweet.

[49] Undoubtedly the first sentence – 'I'm not surprised by @Julius_S_Malema revelations regarding @Derek_Hanekom' – reminds Mr Zuma of his testimony at the Commission. However, it is the second sentence – 'It is part of the plan I mentioned at the Zondo Commission' – that invites the question: What was the plan that it causes him to link the Commission to Mr Hanekom?

[50] At the Commission, Mr Zuma testified that in his role in the ANC as intelligence chief he knew about the work of three foreign intelligence agencies and apartheid spies who had infiltrated the ANC. He named two senior members of the ANC as apartheid spies. He has not named Mr Hanekom – yet. About the plan, he testified at the Commission as follows:

> '[T]here were three intelligence organisations that met … to discuss me and had a plan to begin in 1990 a process of character assassination of Zuma. Two of these organizations came from two different big countries and one of them came from inside South Africa under – which was one of the structures under apartheid which was part of this conspiracy'.[18]
>
> 'Now Zuma has information about these [spies]. We do not know when will he use this information to stop that process that plan of theirs and therefore they took a decision that Zuma must be removed from decision making structures of the ANC and that is why the[ir] character assassination began.'[19]
>
> 'I am saying this because there has been a process and particularly against

[18] Transcript p15.
[19] Transcript p16.

> Jacob Zuma a conspiracy. I am sitting there and I am told by other organisations that my organization as well as in the NEC there are people who are working for them whom they want to be in control of this country.'[20]

And

> 'We kept it as an intelligence issue but it is as important to say this because the character assassination that I faced over the years more than 20 years this is one of the clear sources that I know. There was a plan to deal with Zuma and Zuma has been dealt with all the time.
>
> In other words foreign intelligence organisations and the local one of course under apartheid for a variety of reasons thought it was important to deal with this man.'[21]
>
> 'So the issue of Zuma must resign, Zuma must leave the leadership started way back, as part of this plan.'[22]

[51] Clearly and consciously, Mr Zuma links his evidence at the Commission to Mr Hanekom in his tweet. The plan which allegedly started more than 20 years ago persists today in the ANC and its NEC through Mr Hanekom. So, it is not as recent as the discussions in 2017 or 2018 to have Mr Zuma recalled. Reasonable readers would interpret the link in the tweet to the Commission to mean that Mr Hanekom is part of that plan in which apartheid spies and agents conspired with two big countries to 'deal with Zuma'. In other words, Mr Hanekom's plans to have him removed from leadership in the ANC, dovetails with the apartheid agents' plans. This interpretation gains traction in further evidence from his answering affidavit.

Tweet in context of Mr Zuma's Affidavits

[52] Mr Zuma testifies that the primary function of members of the ANC who played a dual role, was to serve the apartheid intelligence machinery. While Mr Zuma does not dispute Mr Hanekom's membership, he disputes his loyalty to the ANC and its objectives. Like his evidence at the Commission, the following extracts from his affidavit

[20] Transcript p18.
[21] Transcript p20.

locates the inferences flowing from his tweet to times before the attempts to recall Mr Zuma. They go way back into history, into the anti-apartheid struggle, to a time when the ANC was at war with the SADF.

> 'Agents by their very nature operate clandestinely. It is precisely through seeming loyal and the appearance of commitment that enables agents to be effective. Accordingly, Hanekom's allegations about his role or membership in the ANC and the anti-apartheid struggle are entirely irrelevant for the court to determine the dispute in respect of his actual role.'

And

> 'I note that Hanekom's affidavit is replete with his protestation and denial that he was ever an Apartheid spy during the anti-Apartheid struggle. His protestations though understandable are misplaced and premature as I have not yet mentioned him as an Apartheid spy.'

(my underlining)

[53] Mr Zuma denies that Mr Hanekom has been a loyal and disciplined member of the ANC for the most part of his adult life:

> 'His entire life as a duplicitous two faced person is an embarrassing lie.'
>
> 'His entire life and conduct are the anti-thesis of an activist and the new cadre that the ANC seeks to develop.'
>
> 'Only Hanekom can attest to his true role within the SADF or the ANC. He knows which of the two he was deceiving. This is not for this court to determine at this stage.'

(my underlining)

[54] The insinuations, inuendo and ambiguity in the phrase, in Mr Zuma's tweet and reinforced in his evidence at the Commission become explicit in the following paragraph 112 of his answering affidavit:

> 'The statement that I posted about Hanekom say what it says. Hanekom worked with enemies of the ANC to advance their political goals against the ANC and to

[22] Transcript p22.

topple it from government. The statement that I published was therefore truthful, fair comment of Hanekom's conduct and protected under section 16 of the Constitution. By assisting the political enemies with information to weaken the ANC and topple its leadership, Hanekom acted as an apartheid enemy agent.' (my underlining)

Mr Zuma expresses his claim that Mr Hanekom is an apartheid spy unambiguously in the above extract. He uses innuendo to project the same message in the phrase 'known enemy agent' in his tweet. I find that his tweet is defamatory and false.

Inconsistencies, misconceptions and distortions

[55] At the outset I acknowledged the caution that in lawfare, politicians may try to use court to do their bidding. These litigants make many accusations and counteraccusations against each other. Many are either irrelevant to the principal claim for defamation or incapable of resolution in application proceedings. So, they do not feature in this judgment. However, the public interest nature of this application requires some analysis of a few material inconsistencies, misconceptions and distortions. Left unchecked, they could be peddled as truths merely because they are in affidavits that are cloaked with the respectability of judicial proceedings. For some of these inaccuracies, reference to Constitutional Law and history will do. For others, the rules of evidence to determine probabilities will apply.

[56] Mr Zuma says that by 'enemy' he means the EFF and other opposition parties and anyone who sought his removal as President of the country, including other members of the ANC. He says that this is his belief. He repeats this belief several times. So emphatic is he that he goes further to deny that his tweet is 'false and that [he] could not have genuinely believed [it] to be true' in the context provided. He also denies that his tweet is either 'malicious or untruthful'. He seems unaware that these beliefs and denials undermine his defence that his tweet does not imply that Mr Hanekom is an apartheid spy. His beliefs may count in his capacity as a politician. However, it is not his beliefs that count in this defamation claim. The test is: Would reasonable right-thinking people also understand 'enemy' as Mr Zuma does, and would they limit it, as Mr Zuma

suggests, to exclude any reference to Mr Hanekom being an apartheid spy? The answers to these questions originate in our Constitution.

[57] South Africa's 'negotiated revolution' heralded our Constitution in which we pledge to '[h]eal the divisions of the past … and [b]uild a united and democratic South Africa…'.[23] Section 1(d) of our Constitution lays the foundation for 'a multi-party system of democratic government, to ensure accountability, responsiveness and openness.' As such, opposition parties are constitutive of our political landscape, enriching our democracy, diversity of discourse and culture, but simultaneously uniting us to take our 'rightful place as a sovereign state in the family of nations'.[24]

[58] Ironically, it is in *UDM*[25] in which the dispute about the motion of no confidence in President Zuma was decided, that Mogoeng CJ scribing for a unanimous Constitutional Court (CC), extolled the values underpinning the Preamble to our Constitution:

> 'The Preamble to our Constitution is a characteristically terse but profound recordal of where we come from, what aspirations we espouse and how we seek to realise them. Our public representatives are thus required never to forget the role of this vision as both the vehicle and directional points desperately needed for the successful navigation of the way towards the fulfilment of their constitutional obligations. Context, purpose, our values as well as the vision or spirit of transitioning from division, exclusion and neglect to a transformed, united and inclusive nation, led by accountable and responsive public office-bearers, must always guide us to the correct meaning of the provisions under consideration. Our entire constitutional enterprise would be best served by an approach to the provisions of our Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution.'

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[23] Preamble to the Constitution of the Republic of South Africa, 1996.
[24] Preamble to the Constitution of the Republic of South Africa, 1996.
[25] United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21 para 31.

[59] Founded on a negotiated political settlement, the Constitution anticipates that a culture and consciousness of co-operation and dialogue would evolve organically. Political representatives are entrusted to provide leadership to cultivate unity of purpose and action in our collective pursuit of egalitarian ends through dialogical, transformative constitutionalism.[26] To this end, coalitions and collaboration amongst political parties arise. Without common aims and reciprocity, 'nothing resembling a society can exist.'[27] That is not to say that dialogical constitutionalism jettisons conflict and contestation for political power. On the contrary, interparty and intraparty conflict is inevitable in complex societies confronting intractable problems. Dialogical constitutionalism anticipates meaningful engagement to be agonistic, not antagonistic, to sharpen debate for best outcomes, and not to subvert constructive discourse.[28] A critical legal approach to constitutional interpretation recognises, respects and accounts for these phenomena in public interest litigation such as this.

[60] In short, this is what it means to be participatory, dialogical, developmental and constitutional in a multi-party democracy. This is the constitutional culture that democracy-seekers collectively and consciously strive for to make our fledgling nation work. To link 'enemy' to opposition parties would be the antithesis of all that we stand for as a peace-loving, multi-party democracy, historically grounded in our heritage as negotiators of our revolutionary transformation.[29] The adoption of the Constitution symbolises not the end but the continuation of peaceful transformation through dialogue. To regard opposition parties as enemies of the ANC undermines dialogue. To refer to anyone with whom one does not agree, politically, intellectually, ideologically, or in any other way, as enemy, sows the seeds for internecine political violence that bedevil many nations. Against these constitutional imperatives, I find that no reasonable

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[26] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) SAJHR at 150.
[27] L Fuller 'Forms and limits' at 357.
[28] C Mouffe: Agonistic Democracy and Radical Politics http://pavilionmagazine.org/chantal-mouffe-agonistic-democracy-and-radical-politics/ (accessed 15 April 2018).
[29] P Langa 'Transformative constitutionalism' (2006) Stell LR 351 at 352; R Suttner in '25 years of democracy (Part1): ruptures and continuities' (11 February 2019) writes:
'The 'democratic breakthrough' of 1994 constituted a revolutionary rupture with the past, incomplete then and incomplete now.' https://www.polity.org.za/article/25-years-of-democracy-ruptures-and-continuities-2019-02-11 (accessed date?).

reader of Mr Zuma's tweet would link 'enemy' to the EFF, opposition parties or opponents within the ANC.

[61] As a member of the ANC 'for decades', having 'different leadership responsibilities', including as President, Mr Zuma must know, support and actively advance dialogue and other bridge building practices to achieve the revolutionary aims of our Constitution. As a conciliator entrusted to lead a nation fractured by 'strife, conflict, untold suffering and injustice,'[30] Mr Zuma would not reasonably be understood to mean that members of opposition parties are enemies of the ANC. Reasonable, right-thinking people would not anticipate that Mr Zuma would bear such an adversarial disposition towards opposition parties, let alone encourage such antagonism. Mr Zuma's insistence that 'enemy' refers to opposition parties and his detractors is seriously at odds with our constitutional values. If his beliefs prevail, our democracy would unravel.

[62] As the chief of intelligence and an elder in the ANC, Mr Zuma's utterances are weightier than ordinary mortals. On matters of state security, his opinions count. More so than many social media activists. Consequently, when Mr Zuma refers to a political activist as 'a known enemy agent' reasonable readers of his tweet will understand that he is referring to an apartheid era spy.

[63] Mr Zuma began his defense by repeatedly denying that 'known enemy agent' implied 'apartheid spy'. His paragraph 112 unravels his defense altogether. However, this is not the only contradiction in his case.

