EXHIBIT EE 6

NXASANA

SUBMISSIONS

&

JUDGEMENTS

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 EE 6

Office of the
National Director of Public
Prosecutions

NATIONAL PROSECUTING AUTHORITY
South Africa

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

Dear President Zuma

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Representations for the National Director of Public Prosecutions in response to notice of intention to suspend in terms of section 12(6)(a) of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act")

Discretionary power to suspend

1. Section 12(6)(a) of the NPA Act provides for the President to provisionally suspend the NDPP from his or her office pending an inquiry into his or her fitness to hold such office.

2. By letter dated 5 July 2014, I was informed of your intention to establish an inquiry in terms of section 12(6)(a) into my fitness to hold office. The reasons for the inquiry were not given, nor did the letter set out the allegations giving rise to the inquiry.

3. On 30 July 2014, I received a notice inviting me to make representations as to why I should not be suspended from my position as the National Director of Public Prosecutions ("NDPP"). The allegations that are the reason for the inquiry are the following:

   3.1. My criminal convictions for violent conduct;

3.2. Comments reported in media to have been made by me that are unbecoming of an NDPP, are divisive and have the effect of bringing the NPA into disrepute; and

3.3. The failure to lack of disclosure of facts and circumstances of prosecutions that I faced.

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

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

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

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

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

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

7. By 15:55 I had not yet received confirmation that you had granted me more time to file my representations. I take that failure to respond to mean that you do not grant my request.

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

Suspension – the general rule

9. Section 12(6)(a) of the NPA Act empowers the President to suspend the NDPP pending an inquiry into his or her fitness to hold office. The NPA Act is silent on the circumstances that must exist for the President to exercise this discretion. My understanding of s12(6) is that the President is given a discretionary power to suspend. That means he must exercise it subject to the law and the requirements of fairness and rationality.

10. The object of the President's discretionary power to suspend is to protect the integrity of the office of the NDPP and to protect any pending investigation from improper influence or interference by an NDPP who is under investigation.

11. So, a suspension without a hearing or an adequate opportunity to be heard would be unfair. And a suspension in the absence of allegations of serious misconduct and reasonable grounds for believing that the NDPP will interfere with or jeopardise an investigation into the allegations, would not be exercising your discretionary power to suspend fairly, lawfully or rationally.[1]

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[1] Mogoeng v Premier of the North West Province (2009) 30 ILJ 405 (LC) at [31] and [37]

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

The allegations against me do not constitute serious misconduct

No criminal convictions

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

The assaults are not allegations of serious misconduct

13. The two assaults of which I was convicted, concern events that took place almost 30 years ago. They are unrelated to the NPA or to my responsibilities as NDPP nor were they related to an employment situation.

14. The first assault happened in 1985. I do not recall the details or what I was found guilty of. I had forgotten about it. I was reminded of it when I applied for my security clearance during December 2013. I was convicted of the first assault on 23 July 1985. At the time I was 17 years old. I was cautioned and discharged.

15. The second assault happened in 1988, at Nongoma. I was charged and convicted on 13 November 1988 of common assault for assaulting my girlfriend at the time. I remember that my girlfriend and I had a fight, although I do not recall the details. I was sentenced to 30 days imprisonment or a R50 fine. I paid the fine.

16. In my application for admission as an attorney, made in the Pietermaritzburg High Court, I disclosed the assault

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

17. The fit and proper test for admission as an attorney is the same or substantially similar to the fit and proper test for appointment as NDPP.[3] A High Court has already found me to be fit and proper. It has already found that my past criminal record does not make me unfit or improper to be admitted as an attorney. There cannot be any reason why two very old criminal convictions for minor offences, that will be expunged, should render me unfit or improper to be appointed as NDPP.

Reported comments in the media

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

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

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

20.1. Former Minister of Justice asked me to resign;

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

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

[3] Pikoli v President of the Republic of South Africa 2010 (10 SA 469 (GNP) at 484F

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

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

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

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

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

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

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

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

Lack of disclosure regarding prosecutions I faced

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

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

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

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

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

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

5208 along Sydney Road, I was arrested for inconsiderate driving and resisting arrest.