[64] Mr Zuma's evidence in this application is internally inconsistent in multiple ways. He admits that to be called a 'known enemy agent' or an 'apartheid spy' is defamatory. However, he then denies that his tweet 'cast aspersions on the character and integrity of Hanekom'. He continues to say that Mr Hanekom displayed 'a shocking lack of

[30] E Mureinik 'Bridge To Where? Introducing The Interim Bill Of Rights' 10 S. Afr. J. on Hum. Rts. 31 1994.

political integrity and judgment' by 'using his political position, knowledge and experience in the ANC to join the political foes of the ANC with the sole purpose of toppling the ANC leadership and weakening its political power.' He emphasises that by defying 'the ANC to join forces intent on dismantling the ANC and toppling its democratically elected leadership,' Mr Hanekom showed that he 'has no integrity whatsoever. Even in politics, integrity means that you do not place your political party at the jeopardy of losing credibility and support by joining the opposition to topple the leadership of the party and weakening it.'

[65] Furthermore, the 'ANC NEC had specifically instructed all its members in Parliament to not vote with the EFF or any opposition political party in support of a motion to remove the President. Hanekom defied this resolution of the ANC NEC. This defiance does not define discipline and loyalty.

[66] Mr Hanekom counters that it was his loyalty to the ANC that urged him to seek Mr Zuma's removal as President. It is in fact Mr Zuma who damaged the reputation of the ANC as a result of the allegations of fraud and corruption levelled against him. Removing Mr Zuma as President was therefore consistent with the country's Constitution and in the interest of the ANC and the people of South Africa.

[67] In my view, Mr Zuma seems to have forgotten the CC's reminder in *UDM* below that the oath of office is allegiance to the Constitution, not to the political party to which the member belongs:

> 'Central to the freedom 'to follow the dictates of personal conscience' is the oath of office. Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail. This is so not only because they were elected through

their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution. The requirement that their names be submitted to the Electoral Commission before the elections is crucial. The people vote for a particular party knowing in advance which candidates are on that party's list and whether they can trust them.'[31]

[68] The CC also encouraged the Speaker to put the people first in the following extract:[32]

'Considerations of transparency and openness sometimes demand a display of courage and the resoluteness to boldly advance the best interests of those they represent no matter the consequences, including the risk of dismissal for non-compliance with the party's instructions.' (footnotes omitted)

[69] Mr Zuma mistakenly assumes that loyalty to the ANC is synonymous with loyalty to him. His assumption is both factually and constitutionally untenable. Falsely or erroneously, Mr Zuma believes that his recall as President was against the wishes of the ANC. However, it was the ANC NEC itself that insisted on Mr Zuma resigning as President of South Africa. Furthermore, it is not only the wishes of the ANC that matter. Mr Zuma offers no evidence that the people of South Africa were opposed to his recall. The people have an interest in what goes on in the ANC not least because it is the majority governing party.

[70] Support for the removal of Mr Zuma as President of South Africa is not synonymous with undermining the ANC. It is not only Mr Hanekom who supported his removal. Many other members of the ANC who were of the view that Mr Zuma 'did not possess the characteristics befitting the office' of President of the country acted in the best interests of the ANC and the country when they mobilised and resolved to recall him as President. Notwithstanding the efforts within the NEC since 2016 to recall him,

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[31] United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21 para 79.
[32] United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21 para 80.

Mr Zuma chose to resign only in February 2018. If the NEC decision was contaminated by the influence of apartheid spies, as Mr Zuma suggests, then the appropriate response for Mr Zuma was to challenge the NEC decision. Instead he resigned. By his resignation he acquiesced in the NEC decision. Whether he did so as a disciplined member of the ANC or because he acknowledged that the balance of forces within the ANC had shifted, is irrelevant for current purposes. Equally, his bald, unsupported assertions of apartheid spies in the NEC are insufficient to cast doubt on the authenticity of the NEC decision in these proceedings.

[71] By impugning Mr Hanekom's discipline and loyalty to the ANC, Mr Zuma opens himself to the same criticism. Mr Zuma is unmindful that his own resistance to being recalled and his criticism of the NEC resolution and characterisation of members of the ANC who supported it as apartheid spies, opens him to the same accusation that he levels against Mr Hanekom of undermining the ANC.

[72] About his underground activities, Mr Hanekom testifies that in 1979 he contacted the ANC in Botswana. One of his contacts was Roland Hunter, the personal assistant of Colonel Cornelius van Niekerk of the South African Defence Force, who headed 'Operation Mila' a covert programme of support for Renamo rebels, with the sole aim of destabilising the Frelimo government of Mozambique. This was apartheid's model project for similar destabilising programmes in Lesotho, Angola and Zimbabwe. Mr Hanekom facilitated contact with the ANC in Botswana and helped Mr Hunter convey information about Renamo to the ANC. By his involvement in this way, he deceived neither the SADF, of which he was a member only briefly to complete his compulsory conscription to the South African Army in 1971, nor the ANC for whom he gathered information from Mr Hunter.[33]

[73] Mr Hanekom later learned that President Oliver Tambo of the ANC, had

[33] 'Released spy tells of stolen SA secrets' https://mg.co.za/article/1987-11-27-ed-spy-tells-of-stolen-sa-secrets; 'Treason trial in South Africa' CIIR Newsletter September 1984 http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG1977/AG1977-A11-6-8-001-jpeg.pdf (accessed 4 September 2019).

conveyed the information he had gathered to President Samora Machel of Mozambique which enabled Frelimo to respond rapidly to Renamo. His facilitation strengthened the hand of the President of Mozambique in the negotiations resulting in the Nkomati Accord. The search for the source of the information led to his arrest in 1983 for high treason. He faced the prospect of the death penalty.

[74] It is an undisputed objective fact that for conveying information from Mr Hunter, Mr Hanekom was convicted of high treason and imprisoned for 24 months until his release in September 1986. It is a historical fact, tested through evidence in his trial, that Mr Hanekom's activities as an underground operative facilitated contact between Mr Hunter and the ANC in Botswana to convey information about apartheid South Africa's destabilization of neighbouring states. Of the Nkomati Accord, Callinicos writes that it 'proved to be a positive turning point for the ANC. It pushed the movement back to its most fundamental 'rear base', to the people of South Africa, back home, thus escalating the struggle and hastening the demise of the apartheid regime.'[34]

[75] In these circumstances, for Mr Zuma to dismiss Mr Hanekom's anti- apartheid activism, his loyalty to the ANC and his underground work as irrelevant to this application is not only offensive and inflammatory but also disingenuous. Mr Hanekom's anti-apartheid activities are building blocks constitutive of his reputation and his identity. Hence this claim for defamation. Despite being the head of intelligence and 'fully aware' of intelligence operations, Mr Zuma offers not a shred of evidence to support his claim that Mr Hanekom was an apartheid era spy. False narratives about Southern African history cannot be left unchecked.

[76] Mr Zuma acknowledges meeting Mr Hanekom in Zimbabwe, thanking him for his contribution to the liberation struggle and appointing him to Cabinet when he was President. However, he maintains that none of this suggests that he did not believe then that Mr Hanekom worked with political enemies of the ANC to achieve the political

[34] L Callinicos 'Oliver Tambo – Beyond the Engeli Mountains' (2004) at 519. This biography has a stamp of authority with the forward by President Thabo Mbeki.

agenda of those enemies against the ANC. This is another instance of inconsistency with his defence that 'known enemy agent' did not include a reference 'apartheid spy'.

[77] However, for Mr Zuma to testify in this application that Mr Hanekom 'staged' his exile without putting up any facts to support it, is impermissible. Saying so in this application requires him to substantiate it. That he has reserved his right to testify about apartheid spies at the Commission does not relieve him of his obligations to substantiate claims he makes in this application. If he cannot substantiate his claims, he should not make them. Having made them, he should withdraw them if he cannot put up the evidence.

[78] Mr Hanekom challenged Mr Zuma for appointing him to a Cabinet post as Minister while believing him to be an apartheid spy. Inappropriately, Mr Zuma points to President Mandela's appointment of Mr F.W de Klerk as Deputy President in 1994. That appointment was to forge a government of national unity as the outcome of a negotiated revolution. It does not explain why he, Mr Zuma, would knowingly appoint a person whom he believed to be an apartheid spy to senior positions within the ANC and the government. To add that such a person would never assume the position of President of the ANC is no explanation for enabling an apartheid spy to hold high political office in democratic South Africa.

[79] Mr Hanekom challenges Mr Zuma about allowing him to serve on the ANC's National Disciplinary Committee knowing him to be a known enemy of the ANC. About this appointment Mr Zuma's believes the following:

> 'Hanekom has been at the forefront of expelling other members of the ANC who committed the offences of a less serious nature, I suppose, at that point, he did this to pursue his very desire to have me removed at some stage. While pretending to act in the interests of the ANC and its leadership, I believe that he sought to prepare the ground for my removal. His was a stratagem to strip me of any future support that would jeopardize his grand plan to remove me.'

If Mr Hanekom did what Mr Zuma believes he did, then it is equally an indictment of Mr

Zuma's leadership as it is of Mr Hanekom's alleged duplicity. However, Mr Zuma's beliefs are not evidence. They cannot acquire the stamp of legitimacy merely because he articulates them under oath in court proceedings.

[80] Mr Zuma insinuates:

> 'It has become common place for people in Hanekom's place to supress alternative views and facts by rubbishing those who may expose them as being liars or enablers of State capture, when in fact it is they who seek to conceal the true nature of State capture they have perpetrated since South Africa's political settlement in 1994.'

I find on objective evidence in this application that it is Mr Zuma who propagates a false narrative about Mr Hanekom and his underground activities for the ANC. Mr Zuma has no better evidence than Mr Hanekom's admission about his role in having Mr Zuma recalled. Yet, Mr Zuma exaggerates this role to conniving and colluding with opposition parties. He distorts objective historical facts about Mr Hanekom's underground work that led to the Nkomati Accord and his conviction for high treason. There is an NEC decision that binds Mr Zuma, but he seeks to undermine it in the way he conducts his defence in this application.

[81] The litigants finger each other as wedge-drivers. This calls for a value judgment best left to the political party to which they belong. As the ANC adopted the concept of wedge-drivers, it would know best how to apply it.

Remedy

[82] Turning to the three requirements for a final interdict – urgency, harm and alternative remedy [35] – Mr Zuma disputes that the matter is urgent. He testifies that:

> 'An interdict would muzzle the truth, unfairly limit my right to share my political opinions about the actions of persons in the ANC who betray its historical

[35] Hotz v UCT (730/2016) 2016 ZASCA 159 (20 October 2016) at para 29; Setlogelo v Setlogelo 1914 AD 221 at 227.

> mission. An interdict is not a just and equitable remedy in these circumstances. In any event, an interdict as sought will undermine the constitutional right to expression and free speech under section 16 of the Constitution.'

He is yet to complete his testimony in the Commission. To issue this interdict will place unfair limitation on his ability to give evidence that will demonstrate the false views of people like Mr Hanekom on his role in government as President.

[83] The submission that the interdict would bar him from testifying about Mr Hanekom is unsustainable. This application is to interdict Mr Zuma from making false statements about Mr Hanekom. Mr Zuma has deposed to affidavits in these proceedings which oblige him to be truthful. Similarly, by testifying under oath at the Commission Mr Zuma is already barred from making false statements there. Nothing said or done in this application constrains his testimony at the Commission any more than his oath to be truthful.

[84] As for the harm, Counsel concedes that to refer to any person as an apartheid spy would be harmful. However, Mr Zuma contends that whatever harm Mr Hanekom claims to have suffered, is self-inflicted. He cannot see how his tweet, 'which is true, can cause any harm to Mr Hanekom or impugn his dignity.' Mr Hanekom is the 'author of his own misfortune for conniving with the political enemies of the ANC to undermine and topple the ANC and its leadership.' Turning to the remedy, Mr Zuma refuses to apologise to Mr Hanekom for what Mr Zuma regards as the truth and fair comment about Mr Hanekom because he 'sold the ANC'. On the issue of damages, Mr Zuma submits that Mr Hanekom should not be rewarded with damages for conduct that amounted to selling out on the ANC by collaborating with its political enemies.

[85] I find that a reasonable reader would infer that Mr Zuma's tweet implies that Mr Hanekom is an apartheid spy. Mr Zuma must apologise, remove the tweet and pay damages.

[86] Counsel for Mr Hanekom, Ms Steinberg contends that his public profile is

sufficient to determine quantum.[36] However, both Counsel acknowledge that it is inappropriate to determine malice as an element that affects quantification. There may be other aspects of quantum that deserve fuller ventilation. The nature and volume of media publications would be relevant for assessing quantum. Consequently, quantum is referred for oral evidence.

[87] Both litigants claim costs against each other on an attorney client scale. Ms Steinberg expatiated on the difficulties in effecting service on Mr Zuma and his disregard for the time limits set for delivering his answering affidavits. I agree with Mr Sikhakhane that taking instructions from Mr Zuma in Nxamalala Village, in Nkandla, KwaZulu Natal, in a fact sensitive matter such as this, takes time. Importantly, the time taken enabled the matter to be disposed of finally on the merits. Commendably, Mr Sikhakhane acceded to the merits being determined finally, without raising procedural and technical objections. He made appropriate concessions that helped to narrow down material issues. The issues ventilated in the public domain via social and other media are of a public interest. They call for judicial intervention when the litigants are unable to resolve their dispute amongst themselves. In the circumstances. a punitive costs order is unjustified.

Order

1. It is declared that the allegations made about the applicant, Derek Hanekom in the following statement posted as a tweet, are defamatory and false:

   > 'I'm not surprised by @Julius_S_Malema revelations regarding @Derek_Hanekom. It is part of the plan I mentioned at the Zondo Commission. @Derek_Hanekom is a known enemy agent.'

2. It is declared that the respondent, Jacob Gedleyihlekisa Zuma's publication of his tweet above was and continues to be unlawful.
3. The respondent is ordered to remove the tweet within 24 hours from all media platforms including by deleting it from his Twitter account.
4. The respondent is ordered, within 24 hours, to publish on Twitter from his Twitter

[36] Manuel v EFF and Others [2019] 3 All SA 584 (GJ).

account (@PresJGZuma) the following apology:

> 'On 25 July 2019, I published a tweet which alleges that Derek Hanekom is a known enemy agent. I unconditionally withdraw this allegation and apologise for making it as it is false.'

5. The respondent is interdicted from publishing any statement that says or implies that the applicant is or was an enemy agent or an apartheid spy.
6. The interdict in the preceding paragraph does not bar the respondent from testifying truthfully, as he is required to, at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State.
7. The applicant is awarded damages against the respondent, the quantum of which is yet to be determined.
8. The determination of the quantum of damages of R500 000 claimed by the applicant against the respondent is referred for oral evidence.
9. The respondent is ordered to pay the applicant's costs, including the costs of two counsel.
10. The matter is adjourned sine die.

_____

D. Pillay J

Judge of the High Court of KwaZulu-Natal

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Date of Hearing : 23 August 2019

Date of Judgment : 6 September 2019

120

HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D6316/2019

In the matter between:

DEREK HANEKOM **APPLICANT**

and

JACOB GEDLEYIHLEKISA ZUMA **RESPONDENT**

FILING NOTICE

DOCUMENT: RESPONDENT'S ANSWERING AFFIDAVIT

SIGNED AND DATED at **JOHANNESBURG** on this the 20th day of **AUGUST** 2019.

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IN THE HIGH COURT OF SOUTH AFRICA

(KWAZULU-NATAL LOCAL DIVISION, DURBAN)

Case No: D 6316 / 2019

In the matter between:

DEREK HANEKOM Applicant

and

JACOB GEDLEYIHLEKISA ZUMA Respondent

ANSWERING AFFIDAVIT

I, the undersigned,

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and state that:

1. I am the former President of the Republic of South Africa, having served as President for a period of approximately eight years. I resigned from office on 14 February 2018, and now reside at **Nxamalala Village, Nkandla, KwaZulu-Natal Province, Republic of South Africa**.

2. The facts herein contained fall within my own knowledge unless the contrary appears from the context hereof and are true and correct in every respect. Where I make legal submissions, those are made on the advice of my legal representatives, which advice I believe to be correct and valid in law.

PURPOSE AND CONTEXT OF THIS AFFIDAVIT

3. The purpose of this affidavit is to oppose the reliefs sought by the applicant ("Hanekom") against me. It is also to correct some of his misconceptions about my statement, about which he complains. Hanekom combines the contents of my tweet (of 25 July 2019) with my testimony at the Zondo Commission. I stress, at the outset, that I did not mention Hanekom in my testimony before the Zondo Commission. His attempt to fudge the two is mischievous as he seeks to prevent me from continuing with the revelations I seek to make before the Zondo Commission. This may or may not include him, but for present purposes, my tweet has nothing to do with whether or not he was an apartheid spy.

4. Most importantly the purpose of this affidavit is to demonstrate that it is actually Hanekom himself that continues to perpetuate a lie about his true role in the South African conflict during Apartheid.

5. Hanekom's anxiety about his professed role in the anti-Apartheid struggle whether or not this role was duplicitous and whether he was an Apartheid plant within ANC structures is misplaced in these proceedings. It is a matter best left to the African National Congress ("the ANC") and how it seeks to deal with

BMM JZ

those within its ranks that may have sold out their own comrades. It is also a matter best left to Hanekom's own conscience.

6. I also wish to set out my own role in the ANC as Intelligence Chief and how it came about that I testified before the Zondo Commission regarding those members of the ANC who played a dual role as their primary function was to serve the Apartheid Intelligence Machinery.

7. Through this application, Hanekom anticipates that I may or may not mention him in my future testimony. He therefore attempts to prevent me from testifying truthfully and fully before the Zondo Commission.

8. In this affidavit, I seek to demonstrate the context of my tweet and the common cause events that demonstrate that Hanekom has connived and colluded with enemies and opposition parties that sought to remove me as President of the Republic of South Africa.

9. As my tweet demonstrates, my removal as Head of State was part of the broader plan by those opposed to the wishes and objectives of the party that deployed me as Head of State. By his own admission, part of which is attached to this affidavit, Hanekom in conflict with positions of the ANC deemed it fit to plot my removal with enemies and opponents of the ANC.

10. Hanekom by his own admission held various meetings with those who sought to undermine the ANC by removing its elected President as Head of State. In particular, Hanekom met specifically with members of the Economic Freedom

BMM JZ

Fighters ("the EFF"). His own statement reflected in annexure "FA6" to his founding affidavit attests to this fact.

11. Hanekom fails to disclose other meetings involving other senior members of the ANC with whom he collaborated in conniving with the opposition to oust me as the Head of State. Further, Hanekom fails to disclose whether or not he received any financial reward or support associated with his role in ousting me as Head of State or his role in the so-called CR17 campaign.

12. Hanekom states at great length from paragraphs 15 to 25 of his founding affidavit, his role and membership in both government and the ANC. While his ANC membership is not in dispute, I dispute his assertion about his loyalty to the ANC and its objectives.

13. Insofar as Hanekom seeks to suggest that one's membership of one party precludes them from being agents of another, he misses entirely the very nature of agents. Agents by their very nature operate by clandestinely. It is precisely through seeming loyal and the appearance of commitment that enables agents to be effective. Accordingly, Hanekom's allegations about his role or membership in the ANC and the anti-apartheid struggle are entirely irrelevant for the court to determine the dispute in respect of his actual role. By his own admission he worked with opponents / enemies of the ANC. By so acting Hanekom fits the description I attach to him in my tweet as he did this to undermine the ANC, the party to which he claims his loyalty and allegiance in his founding affidavit.

14. I note that Hanekom's affidavit is replete with his protestation and denials that he was ever an Apartheid spy during the anti-Apartheid struggle. His protestations though understandable are misplaced and premature as I have not yet mentioned him as an Apartheid spy. In fact, it is Hanekom himself who posted a tweet in which he commends a journalist by saying "[y]ou are a good researcher, Kay. I guess we were spies of some sort -providing information to the ANC about SADF covert operations against Mozambique. Roland Hunter was the main spy..." I attach hereto as annexure "**JGZ1**" a copy of the tweet.

15. Only Hanekom can attest to his true role within the SADF or the ANC. He knows which of the two he was deceiving. This is not for this court to determine at this stage.

16. Hanekom deliberately misconstrues my tweet in order to serve his own interests of denying in advance whether or not he was an Apartheid spy. This is an abuse of process as it is entirely irrelevant for the determination of the import of my tweet which correctly describes him as an enemy agent for conniving with those who seek to undermine the objectives and resolutions of the ANC.

17. Accordingly, this court should take a dim view of a litigant who uses a court process for ulterior, nefarious and political purposes.

18. Therefore, his self-praise statements about his commitment to the ANC are nothing but a fabrication and a result of the not so uncommon God-complex of people of his ilk. His own organisation to which he claims allegiance has

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gone public and in an unprecedent way referred to Hanekom as a "**charlatan**". I attach hereto as annexure "**JGZ2**" a copy of the ANC statement in this regard.

19. Throughout the history of the ANC and the anti-Apartheid struggle many people have played a duplicitous role, some have even participated in activities that led to the brutal murder and imprisonment of their own comrades. The fact that one has been placed in senior position in post-Apartheid South Africa is no proof that they were not part of the Apartheid machinery. In fact, many former Apartheid officials continued to work within the post-Apartheid State.

20. The Commander in Chief of former Apartheid armed forces, Mr FW de Klerk was one of the first deputy presidents of democratic South Africa. Accordingly, it should not surprise Hanekom that former Apartheid spies, as a general point, could occupy the higher echelons of a post-Apartheid South Africa. I state this insofar as Hanekom presents the appointment of former Apartheid spies / officers in the democratic government as anomalous.

21. There were many people who played a duplicitous role during the struggle and most of the remain in the ANC. Some of them have indeed occupied senior positions in the post-Apartheid democratic government. Many have raised the question as to why such known agents were appointed to senior government positions in democratic South Africa. This question misses the point entirely and arises out of both dishonesty and ignorance about State craft and intelligence work.

22. Accordingly, Hanekom's entire affidavit constitutes both perjury and an abuse of process. He has admitted that indeed he plotted with parties opposed to the ANC. I attach hereto as annexure "**JGZ3**" a transcript of his public statement in this regard.

23. I also attach hereto as annexure "**JGZ4**" a confirmatory affidavit of Mr Kenny Kunene ("Kunene") who informed me that Hanekom met with him in devising the plan to oust me. It must be noted that this plan was not based on any ANC resolution to remove me but was Hanekom's own frolic or plan between himself and his partners in conspiracy. I invite Hanekom to contradict my statement that his plans to oust me were not mandated by the ANC. He may or may not wish to be candid with the court and state who exactly was the source of his elaborate plan, if not the party he claims to serve loyally.

24. Kunene states that as early as 2013 Hanekom invited him (Kunene) to be part of the broader plan to remove me as Head of State. This came after Kunene had written a letter which was critical of me and my role as Head of State. It is therefore self-evident that Hanekom was part of, if not the initiator, of a grand plan to remove me as Head of State. I was President of the ANC during the aforesaid period and I know of no resolution or plan of the ANC to seek to remove me. Accordingly, Hanekom's grand plan could not have been that of the ANC, the party he claims to be loyal to. It is in this context that my reference to Hanekom as part of the plan must be understood.