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

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

No justification to suspend

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

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

30. The facts and circumstances related to my criminal convictions, my acquittal during 1995 for murder and the withdrawal of the September 2013 charge for inconsiderate driving are a matter of public record.

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

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

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

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

Prejudice

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

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

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

37. I was informed of your decision to establish an inquiry in terms of section 12(6)(a)(iv) on 4 July 2014. I have not influenced or interfered with or attempted to influence or interfere with any

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

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

Yours sincerely

Mr Mxolisi Nxasana
National Director of Public Prosecutions
Date: 01/08/2014

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THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO. 26912/12

In the matter between:

Freedom Under Law	Applicant
And	
The National Director of Public Prosecutions	First Respondent
The National Commissioner: South African Police Service	Second Respondent
The Head: Specialised Commercial Crime Unit	Third Respondent
The Inspector-General of Intelligence	Fourth Respondent
Richard Naggie Mdluli	Fifth Respondent
Minister of Safety and Security	Sixth Respondent

JUDGMENT

Murphy J

1. This application is a matter of public interest and national importance on account of it raising significant issues of propriety, accountability and justifiable conduct in the governance of the Republic. The main issue is whether certain decisions made by the various respondents to withdraw criminal and disciplinary charges against the fifth respondent, Lieutenant-General Richard Mdluli ("Mdluli"), the Head of Crime Intelligence within the South African Police Service ("SAPS"), were unlawful.

2. The applicant, Freedom under Law ("FUL"), a public interest organisation, seeks an order directing the National Prosecuting Authority ("the NPA") to reinstate several withdrawn criminal charges, (including murder, attempted murder, kidnapping, assault, fraud and corruption), against Mdluli. It also seeks orders directing the

National Commissioner of SAPS ("the Commissioner") to reinstate withdrawn disciplinary charges against Mdluli arising from the same alleged misconduct.

3. FUL is a non-profit company as contemplated in section 10 of the Companies Act.[1] It was established in 2008 and has offices in South Africa and Switzerland. It is actively involved *inter alia* in the promotion of democracy, the advancement of and respect for the rule of law and the principle of legality as the foundation for constitutional democracy in Southern Africa. Its board of directors and international advisory board are made up of respected lawyers, judges and role players in civil society in various parts of the world.

4. Dr Mamphela Ramphele, the deponent to the founding and supplementary affidavit, is a member of the international advisory board of FUL and was previously Vice-President of the World Bank in Washington and Vice-Chancellor of the University of Cape Town. She was a universally recognised leader of the Black Consciousness Movement in the struggle against apartheid and is currently President of Agang, a new political formation in South Africa. The deponent to the replying affidavit is the chairperson of the board of FUL, Justice Johann Kriegler, a retired judge of the Constitutional Court, who in 1994 served as Chairperson of the Independent Electoral Commission overseeing the first democratic election in South Africa.

5. Both the Constitutional Court ("the CC") and the Supreme Court of Appeal ("the SCA") have in the past recognised the right of FUL to act in the public interest in terms of section 38 of the Constitution in relation to infringements of the Bill of Rights.[2] FUL has on occasion also been admitted by the courts as *amicus curiae* in important cases involving constitutional matters.

6. These review proceedings, brought in terms of Part B of the Notice of Motion, challenge the decisions of the first, second and third respondents to withdraw the criminal and disciplinary charges that were pending against Mdluli who, though currently interdicted by this court from performing his duties, remains the Head of Crime Intelligence within SAPS; and, as stated, are aimed at reinstating the criminal and disciplinary charges forthwith. The present proceedings were preceded by an urgent application, in terms of Part A of the Notice of Motion, for an interim order interdicting Mdluli from carrying out his functions and the Commissioner from assigning any tasks to him pending the finalisation of the review proceedings. The interim order was granted by Makgoba J on 6 June 2012.