25. By way of example, I am not the first to refer to Hanekom's propensity for duplicity. I attach hereto as annexure "**JGZ5**" an article written by Clyde

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Ramailane on 25 April 2019. I also attach hereto as annexure "**JGZ6**" a copy of an article dated 25 July 2019 in which the MKMVA refers to Hanekom in similar terms.

THE APPLICATION IS MISCONCEIVED

Urgency is self-created

26. By his own admission, Hanekom, without the mandate of his party worked in a clandestine fashion to pursue the objectives of those opposed to the ANC. Accordingly, his claim that my tweet impugns his dignity is false. My tweet confirms what he himself admits. There can be no violation of his dignity and accordingly his reliance on urgency is self-created and self-serving. It is an abuse of court process.

27. Hanekom is selective in his choice of complaint. He completely ignores the statement made by Mr Julius Malema in the context of which I posted the tweet. Furthermore, similar references have been made about him as early as 2018.

Motion Proceedings not Appropriate

28. If Hanekom seeks the determination of whether or not he was an Apartheid spy, he knows or ought to know that such a determination cannot be made by way of motion proceedings.

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29. Even his role in conniving with the EFF or other opposition parties is a matter about which disputes can arise as he is less than candid about the number of meetings, the nature of the discussions, the names of those who participated and the rewards, if any that accrued to him and his co-conspirators in acting contrary to the resolutions of the ANC.

30. I am advised and submit that motion proceedings are not appropriate in circumstances where genuine disputes of fact can be expected.

31. In fact, Hanekom's choice of approaching this court by motion proceedings is in bad faith. He seeks to ensure that there is no real ventilation of the issues surrounding his dubious and duplicitous role in the ANC. His choice is a stratagem designed to end the debate about his true role as quickly as possible. He seeks an order by way of urgency, which blocks the truth from being known.

The Relief is Incompetent and Premature

32. Reduced to essential components, the relief sought by Hanekom constitutes a usurpation of the Zondo Commission and a premature interference with my evidence therein. In actual fact this anticipatory application seeks to prevent me from mentioning his name in my evidence in the Zondo Commission.

33. Hanekom seeks orders that will have an undesirable impact on my evidence before the Zondo Commission. I am a witness before the Zondo Commission and have yet to complete giving evidence there. What the applicant seeks to

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do is to muzzle me from giving further evidence relating to the existence of enemy spies in the ANC who are executing an intelligence plan that I spoke about in my evidence before the Zondo Commission. I am yet to complete my evidence in that forum. After completing my evidence, I expect that there will be people who wish to cross-examine me on that evidence. What the Applicant seeks to do is to block me from giving evidence about the role of enemy agents in dividing the ANC as have already done and his role.

34. If the orders are granted, the following would be the effect:

34.1. I would be barred from giving my full evidence on the existence and role of Apartheid spies within the ANC who have played a significant role in dividing the ANC.

34.2. The Court is being asked to prematurely determine incomplete evidence based on Hanekom's view of what I have alleged. The phrase Apartheid spies is not contained in my tweet and can never be reasonably implied to be what I meant. It is added by Hanekom himself.

34.3. The statement that Hanekom is a known enemy agent is true, alternatively constitute fair comment based on a number of factors including that he colluded and plotted with the political enemies of the ANC to topple ANC leadership and weaken its public credibility.

B.M.M.

34.4. The statements that Hanekom is a known enemy agent constitutes speech that is protected in terms of section 16 of the Constitution. Hanekom himself has confirmed that he colluded with parties whose agendas were inimical to that of the ANC.

34.5. It is impermissible in these proceedings to grant an anticipatory order seeking to bar or prevent me from making a statement I may wish to make in the future. There is no basis in my tweet for this anticipation.

34.6. An interdict under the circumstances is incompetent and inappropriate. There are intractable disputes of facts which cannot be resolved in these papers relating to the role that the Applicant played in the liberation struggle, given his association with the South African Defence Force, his collusion with the ANC political enemies in order to destroy the ANC.

35. The statement contained in my tweet is not before the Zondo Commission at all. Hanekom's role during Apartheid may or may not be part of my testimony in other forums. This is irrelevant for purposes of determining the meaning and import of my tweet.

36. Given that I am yet to complete my evidence before the Zondo Commission, it is premature for the Honourable Court to entertain the Applicant's complaint. The Court may not usurp the role of the Zondo Commission by interpreting incomplete evidence before that Commission.

B.M.M

37. For the reasons set out above, this application should be dismissed for lack of urgency, alternatively struck off the roll for both lack of urgency and prematurity.

ESSENTIAL BACKGROUND

38. It is a known fact that I have been in the ANC for decades. I joined the ANC in my early age, worked within the structures of the ANC both inside and outside the country. I have paid dearly for my activities in the ANC, including serving a ten-year prison term on Robben Island. In exile and inside the country, the ANC has given me different leadership responsibilities.

39. For present purposes though, I will confine myself to my responsibilities as head of intelligence, a role through which I got to know about sensitive information. I do this in order to contextualise my testimony at the Zondo Commission, contrary to the purpose for which Hanekom seems to draw it in these proceedings. To this effect, the following background is relevant:

39.1. At the dawn of the negotiations about South Africa's political settlement, I was Chief of Intelligence of the ANC.

39.2. This role meant that I was part of the leadership that was privy to the most sensitive information within the ANC. This role I shared with my late Comrade and Minister of Intelligence Mr Joe Nhlanhla.

39.3. This role also meant that I was the custodian of information relating to Apartheid's own attempts at infiltrating the ANC in exile, inside the country and in its post-Apartheid role as the future ruling party. It is also through this role that I understood that it is a myth that Apartheid spies disappeared with Apartheid when it was removed from our statute books.

39.4. In fact, former Apartheid agents within the ANC became much more significant for Apartheid and foreign intelligence agencies that sought to influence the policy direction of the ANC and post-Apartheid South Africa.

39.5. I was part of the ANC's team of negotiators that met with negotiators of the government of the National Party.

39.6. In 1991 I was elected Deputy Secretary General of the ANC. Later I became the Deputy President of the ANC and the country. Finally, I became President of the ANC in 2007 and 2009 of the country.

40. I am acutely aware that there are protocols that apply to intelligence information. My reference to intelligence information at the Zondo Commission was cited in order to enlighten the Commission about the grand plan to assassinate my character and remove me. My reference to specific names was no recklessness but a careful response to individuals that had themselves elected to make false statements and to further the grand plan to which I referred.

B.M.M

41. Insofar as Hanekom contends in paragraph 37 of his founding affidavit that it is inconceivable that I would appoint him to ministerial position between 2012 and 2017 while knowing that he had been an enemy agent, he pretends he does not know that such appointments had been made by previous Presidents.

42. In fact, those with knowledge of the intelligence environment will tell you exactly why enemy agents may well be appointed to strategic positions in order not to alert them and/or their handlers of your knowledge of their role.

43. By way of example and in so far as it is relevant in these proceedings, when I was elected President of the ANC in the Mangaung Elective Conference, I had reservations when comrades proposed the name of a known Apartheid agent to occupy a very senior position in the ANC. However, and in the interest of unity of the ANC, I was persuaded that despite this fact this agent would never ascend to the position of President of the ANC.

44. I state this only to demonstrate that the appointment of one to strategic and senior positions both in the ANC and government is no evidence that they had not been Apartheid spies. In any event, this issue is not relevant to this application as my tweet never referred to Hanekom as an Apartheid spy.

45. It is true that I first met Hanekom in 1988 in his staged exile in Zimbabwe. Whether this meeting is proof that Hanekom was not an Apartheid spy, is a matter that is not relevant for these proceedings.

46. My tweet must be understood in its correct context and not the purposes for which Hanekom seeks to use it. It is indeed true that I was not surprised at all that it was easy for Hanekom to plot with parties opposed to the ANC in order to undermine it.

47. As I have stated above, his desire to plot with forces external to the ANC started some time ago. I have already made reference to his communication with Kunene. He cannot possibly submit that such grand plan to remove me was a resolution of the ANC. In fact, he sought to sabotage the ANC's position by seeking to collude with external forces to remove an elected President of the ANC without the mandate of the structures of the ANC.

48. In fact, he has perfected this duplicitous role. By his own account, he was a spy of some sort during apartheid. Only, he claims that he played a duplicitous role for the benefit of the ANC. It is for this reason that he would not find it anomalous or burdensome to his conscience to collude with the Economic Freedom Fighters to undermine positions of the ANC caucus in Parliament.

49. I now turn to the allegations set out in the founding affidavit and respond *ad seriatum*. Any allegation contained in the founding affidavit which is not dealt with herein and/or inconsistent with the contents of this answering affidavit are denied.

R.M.M

AD PRARGRAPH 1 to 5

50. Save to deny that the facts are both true and correct, the allegations in these paragraphs are noted.

AD PARAGRAPH 6 to 8

51. It is admitted that following the public disclosure made by leader of the EFF, Mr Malema, regarding the role of Hanekom in covertly supporting efforts by opposition political parties, that were actively and vigorously campaigning for my removal as President of the Republic of South Africa, and the defeat of the ANC as the governing party, I published the alleged statement.

52. The true meaning of Mr Malema's public disclosure is that Hanekom had worked, in clandestine and covert manner with the political enemies of the ANC to cause a democratically elected ANC President, deployed in government as President of the Republic of South Africa, to be removed. Not only was the campaign of the political enemies of the ANC to remove the President but it was the weakening and removal of the ANC as the governing party in government.

53. In essence, the allegation made by Mr Malema is that, while the EFF was involved in vigorous and unrelenting campaigns for my removal as President of the Republic, Hanekom was against the ANC's own binding resolutions on

B.M.M

these motions, providing critical information to these ANC political enemies for the purpose of achieving success.

54. Hanekom must admit that the EFF is a political party actively opposed to the ANC. He must also admit that providing critical information of ANC members who were involved in campaigning against their own party by supporting the removal of a democratically elected President places him in the role of an enemy agent. In essence, his conduct was to strengthen opposition to the ANC by covertly giving enemies of the ANC information that was necessary to achieve the removal of an ANC President and the country and to weaken the ANC itself.

55. Hanekom has also admitted that he "plotted with the EFF to bring down President Zuma." He is reported to have accepted what Mr Malema said about his role in the EFF to topple the ANC and its leadership.

56. When he collaborated with the EFF, he associated with their publicly stated views on the ANC which are the following:

56.1. The ANC is a corrupt organisation and has betrayed the country;

56.2. It must be removed from government because it has betrayed its historical mission;

56.3. The ANC leadership was corrupt, in particular that I am corrupt;

56.4. The ANC has failed its people and undermined their historical confidence in the ANC's mission to ensure that it governs the country in the interests of its people;

56.5. That I as the President of the Republic had abused my position to enrich my friends and myself;

56.6. That I as the President of the ANC was responsible for the unhealthy condition of the ANC.

AD PARAGRAPH 9

57. It is true that I made the statement and placed it within the context of my evidence in the Zondo Commission. I did not, at the Zondo Commission, mention Mr Hanekom as an apartheid spy. I mentioned Ramathlodi and chose not to mention others that I know. In my public statement, following Mr Malema's disclosures of Hanekom's role in supporting enemies of the ANC, I said that Hanekom was a known enemy agent. This was said in the following context:

57.1. Hanekom, a Member of the ANC had worked with the EFF, an avid opposition political party that had ceaselessly campaigned to discredit the ANC and its President.

57.2. This conduct of Hanekom – working with the enemies of the ANC to weaken it politically and ultimately cause its removal from power - fits well within the pillars of the intelligence plan that I spoke about at the Zondo Commission. More importantly, his conduct fits the definition of enemy agent.