7. The first respondent is the National Director of Public Prosecutions ("the NDPP"), the head of the NPA. The NDPP is appointed by the President of the Republic and invested by section 179(2) of the Constitution and Chapter 4 of the National Prosecuting Authority Act[3] ("the NPA Act") with the powers, functions and duties to institute criminal proceedings on behalf of the State and to carry out any necessary function and duty which is incidental thereto. At the time these proceedings were launched, the office of the NDPP was vacant as a consequence of the decisions of

[1] Act 71 of 2008
[2] *Freedom under Law v Acting Chairperson: Judicial Services Commission and Others* 2011 (3) SA 549 (SCA)
[3] Act 32 of 1998

the SCA and the CC finding the appointment of the previous incumbent, Advocate Simelane, to be unconstitutional. During the period relevant to these proceedings, the position was occupied by Advocate Nomgcobo Jiba, who served as the Acting NDPP until the recent appointment of Mr Nxasana as NDPP by President Zuma.

8. The second respondent is the Commissioner, who in terms of the relevant legislation is the head of SAPS. The Commissioner withdrew the disciplinary charges against Mdluli and reinstated him as Head of Crime Intelligence in SAPS. Section 207(2) of the Constitution, read with the relevant provisions of Chapter 5 of the South African Police Services Act[4] ("the SAPS Act") and the Regulations made in terms thereof, oblige the Commissioner to ensure that members of SAPS diligently fulfil their duties to prevent, combat and investigate crimes, maintain public order, protect and secure the inhabitants of the Republic, and uphold and enforce the law of the land. The Commissioner and his or her provincial or divisional subordinates have the duty to institute and prosecute disciplinary action against any member of SAPS who is accused of and charged with misconduct and to suspend from office such a member, pending the outcome of disciplinary proceedings.[5]

9. When these proceedings commenced, the office of the Commissioner was occupied by Lieutenant-General Nhlanhla Mkhwanazi ('the Acting Commissioner"), who was serving in an acting capacity, following the suspension of the former Commissioner, General Bheki Cele, on grounds of alleged impropriety. Subsequent to the commencement of these proceedings and the ultimate dismissal of General Cele, President Zuma appointed General Mangwashi Phiyega as Commissioner. The impugned decisions of the Commissioner withdrawing disciplinary charges and reinstating Mdluli in his position were taken by Lieutenant-General Mkhwanazi.

10. The third respondent is Advocate Lawrence Mrwebi, ("Mrwebi"), a Special Director of Public Prosecutions, and the head of the Specialised Commercial Crimes Unit ("SSCU") within the NPA. It was he who took the decision and gave instructions to withdraw charges of fraud and corruption against Mdluli. Other charges of murder, attempted murder, kidnapping, intimidation and assault were withdrawn by Advocate Chauke ("Chauke"), Director of Public Prosecutions ("DPP") for South Gauteng, who has not been cited as a party, it having been deemed sufficient to cite the NDPP as titular head of the NPA to whom Chauke is accountable.

11. The fourth respondent is Ambassador Faith Radebe, the Inspector General of Intelligence ("the IGI"), appointed in terms of section 7 of the Intelligence Services Oversight Act.[6] She is the only respondent not to not to oppose the application and has filed a notice to abide.

12. The fifth respondent, Mdluli, did not actively oppose the relief sought in Part B of the notice of motion. He filed an answering affidavit opposing the relief sought in Part A of the notice of motion. He however did not file further opposing papers and was not represented at the hearing before me.

[4] Act 68 of 1995
[5] Regulations 12 and 13 of the Discipline Regulations published under the SAPS Act in GNR. 643 GG 28985 on 3 July 2006.
[6] Act 40 of 1994.

13. The sixth respondent, the Minister of Safety and Security, was joined in the proceedings to give effect to the interim order interdicting the assignment of tasks to Mdluli pending the finalisation of the review. He has joined the Commissioner in opposing the application.

14. In sum, FUL seeks to review and set aside four decisions in relation to Mdluli: the decision taken by Mrwebi on 5 December 2011 to withdraw the corruption and related charges; the decision taken by Chauke on 1 February 2012, to withdraw the murder and related charges; the decision taken by the Acting Commissioner, on 29 February 2012, to withdraw the disciplinary proceedings; and the decision, of 27 or 28 March 2012, to reinstate Mdluli as the Head of Crime Intelligence within SAPS. It also seeks an order directing that the criminal and disciplinary charges be immediately re-instated and prosecuted to finalisation, without delay.