57.3. Save as aforesaid, the allegations contained in this paragraph are denied.

AD PARAGRAPH 10

58. It is true that Hanekom was part of those who deliberately sought to assassinate my character and discredit my political role both in the ANC and the country. It is also true that Hanekom used his position in the ANC and information of the ANC to support the enemies of the ANC and myself. A clear example of his role is the support that he gave to the EFF to bolster its political opposition of the ANC. I accept that the statement is defamatory, but it is true and was a fair comment.

AD PARAGRAPH 11

59. I deny that the statement cast aspersions on the character and integrity of Hanekom. It is true that he is a known enemy agent and part of the plan that is designed to discredit the strength, influence and role of the ANC by working with its political enemies to bolster the objectives of the political enemies of the ANC. The role of Hanekom in the liberation struggle does not mean that

he did not act against the interests of the ANC when he deliberately worked with its enemies to discredit its support and encourage its removal from power. When he worked against the political interests of the ANC by actively seeking the help of the enemies of the ANC to topple its democratically elected President, Hanekom earned his crown as enemy agent.

AD PARAGRAPH 12

60. The allegations in my statement are true and where made fairly having regards to the undisputable conduct of Hanekom. His declared support of ANC enemies placed him in the camp of the enemy. While he was a member of the ANC, Hanekom was not entitled to conduct himself in a manner that undermined the political support of the ANC. Giving ANC enemies the information on which to wage their political war on the ANC fits within the definition of an enemy agent.

AD PARAGRAPH 13

61. The evidence that I have of Hanekom having worked with the political enemies of the ANC to discredit and weaken its support is his admitted conduct. In the ANC, it is known that a member that works with its enemies to weaken it, is an enemy agent. Whether or not it is harsh to do so is a matter of perspective or choice of words. Nothing really turns on it.

AD PARAGRAPH 14

62. I admit the stated purpose of the application. However, I deny that such purpose is in good faith.

63. I deny that even the stated purpose has any merit. Hanekom worked with the ANC's political enemies in an unprecedented campaign to remove me, destabilise the ANC on the basis of propaganda and lies. His own conduct admitted defined him as an enemy agent – using his membership, position, unique knowledge and understanding of the ANC to bolster the objectives of the ANC's political enemies – which were to remove the ANC from power and to discredit its leadership.

64. In the past, Hanekom has chaired disciplinary proceedings in which he found members of the ANC guilty when they had committed less serious offences. This is duplicitous and lacking in integrity.

65. Save as aforesaid, the allegations contained in this paragraph are denied.

AD PARAGRAPH 15

66. I deny that when Hanekom worked with the ANC political enemies whose objectives were to it from government, he was acting with integrity, loyalty and discipline. If these allegations are true, I dare Hanekom to disclose the list of ANC members that he informed the EFF would vote with them to remove an ANC leader. If indeed Hanekom's claims are true, I dare him to take the court

B.M.M

into its confidence by succinctly explaining why this list of ANC members to the EFF was given clandestinely and covertly. *Alternatively*, I dare him to tell the court if he informed the ANC leadership that he would be cooperating with the enemies of the ANC to remove an ANC President from power.

67. The ANC NEC had specifically instructed all its members in Parliament to not vote with the EFF or any opposition political party in support of a motion to remove the President. Hanekom defied this resolution of the ANC NEC. This defiance does not define discipline. Having defied the ANC, to work with the political enemies of the ANC whose publicly stated objectives included the removal of an ANC President and government places him outside the definition of a loyal and disciplined member.

68. Save as aforesaid, the allegations contained in this paragraph are denied.

AD PARAGRAPH 16

69. This is interesting history about Hanekom and must make him feel good about himself. It is not uncommon for people like Hanekom to boast about their role in the struggle as if the was something unique and special about their involvement. Each person got involved in the struggle because they were outraged by the injustices of apartheid and colonialism. However, some wear this involvement on their sleeves, to remind everyone who dares to differ with them.

B. M. M

70. In any event, Hanekom's alleged loyalty to the ANC did not prevent him from working with the political enemies of the ANC to advance objectives that were inimical to its historical mission and binding resolutions. Mr Malema says that he, as an ANC member, plotted with the EFF to topple an ANC President.

71. Save as aforesaid, the allegations contained in this paragraph are denied.

AD PARAGRAPH 17

72. The role of Hanekom and the basis of his arrest are all interesting and fascinating historical facts. They are not evidence that he did not work with the enemy of the ANC when it suited him and his view of politics.

73. It is common cause that he worked with the EFF to topple an ANC President. It is reasonable to assume that his conduct is such that when he felt strongly about certain political issues, he would sell out an ANC President. He did so when he worked to topple an ANC President with the political enemies of the ANC.

AD PARAGRAPH 18

74. I note the allegations made in this paragraph. However, I deny that Hanekom did not work with the political enemies of the ANC when it was convenient for him. It is clear that he could use his ANC membership to bolster the strategies of the political enemies of the ANC against it. In other words, he could work

against his own political party, to ensure that it was weakened and finally removed from power. That, on the objective and uncontested facts, is disloyalty to the ANC and places him in the camp of the enemy of the ANC while he continues to declare himself as its loyal member.

AD PARAGRAPH 19

75. The allegations in this paragraph are noted but do not constitute evidence that Hanekom did not work with the enemies of the ANC when he felt strongly about certain issues. I say nothing about his underground work. As head of ANC Intelligence, I was fully aware of legitimate intelligence operations conducted by its members to fight against the apartheid regime. It is of no relevance in this application.

AD PARAGRAPH 20 to 21

76. The allegations in this paragraph are correct. They do not however mean that Hanekom did not plot with the enemies of the ANC to topple an ANC President who he regarded as corrupt. He plotted with the EFF to topple an ANC President.

AD PARAGRAPH 22

77. It is denied that Hanekom has been a loyal and disciplined member of the ANC for the most part of his adult life. I do not know what standard he is

relying on to characterise himself this way. I know that when he plotted with the ANC political enemies to topple an ANC President, he lacked the attributes of ANC loyalty and disciple. On his own version he plotted with the enemies of the ANC. It is instructive that he sees no contradiction in this role of his. He seems unable to recognize that such duplicitous conduct is inimical with integrity.

AD PARAGRAPH 23

78. I note the allegations in this paragraph. I point out that under Hanekom, this organisation was used to fight against me as the ANC President.

AD PARAGRAPH 24

79. These kind words that Hanekom described himself with do not mean that he did not work with the political enemies of the ANC to topple an ANC President and facilitate a narrative that would damage the standing of the ANC.

80. His conduct against the ANC damaged it and resulted in a bad narrative about its role in society that will be difficult to remove for a long time. It remains to be seen on whose behalf Hanekom plays this role. I submit that it is a matter for the ANC and its own processes.

AD PARAGRAPH 25

81. If his claims of reputation and loyalty are true, Hanekom must explain why it was easy for him to defy the ANC and organise against it to topple its President with the enemies of the ANC. This conduct was rightly denounced by the ANC in a public statement issued by the Secretary General. He called his conduct what it is – that of a wedge driver and not a unifier.

82. As I have stated above, Hanekom has been at the forefront of expelling other members of the ANC who committed offences of a less serious nature. I suppose, at that point, he did this to pursue his very desire to have me removed at some stage. While pretending to act in the interests of the ANC and its leadership, I believe that he sought to prepare the grounds for my removal. His was a stratagem to strip me of any future support that would jeopardize his grand plan to remove me.

83. His duplicitous character has been confirmed by his own admission that he had no difficulty working with the enemies or opponents of the ANC to remove its President when it had not adopted such a resolution.

AD PARAGRAPH 26

84. The evidence that I gave at the Zondo Commission is what it is. I never said that Hanekom was an enemy agent. I said that there is an intelligence plan that I am aware of, which was specifically created to ensure that the ANC is ultimately hijacked by a person who had worked for the intelligence organisations to fight against the ANC.

85. That plan included ensuring that the ANC was weakened and controlled by the interests represented by those intelligence organisations. There are people who do their work purporting to advance a good agenda but in truth being part and parcel of the plan. I even stated that the Zondo Commission was my graveyard which my enemies intended to bury me in with lies and character assassination.

86. I stated that certain people including it appears, Hanekom believe that I am corrupt, despite there being no tangible evidence to support that insult. When Hanekom actively associated himself with the objectives of the EFF whose intention was to topple me, he, like the EFF advanced the objectives of the plan.

87. In any event, I do not believe that it is appropriate for Hanekom to sue me on the strength of what I said in the Zondo Commission. The fact that he cannot cross-examine me means that his entire attempt to muzzle my right to give my evidence at the Zondo Commission is unjustified. I have not completed my evidence at the Zondo Commission and can therefore not be subjected to a claim for damages based on what I said there. In any event, I made no reference to Hanekom at the Zondo Commission. He seems apprehensive about my testimony the and has rushed to interdict me from even mentioning him.

88. I deny that, to the extent that he relies on the evidence being given at the Zondo Commission, he has no other remedy other than to approach this court.

He is at liberty to give his evidence at the Zondo Commission to rebut mine if he should wish to do so.

AD PARAGRAPH 27

89. The allegations in this paragraph are admitted to the extent that they accurately reflect the transcript of the Commission. Hanekom may not use the evidence that I am still giving at the Zondo Commission to fight me in this court before I have concluded the evidence and been cross-examined. If he wishes to avail himself the opportunity to test my recollection of his role in the ANC, I am happy for him to apply to the Commission has stood till today from which he now claims to have obtained his reputation and loyalty.

AD PARAGRAPH 28

90. I deny that I told the Zondo Commission that Hanekom was a spy. I am still to return to the Zondo Commission. Accordingly, the relief he seeks constitutes an interference with my right as a witness before the Commission to harass me for the evidence that I am still giving. Hanekom should not seek to muzzle me for the evidence that I am giving at the Zondo Commission. It is not allowed by the rules of the Zondo Commission.

AD PARAGRAPH 29

91. I deny the allegations in this paragraph. The harm, if any, is not caused by my posted tweet, but by Hanekom's own collusion with the ANC's opposition. I

B.M.M

cannot see how my statement, which is true, can cause any harm to Hanekom or impugn his dignity.

92. Hanekom deliberately and mischievously adds "apartheid spy" to my reference to him as an enemy agent. I repeat that I never referred to Hanekom as an apartheid spy. I have not expressed any view about his role and history in the ANC. It is instructive that he deems it appropriate to prevent me from future statements I may or may not wish to make about him. His anxiety in this regard is indeed telling.

AD PARAGRAPH 30 & 31

93. I admit the letter. I deny that I was obliged to accede to any of the demands made therein. Hanekom has deliberately misconstrued my tweet to suit his grand plan to muzzle me into silence in case I make any further revelations in other forums. His application is merely part of a grand political plan to deal with me and the possibility that I may make more revelations in other ANC forums or Commissions.

AD PARAGRAPH 32 & 33

94. I admit the allegations in this paragraph.

AD PARAGRAPH 34

95. I deny that there is a legal duty on me to remove the statement. In context, it is true that Hanekom worked with the ANC political enemies to topple an ANC President. My statement is true. He supported the allegations of political enemies regarding the ANC and its leaders and when he had the opportunity, armed these enemies with critical information for the sole purpose of weakening the ANC and toppling its President.

96. In any event, on the objective facts, the allegations are consistent and constitute fair comment.

AD PARAGRAPH 35

97. The statement says no more than that Hanekom was a known enemy agent in that he was part of those members within the ANC who 'plotted with the political enemies of the ANC' to topple the ANC leadership and to strengthen the hostile agenda of the political enemies of the ANC, by arming them with information that could be used to achieve those anti-ANC goals.

AD PARAGRAPH 35.2

98. The statement taken in context does not expressly or by clear implication allege that Hanekom was an apartheid spy. What the statement expressly and by clear implication is that Hanekom was a known enemy agent as disclosed by Mr Malema in that:

B. M. M

98.1. He collaborated with the political enemies of the ANC to topple the ANC leadership with the aim of weakening the unity of the ANC;

98.2. He collaborated with the political enemies of the ANC to promote the political agenda of those enemies with the aim of toppling the ANC leadership;

98.3. He collaborated with the political enemies of the ANC with the intention of promoting the political objectives them to topple the ANC leadership and weaken the ANC;

98.4. He rebelled against the directive of the ANC NEC that its members would not collaborate with political enemies to topple or weaken the ANC;

98.5. His conduct was similar to the pattern and strategy of spies who joined the ANC with the sole purpose of toppling the ANC leadership and weakening its ability to fight for the liberation of the country from the oppressive regime. However, I did not state this as a fact or at all. Only Hanekom attaches this meaning to my tweet;

AD PARAGRAPH 35.3

98.6. The conclusions of Hanekom in this paragraph are correct. When he joined the plot to topple the ANC leadership to advance the political

interests of the enemies of the ANC, he acted in a manner that is contrary to the interests of the ANC and those of the country.

98.7. By using his political position, knowledge and experience in the ANC to join the political foes of the ANC with the sole purpose of toppling the ANC leadership and weakening its political power, Hanekom displayed a shocking lack of political integrity and judgment. He defied the ANC to join forces intent on dismantling the ANC and toppling its democratically elected leadership. That has no integrity whatsoever. Even in politics, integrity means that you do not place your political party at the jeopardy of losing credibility and support by joining the opposition to topple the leadership of the party and weakening it.

98.8. I certainly did not trust Hanekom's motives for joining the campaign of the ANC to topple the ANC leadership and dismantle the ANC itself. I do not believe that he is trustworthy as a member of the ANC and has rightly been called a wedge-driver by the Secretary General of the ANC.

98.9. It is true that Hanekom lied and deceived his comrades when he sided with the political enemies of the ANC to topple its leadership and divide the ANC. Firstly, he did declare his activities with the ANC enemies to the ANC itself. Secondly, Hanekom has not disclosed the names of those other comrades who were going to join the EFF in its

fight against the ANC leadership and the ANC. To date he has not told the nation who in the ANC was mobilised to topple the ANC leadership and weaken the ANC. The non-disclosure of the list of these ANC comrades is deceit and concealed in lies. Had the leader of the EFF not disclosed his name, Hanekom would not have done so. His unimpressive attempts to explain this deceitful conduct just confirms that he is not a comrade in the ANC that can be trusted with the historical mission of the ANC.

AD PARAGRAPH 36

99. I deny that the statements are false. In any event, statement constitutes comment that is fair in context. Finally, the comments constitute free speech and therefore protected in terms of section 16 of the Constitution. His admitted conduct attests to my statement.

AD PARAGRAPH 37

100. I deny that the statements are false and that I could not have genuinely believed them to be true. As stated above, the statements are true in the context provided above. He connived and plotted with the political enemies of the ANC to topple the ANC leadership and to dismantle the political influence of the ANC to advance the objectives of the ANC political enemies. His goal in giving the EFF information about ANC comrades is similar to those

apartheid agents who joined the ANC to advance the agenda of the political enemies.

101. I did meet Hanekom in Zimbabwe and thanked him for his contribution to the liberation struggle. I also appointed him to Cabinet when I became President. Those two acts do not suggest that I do not believe that he worked with the political enemies of the ANC to achieve the political agenda of those enemies against the ANC. He has not even denied that his alliance with the ANC political enemies was for the purpose of toppling the ANC leadership.

102. After the liberation of our country from the apartheid regime, we formed a government in which we worked with apartheid spies. We worked with the enemies of the ANC liberation struggle in order to promote national reconciliation and reform our political landscape from that of apartheid and discrimination to that of human dignity, freedom and human rights.

103. As the ANC we took a decision that we would give even those that had sold out in the ANC a chance to work in government. We recognised that these individuals had misdirected passion and vision and placed within the constraints of the Constitution, would turn from their wicked ways to support the national agenda of reconciliation and development.

104. The fact that Hanekom had worked for the ANC does not mean that he also did not work with the enemies of the ANC after liberation to undermine and

topple the ANC leadership and weaken the ANC's strength. The is evidence that he did. He admits to this himself.

AD PARAGRAPH 38

105. I deny that the statement was malicious or untruthful. It was made after Mr Malema had disclosed the role of Hanekom in advancing an anti-ANC agenda and mission. His involvement in joining forces with the enemies of the ANC to topple its leadership is what apartheid spies joined the ANC to accomplish.

AD PARAGRAPH 39

106. It is true that Hanekom suffered reputational harm. However, the reputational harm is self-inflicted because he brought this to himself. He connived with the political enemies of the ANC to topple an ANC President and to weaken the ANC. His conduct resulted in great division within the ANC and a political turbulence that culminated in the ANC recalling its President from government. The political objectives of the ANC enemies were fortified and emboldened in destroying the ANC because they knew that they had allies within the party who were willing to assist their agenda. Hanekom was therefore in the middle of a political act of betrayal and sabotage.

AD PARAGRAPH 40 to 43

107. It is true that since I decided to use the medium of Twitter to engage with the public, I have had significant followers.

AD PARAGRAPH 44

108. Those who commented on my statements on Twitter were entitled to do so. The views were varied and Hanekom is selective in choosing only those that were negative about him. There was a significant number of those on Twitter that heavily criticised me for my statement. I am not grumpy about that because I fought for the liberation of this country so people can freely express their views about anything.

109. The ANC Veterans League denounced my statements with Carolesson going as far as calling me a thug and corrupt. Hanekom possibly holds the same view as those of the League.

110. Public interviews were held by Ronnie Kastrils in defence of Hanekom. In those spirited public defences of Hanekom, Mr Kastrils even insinuated that I was possibly an apartheid agent. Hanekom said nothing about these insults hurled at me by his supporters. He obviously identifies with them.

AD PARAGRAPH 45

111. Hanekom has no legal right to remove my truthful and fair comment.

AD PARAGRAPH 46

112. The statement that I posted about Hanekom say what it says. Hanekom worked with enemies of the ANC to advance their political goals against the ANC and to topple it from government. The statement that I published was therefore truthful, fair comment of Hanekom's conduct and protected under section 16 of the Constitution. By assisting the political enemies with information to weaken the ANC and topple its leadership, Hanekom acted as an apartheid enemy agent.

AD PARAGRAPH 47 to 49

113. Whatever harm Hanekom claims to have suffered is self-inflicted. He worked with the ANC political enemies to topple the ANC and its leadership. He betrayed the ANC and defied its resolutions on working with political enemies to undermine the political strength and influence of the ANC.

AD PARAGRAPH 50

114. Hanekom acted in an untrustworthy manner when he worked with the enemies of the ANC to topple it and undermine its leadership. He is rightly treated with

B.M.M

suspicion for the role he played in toppling the ANC leadership and undermine the unity of the ANC.

AD PARAGRAPH 51

115. I deny that Hanekom has met the requirements of an interdict. I accept that he has a right to dignity and reputation but that such rights are subject to constitutional limitations. In any event, he is the author of his own misfortune for conniving with the political enemies of the ANC to undermine and topple the ANC and its leadership.

116. I am not obliged to remove the statement about Hanekom which is true, in any event constitutes fair comment and is protected speech under section 16 of the Constitution.

117. The statement that I made against Hanekom is justified and is a consequence of Mr Malema's claims that he plotted to undermine the ANC and its leadership.

118. An interdict would muzzle the truth, unfairly limit my right to share my political opinions about the actions of persons in the ANC who betray its historical mission. An interdict is not a just and equitable remedy in these circumstances. In any event, an interdict as sought will undermine the

constitutional right to expression and free speech under section 16 of the Constitution.

119. Most importantly, I am in the middle of giving evidence in the Zondo Commission about people in the ANC who worked to undermine the ANC by working with the enemies of the ANC. To issue this interdict would place unfair limitations on my ability to give evidence that will demonstrate the false views of people like Hanekom on my role in government as President.

AD PARAGRAPH 52 to 55

120. The allegations that the hearing of this matter is urgent are denied. The matter is self-evidently not urgent.

121. Moreover, the matter raises very numerous disputes of facts which cannot be resolved without oral evidence. Hanekom acknowledges this when he complains that he could cross-examine me for my evidence at the Zondo Commission, because he understands that whether or not he sold out on the ANC when he collaborated with the ANC enemies is a matter that is not settled. His application does not settle it.

122. Accordingly, Hanekom acknowledges the fact that this matter has potential disputes of fact that can only be determined through cross-examination. He cannot, in parallel proceedings, claim that they are to be brought to finality and closure by way of motion proceedings.

AD PARAGRAPH 56

123. I take exception to Hanekom's constant reference to me as a liar in his founding affidavit. It has become common place for people in Hanekom's place to suppress alternative views and facts by rubbishing those who may expose them as being liars or enablers of State capture, when in fact it is they who seek to conceal the true nature of State capture they have perpetrated since South Africa's political settlement in 1994.

124. Hanekom is the last person to talk about lying. His entire life as a duplicitous, two-faced person is an embarrassing lie. He seeks to reinvent history and perpetuate a lie in the face of evidence that he acted in collaboration with parties acting to undermine the ANC.

125. His entire life and conduct are the anti-thesis of an activist and the new cadre that the ANC seeks to develop.

126. Hanekom belongs to that category of people that use the ANC for purposes that are in conflict with its own historical mission. Like others, he uses it to serve his own interests and to transform the ANC into a vehicle for policies that undermine true freedom of the African people. To sue me for defamation for stating what he already knows to be true truly reveals his true character.

127. I deny that courts routinely deal with such matter on an urgent basis. A case of urgency must be made on the papers. Hanekom has failed to make out a case for urgent relief in this regard.

128. Save as aforesaid, the remainder of the allegations are denied.

AD PARAGRAPH 57

129. It is denied that the Notice of Motion makes provision for a reasonable response.

130. I deny that the statement is a lie about the role of Hanekom in helping ANC political enemies with information that was used to topple its leadership, create instability within the ANC and undermine the potency of the ANC.

AD PARAGRAPH 58

131. I deny that Hanekom is entitled to the relief that he seeks, for the reasons set out in this affidavit.

AD PARAGRAPH 60

132. I will not apologise to Hanekom for the truth or fair comment about him. He sold the ANC when he collaborated with ANC enemies to topple its leadership and undermine the unity of the ANC.

AD PARAGRAPH 61

133. I deny that Hanekom is entitled to any damages for the comments that I made about him. He should not be rewarded with damages for conduct that amounted to selling out on the ANC by collaborating with the political enemies of the ANC.

AD PARAGRAPH 62

134. It is denied that Hanekom is entitled to the cost order or as prayed for. In fact, I have demonstrated above that my statement(s) are true and therefore in such event the costs should be against Hanekom on a punitive scale. I have also demonstrated how he is actually lying under oath and misleading this court.

AD PARAGRAPH 63

135. It is denied that Hanekom is entitled to the relief he seeks. In the circumstances, I pray for the dismissal of his ill-conceived application with costs on an attorney and client scale.

DEPONENT

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Rosebank on this 20 day of August 2019 and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

43

B W Magwangwana
COMMISSIONER OF OATHS

FULL NAMES:
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DESIGNATION:
AREA:

Stamp:

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Derek Hanekom
@Derek_Hanekom

You are a good researcher, Kay. I guess we were spies of a sort - providing information to the ANC about SADF covert operations against Mozambique. Roland Hunter was the main spy. We ended up in prison for it...

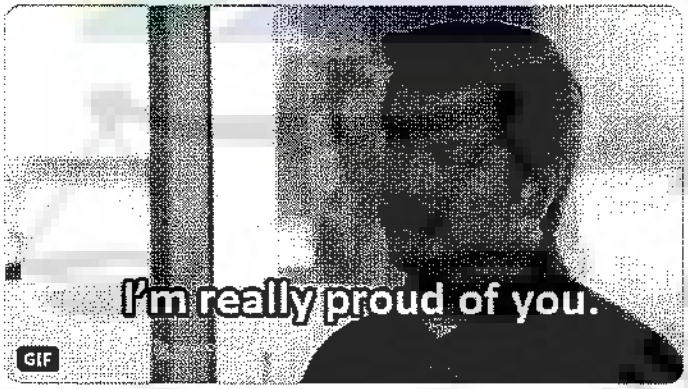
> **Kananelo** @kaysexwale · Jul 24
> Replying to @Raszen @Derek_Hanekom and @RediTlhabi
> Read this : mg.co.za/article/1987-1...

11:31 AM · Jul 24, 2019 · Twitter for Android

20 Retweets **82** Likes

Motleleng @Marcell_627 · Jul 24
Replying to @Derek_Hanekom
I don't like the man, at least he is honest about meeting @EFFSouthAfrica. Unlike someone who ate potjie kos in #Stellenbosch and he is still quiet. Can you hear me at the back, ke ra wena @MbalulaFikile.
2

Martin @chopstics0604 · Jul 25
Replying to @Derek_Hanekom
Salute Hannie forward to dealing with lumperns and impimpi



MbekezeliZulu @ZuluMbekezeli · Jul 24
Replying to @Derek_Hanekom
Nxh!!! This moron called hanekom - I don't wanna lie he is not there for the betterment of our ppl but he is there for alterior motives the sooner the Anc throws him out the better
2 3

3 more replies

Tornado..Veteran 102 @tyengeni1954 · Jul 24
Replying to @Derek_Hanekom
Who were spies..?
1 1 7

Thulani Ike @Ike_thulani · Jul 24
Lorl you don't have to ask, dereck is one of them
3

Alex (a legitimate businessman) @AlexrRudi · Jul 24
Replying to @Derek_Hanekom
I wonder if the eff get jealous when they see what real revolution looks like? Not the gucci arm chair stuff of vbs looting
4

Relevant people

Derek Hanekom
@Derek_Hanekom
Former Minister of Tourism NWC, Chair of Ahmed Kath Foundation, South Afric

Kananelo
@kaysexwale
I mean what I tweet but I d tweet what I mean.

Zenzele Bryan Ngwenya
@Raszen
Repatriation and emancipa time.Atheist mutating towa agnosticism.Standards rebel.Mayibuye!!!....

Trends for you

Trending in South Africa
#WhyWomenDontShelaForSex
Fariki is Tweeting about this

Trending in South Africa
BREAKING NEWS
98.8K Tweets

Trending in South Africa
Nomahelele
3,121 Tweets

Trending in South Africa
#StupidQuestionsPplAks
8,216 Tweets
Fariki is Tweeting about this

Trending in South Africa
#AskAMan

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JGZ 2

For Immediate Release
24 July 2019

STATEMENT OF THE AFRICAN NATIONAL CONGRESS ON THE CONFESSION BY ANC NEC MEMBER COMRADE DEREK HANEKOM

The African National Congress is dismayed by its National Executive Committee Member Derek Hanekom's confession that he did have several meetings with the opposition EFF to indicate that he and other ANC MP's would support the EFF vote of no confidence last February against Former President Jacob Zuma.
Hanekom had full access to air his acerbic views in the NEC of the ANC, he did so ad nauseum. He always spoke in an even, practiced voice, linking all the bad publicity that the ANC has had to the accusations against former President Zuma.
The ANC called for an open vote and it is Hanekom and others who put pressure on the Speaker to accede to the demand by the EFF for a secret ballot.
The agenda of the EFF by their own admission as an opposition party is to displace the ANC, they work fearlessly to divide the ANC and have a number of sleepers in the ANC proactively ensuring that divisions in the ANC are deepened.
The ANC is working to unite its members and in our midst is Derek Hanekom a wedge driver and on a mission to divide the ANC. Indeed this charlatan is making his mark through his ownership of the Ahmed Kathrada Foundation. Hanekom does not have the capacity to form a new political party, but he has shown remarkable agility in his efforts to divide the ANC.
Well we say to him and other EFF sleepers in the ANC, this only makes the members of the NEC, PEC REC and branches more determined to unite the ANC and deliver services to the people of South Africa.
We will ride this storm of accusations, and counter accusations.
We will unite behind the leadership of President Ramaphosa and all ANC members of good faith and defeat the nefarious negative actions of Hanekom

Issued by the Secretary General of the African National Congress
Cde Ace Magashule

Enquiries

Pule Mabe
National Spokesperson
071 623 4975

Dropping the political bomb on Tuesday, Malema claimed that Hanekom and Solly Mapaila, first deputy-general secretary of the SACP, lobbied them to help oust Zuma and even shared a list of ANC MPs who were prepared to vote with them.

On Wednesday Hanekom denied that he shared names with the EFF, saying he only met them and challenged them to produce an audio recording of the meeting.

He said he had no idea why Malema suddenly on Tuesday decided to make the confidential meeting public.

Jacob G Zuma
@PresJGZuma

I'm not surprised by @Julius_S_Malema revelations regarding @Derek_Hanekom. It is part of the plan I mentioned at the Zondo Commission. @Derek_Hanekom is a known enemy agent.

6,512 9:21 AM - Jul 25, 2019

4,727 people are talking about this

In a text message that was circulated widely on social media on Wednesday, Hanekom said it was no secret that there was a number of discussions with opposition parties to force Zuma out.

"I had coffee with Godrich Gardee (EFF's secretary general) twice at the Eastgate Mugg and Bean. Maybe even three times. I did not give him a list of ANC names nor did I say that Pravin and I were discussing the formation of a new party," he wrote to the SABC.

Hanekom later also responded to whether the revelations should also see him being dragged to the commission probing allegations that there are party members who helped to form smaller breakaway parties ahead of the May general elections, saying he had nothing to answer for.

NS

J.G.Z.

"No, this had nothing to do with forming any party. There is nothing to explain. There is nothing wrong with members of different parties meet(ing) with each other. He (Malema) initiated it," Hanekom said in response.

Earlier this month Zuma told the Zondo Commission inquiry into state capture about an alleged decades-long campaign of character assassination in an attempt to "get rid" of him.

"Some say this old man is angry," he said at the time. "All I'm saying is people must be very careful. When I say, I will say things about them - I mean it."

He warned his detractors that he would reveal information about more "spies" in the ruling party, after claiming his former Cabinet ministers Siphiwe Nyanda and Ngoako Ramatlhodi were double agents in the apartheid-era.

"They will think I am mad when I reveal them one by one," he told the commission.

IOL

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HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D 6316 / 2019

In the matter between:

DEREK HANEKOM **APPLICANT**

and

JACOB GEDLEYIHLEKISA ZUMA **RESPONDENT**

CONFIRMATORY AFFIDAVIT

I, the undersigned

THAPELO KENNETH KUNENE

do hereby under oath and say the following:

1. I am an adult businessman of full legal capacity. I depose to this affidavit on my own behalf and in support of the facts to which I refer below.

THK

BM 44

2. The facts deposed to in this affidavit are within my personal knowledge, unless the content otherwise indicates and to the best of my belief are both true and correct.

3. I have read the answering affidavit of Former President Jacob Gedleyihlekisa Zuma ("Mr. Zuma") and the founding affidavit of Mr. Derek Hanekom ("Mr. Hanekom"). Insofar as Mr. Zuma's answering affidavit refers to me and my interactions with Mr. Hanekom, I confirm such references as both true and correct.

4. In order to amplify refences made in Mr. Zuma's affidavit, I add the following relevant facts:

4.1. On Wednesday 19 June 2013, I spent virtually, the entire day penning an open letter to then State President Jacob Zuma. The following day I distributed it to all media houses.

4.2. The Star newspaper was the first publication to run my open letter in full on Friday, 21 June 2013. Other newspapers called me to follow up on the letter.

4.3. The following week, it became chaotic, as I was inundated with requests for interviews by television and radio stations. These interviews went on for nearly two weeks. Within that period, prominent politicians, business personalities, ordinary members of the ANC and opposition party

members called and congratulated me, for my bravery whilst others insulted and threatened me.

4.4. I was called by a person who identified himself as comrade Derek Hanekom. He congratulated me on *"your very powerful, honest and truthful"* letter.

4.5. Mr. Hanekom continued and told me that I had no idea how my letter had empowered many comrades who were scared to speak out in the open. He went further and indicated that him and other comrades who *"have had enough"* would love to bring me on board as part of a plan to remove *"this corrupt Jacob Zuma and his cronies"*.

4.6. Mr. Hanekom stated that if I was willing to be part of the plan, someone would call me. I thanked him for the call and asked him to give me a few days to think about his request.

4.7. I then notified my best friend Gayton McKenzie about a call from comrade Hanekom.

4.8. A few weeks later, I became active in founding the EFF. Two months later, I met with Mr. Zuma. During our conversation, I informed Mr. Zuma about those who were congratulating me on writing an open letter to him. I also told him about the call from comrade Hanekom and the plan he invited me to be part of. Surprisingly, Mr. Zuma just laughed and told me he was aware of the plan.

TKK JGZ 13 BMM

DEPONENT

I certify that the Deponent has acknowledged that he knows and understands the contents of the Affidavit which was signed and sworn to before me at Johannesburg at this the 20 day of August 2019, the regulations contained in Government Gazette No R1258 of July 1972 and R1648 of 1997 having been complied with.

COMMISSIONER OF OATHS

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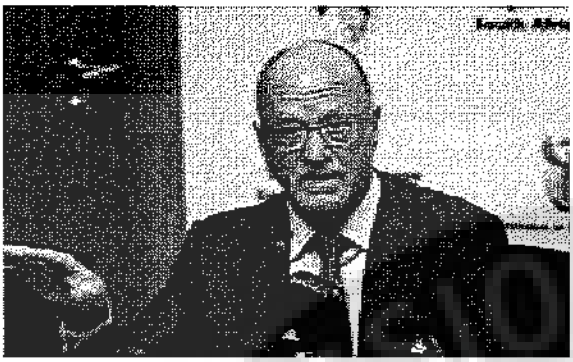
‘Baas’ Hanekom acts out his white privilege as an untouchable in the ANC!

April 25, 2018



Derek Hanekom. FILE PHOTO: GCIS

Clyde Ramalaine

White privilege, a right, advantage or immunity granted to or enjoyed by white persons beyond the common advantage of all others; is not about to die anytime soon for as long as Derek Hanekom exercises this as his inalienable right within the ANC in letting his white identity count.

Hanekom affords himself space, time and place to act as it pleases him, despite the ANC resolution to work for unity. He claims the right to be contrarian to the confirmed agreement that office bearers and the NEC of the 54th Conference resolved not to entertain any divisive comments and statements from ANC members and leadership since it committed to call those in and ask them why they engage in such.

Then again, we may have forgotten Hanekom is not your ordinary ANC member, he is firstly white (before you shoot me down read first), he is arguably the oldest white member in the NEC and cabinet and he is a senior member (something he reminded us a year ago) by virtue of the fact that he has held senior positions in the ANC including cabinet positions.

Hanekom is no stranger to controversy, he has consistently courted controversy if not shown complete ill-regard for organizational discipline as someone who vents and shares his opinions regardless of what impact it has on what or who.

Hanekom in a history of events stood accused of playing this divisive role in both the ANC – Western Cape and Eastern Cape (Port Elizabeth area) ANC politics for an elongated period and it delivered its own negative impact on the performance of the ANC in these provinces.

We will remember how he as programme director of the Kathrada Funeral Programme proved grossly divisive in his statements pitting ANC leaders against each other at the funeral of the ANC stalwart and champion for non- racialism.

In May 2017 Hanekom defied the ANC leadership and ventured a public opinion on the decision of the ANC Leadership and Caucus on voting in a vote of no confidence motion against President Jacob Zuma. He later had to clarify his statement.

In August 2017, Hanekom was given 10 days to explain why he should be retained as chairperson of the ANC National Disciplinary Committee following a series of tweets from his account. We will recall the letter by the then ANC secretary-general Gwede Mantashe claimed that Hanekom behaved in a less than neutral manner and therefore as an individual with his tweets was weakening the entire disciplinary machinery of the party. The then Treasurer General Zweli Mkhize, when interviewed on the subject, asserted that Mantashe as Secretary-General is empowered to initiate processes to have Hanekom replaced. We do not know if 'Baas' Hanekom ever honoured the secretary general's letter and how this was concluded.

Hanekom is no more the chair of the ANC disciplinary committee, that position is now held by Edna Molewa. We can only surmise he was not retained in this position in the new era as a result of his lack of restraint and potentially for his personal lack of neutrality, therefore, proving a divisive character.

His most recent utterances on the need to shut ANN7 down stands in this now long tradition of an ill-disciplined member, one showing lack of restraint as a leader as Hanekom considers himself of special designation. His exact tweet, "Eish. The sooner ANN7 closes down the better. Giving such coverage to a person facing so many corruption charges; who brought our country to the brink of disaster and who thinks it's okay, as a 76-year-old man, to get a 24-year-old girl pregnant...— Derek Hanekom (@Derek_Hanekom) April 21, 2018.

This tweet says so much and it is perhaps worth attempting an analysis. In the first instance Hanekom knows the ANC policy position of media freedom, he knows that every conference has underscored the defense and need for a free media. To, therefore, reiterate the need for shutting down ANN7 only because he as an

individual disagrees with its content or those it invites to its panels as participants show the intolerance of Hanekom in stark contrast to his claims of being a Democrat. Hanekom has never demanded that eNCA is shut down despite the latter acting in the same vein as ANN7. Hanekom as ANC member, leader and cabinet minister with this tweet continues to bring both his party and democracy into disrepute.

Secondly, beyond showing the vile bitterness of deep-seated hate for a former ANC and SA president Jacob Zuma, it confirms Hanekom inadvertently show his high intolerance for an open debate on land. He fails to engage anything raised by Zuma on the land issue. He clearly has a right to disagree with Zuma or anyone, but Hanekom's intolerance of Zuma as a person blinds him to remotely entertain the content. His terse reply to former president Zuma's Black Caucus address shows the lack of tolerance hardly, a democratic value to share if you are a senior leader and cabinet minister in the ANC or in constitutional democratic SA. One wonders where Hanekom stands on the land debate. You will recall, that when the motion of land expropriation without compensation was entertained early in March the motion stood with 241- 83, we know many ANC members of parliament did not vote or were not present.

We do not have to doubt 'Baas' Hanekom on the land issue because his views are public. We know that at the ANC Policy Conference in June 2017 'Baas' Hanekom called ANC delegates in support of land expropriation without compensation crazy.

He was forced to retract this senseless statement and he expressed a very reluctant apology for his remarks, but he the next day attending an Agri-Forum Conference, held at Emperor's Palace, did not nothing but mocked the very same apology.

He said to white farmers and land owners in attendance at the Agri-Forum Conference that they know what his views on land expropriation are, but due the fact that he had to apologize for such at the ANC Policy Conference he is not at

liberty to share his views with them. This was accompanied by much sarcastic laughter.

We can go to an earlier epoch 1994-1999 when Hanekom served as Minister of Agriculture and Land Affairs, we must ask him what his contribution and leadership on redress of land was during that time as the first minister in that portfolio. The former SACP member appears very soluble on land issues.

Thirdly, Hanekom's tweet evidence is a very shallow grasp what constitutes laws be it traditional or conventional in the South African setting. The relationship between Ms. Conco and former president Zuma is nowhere abhorred or called to question by any of the families hence we know a marriage is planned. Also, no conventional law is broken by the relationship of intimacy shared by the pair, since Ms. Conco is a consenting adult constitutionally empowered to make her own decisions a right Derek Hanekom equally shares in. The subject of morality simply does not stand as dragged in through the backdoor of the European mind. On behalf of whose morality is Hanekom speaking in this regard?

What Hanekom is not honest about is on the many men in the ANC who despite claiming a public ethic of single marriage uphold, have been guilty of affairs with young ladies, some even raising children and never owning up to their responsibility for which the neo-moralist Hanekom was silent. His own questionable relations with a journalist does not strike him as odd if he seeks to bring the subject of age into the equation. Instead of celebrating a man who is owning up to his fatherhood, Hanekom is overtaken by his cancerous bitterness towards Zuma and that is what informs his opinions he can hardly be objective.

To, therefore, talk about a 76-year-old man impregnating 24-year-old shows the shallow sensationalism of a white mind who has always appropriated a right to think for those deemed black. Hanekom must tell us if his claim against Zuma is also leveled at Tokyo Sexwale who also not so long ago impregnated a much younger lady with whom he shares romantic relations? Why was the moral Hanekom silent then? Does his silence in this instance and his laudability now

show you the hypocrisy of this mind? The ANC is replete with people who have fathered children with younger women and it was never an issue, from where this cheap attack?

Hanekom is therefore either lazy in his analysis or is so blinded by his personal hate that he omits to acknowledge that Zuma made it public he will marry for the last time, long before the news of the child was public, and the families are engaging on such planned marriage.

Lastly, in an organisational setting such as the ANC, that manifests clear chasms and lingering factional divides given the elections results of the 54th Conference and its resolutions on working for unity, Hanekom's tweet on former President Zuma addressing at the Black Caucus on the subject of land is not just distasteful, but in complete defiance of the overarching aims of the 54th Conference. He thus acts in vintage Hanekom divisive style and is afforded the latitude while invoking his seniority in the ANC.

Does Hanekom behave in this fashion because he knows the ANC's disciplinary processes attest a weakness and inconsistency that he may have contributed to?

White privilege is also understood as, "a privileged position; the possession of an advantage white persons enjoys over non-white persons". It does not take rocket science to decipher this ringing true for Derek Hanekom within the African National Congress.

I will postulate it is not necessarily his claimed seniority that anchors the attitude and mind of a Hanekom, it is really his 'baaskap' extracted directly from his whiteness of identity that he leans on to afford him to act out that white privilege. If we are abhorred by the tweets from Helen Zille why are we tolerant of Hanekom's? These tweets are not mutually exclusive but stem from the same mind. Zille never supported the National Party, she even claims to have been supporting Steve Biko, yet her tweets tell another story.

While many in the ANC attempt uniting the movement, 'Baas' Hanekom continues his characteristic divisive style of factional mind in leading the ANC and government, exuding the triumph of those who consider themselves having won in

December 2017. He is aided by having being returned to his position as a cabinet minister under the new leadership.

It is time to ask how fit Hanekom really is to lead anything in the ANC and if he should not long have been called to a proper disciplinary hearing, so as to rescue the ANC from his now known errant behaviour and attitude. On another score, it appears Hanekom warrants being liberated from his white supremacy mind of divide and rule.

If the ANC is taking itself seriously on the subject of organisational discipline it should long have convened a hearing to discipline Baas Hanekom. After all, it was ready to deal with the now politically retired Makhosi Khoza, the black woman. It also has dealt before with other blacks like Malema etc, who equally behaved in disregard for the ANC and its organisational fundamentals. Why this imbalance of extraordinary patience with Hanekom, is it because he is white?

Clyde Ramalaine
Political Commentator and Writer
Chairperson of TMoSA Foundation – The Thinking Masses of SA
PICTURE: Supplied

MKMVA DEMANDS THAT *MR. DEREK HANEKOM MUST FORTHWITH BE EXPELLED FROM THE ANC, AND SAYS HE MUST GO IMMEDIATELY

Date: Thursday, 25 July 2019

The Umkhonto we Sizwe Military Veterans Association (MKMVA) noted with anger and the utmost dismay the despicable and treacherous behavior that Mr. Derek Hanekom confessed to. There is no way that Hanekom's behavior can be sugar coated: The harsh reality is that he plotted against an incumbent President of the ANC together with the Economic Freedom Fighters (EFF). This is nothing less than treachery and a blatant and fundamental breach of the ANC Constitution.

This is not about the individual person of President Jacob Zuma, it is about the position and Office of the President of the ANC - no matter who holds that high elected office at any given time. It is about the principle that to conspire with the opposition/enemy outside the ranks of the ANC to undermine the ANC is unforgivable treachery.

MKMVA noted and applauds the angry language in the media statement that our Mother body the ANC issued last night about Hanekom's treacherous conduct. However, this is such a serious and fundamental issue that our condemnation of this traitor in our ranks, cannot - and should never - be confined only to angry words and condemnation. For the sake of the future of the ANC our condemnation of Hanekom must, as a matter of urgency and necessity translate into immediate, clear and unequivocal disciplinary action.

On the basis of Hanekom's own confession of his treachery and betrayal of the ANC MKMVA calls for the Secretary General (SG) of the ANC, comrade Ace Magashule, and the National Office Bearers (NOB's) of the ANC, to forthwith *(and by forthwith we mean IMMEDIATELY)* suspend Hanekom's membership of the ANC. There is no need to investigate Hanekom's conduct any further, he has himself through his own confession confirmed what he had done. Once immediately suspended, MKMVA calls on the ANC NEC, again on the basis of Hanekom's own confession, to forthwith process his permanent expulsion from the ANC. This should be done during the upcoming full ANC NEC meeting that is due to start tomorrow the 26th of July 2019. ***This course of action should be the absolute and bare minimum. Nothing less will suffice***.

The ANC can not, nor should, any longer tolerate counter revolutionaries, wedge drivers and traitors in our ranks. MKMVA concurs with the ANC media statement that Hanekom is an enemy sleeper inside the ANC whose singular mission for a long time now had been to divide and destroy the ANC.

No self-respecting ANC member can tolerate Hanekom being allowed to continue as a member of our beloved Liberation Movement, not even to talk about allowing this

despicable traitor from continuing to keep his position as a leader of the ANC through his membership of the National Executive Committee (NEC) of the ANC.

MKMVA supports the ANC's call for unity, and for the delivery of services to the people of South Africa. However, such unity must be principled, and forged by ANC members in good standing. Through his own despicable conduct Hanekom has removed himself from the ranks of ANC members in good standing. He is an utter disgrace, and disciplined and decisive action to remove the cancerous tumor that he has become from the body of the ANC, is a pre-condition for building unity in our ranks.

How we deal with a traitor such as Hanekom should also serve as a timeous warning to all the other traitors, spies, and counter revolutionary sleepers in our ranks.

Truly the time has come to cleanse the ANC from this traitor Hanekom, and also all the other Hanekom's and their hanger-on's, in our ranks. MKMVA will not rest until this is achieved!

**For MKMVA the word comradeship conveys revolutionary commitment, and calling a fellow ANC member a comrade should be the highest form of respect and acknowledgement of that member's commitment to the full liberation of our people. Evidently, on the basis of his own confession of counter-revolutionary treachery Mr. Hanekom is no longer worthy of being called a comrade, and henceforth we will refer to him as Mr. Hanekom.*

Issued by Carl Niehaus, member of the National Executive Committee (NEC) of MKMVA, and MKMVA National Spokesperson.

For further information Carl can be contacted on: 082 796 2626