Preliminary evidentiary and procedural issues

15. The background facts giving rise to the review are for the most part common cause. However, in its founding affidavit FUL conceded that it was compelled by force of circumstances in bringing the application to rely on hearsay statements reported in the media and elsewhere. It accordingly made a general application for any hearsay evidence to be admitted in the interests of justice in terms of section 3 of the Law of Evidence Amendment Act.[7] It based the application on five broad considerations: the relevant source documents relating to the decisions were inaccessible as they are under the control of the respondents; some of the statements have been reported in the media and have not been repudiated by the respondents; the impugned decisions were taken without any public explanation in violation of the constitutional obligation of transparency, openness and accountability; the review deals with subject matter of significant public interest; and the respondents would suffer no material prejudice by the admission of the hearsay, with any prejudice being outweighed by the public interest in proper justification of the decisions.

16. In motivating the admission of the evidence, FUL did not identify the specific statements upon which it hoped to rely. Nonetheless, it is evident that it had in mind a range of statements made in certain newspaper articles, as well statements and reports made by members of SAPS and the NPA (in particular Colonel Kobus Roelofse and Colonel Peter Viljoen of the Directorate Priority Crime Investigations in Cape Town, the Hawks; and Advocate Glynnis Breytenbach of the NPA) who investigated the allegations against Mdluli but were inhibited by institutional constraints and perceived conflicts of interest from deposing to confirmatory affidavits.

17. In the answering affidavits filed by the NDPP and the Mrwebi, the hearsay evidence was for the most part dealt with in general terms without any particular statement being objected to. The Commissioner largely avoided dealing with the merits of the factual allegations in relation to the decisions, raised mainly technical defences and objected to the hearsay in general terms.

[7] Act 45 of 1988

18. In reply, FUL reiterated the point that the problem of hearsay in most respects would have fallen away had the NDPP and the Commissioner taken the court into their confidence by making full and frank disclosure regarding the Hawks investigation and by consenting to their employees testifying in these proceedings. Instead, it alleged, the deponents, in violation of their constitutional obligations of transparency and accountability, strained to withhold vital information in their possession. FUL therefore submitted that it is not open to the respondents to seek to have the evidence disallowed on the basis that it is hearsay when they have declined to fulfil their obligation to provide it.

19. The dispute between the parties about hearsay, delineated as it is in such general terms, is frankly much ado about not a great deal and not especially helpful in deciding any disputes of fact. Because evidence was sourced from other proceedings in which evidence was given under oath, most of the relevant factual issues have become less contentious. And where there are factual disputes they must be resolved by reference to the principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[8] For the reasons put forward by FUL, I will adopt a generous approach. The hearsay nature of any statements allowed as evidence in the interests of justice, and which form the basis of averments of either party, will nonetheless influence the determination of the veracity, probability, reliability and ultimate cogency of the averments.

20. FUL complained furthermore that the respondents have, through their conduct, delayed and frustrated the prosecution of the review. Each of the first to third respondents was called upon, in terms of Rule 53 of the Uniform Rules of Court, to file a record of decision, and reasons, justifying his or her decision under attack. Each of them failed to file a record timeously or on request. FUL was compelled to serve Rule 30A notices, upon which the first and third respondents eventually filed incomplete records. FUL's attorney addressed a letter to the state attorney on 25 July 2012 requesting a complete record of decision itemising twelve identified items that had not been disclosed, including the representations made to the NDPP by Mdluli requesting the withdrawal of charges, communications with the IGI and the Auditor General to whom the allegations of misconduct had been referred for investigation, representations made by Advocate Breytenbach to Mrwebi recommending that the charges not be withdrawn and so on. The request was not heeded. FUL also had to bring an application to compel production of the Commissioner's record. Even then an incomplete record was delivered. The Acting Commissioner filed a record comprising only two letters notifying Mdluli of the withdrawal of the disciplinary charges and the upliftment of his suspension.

21. The respondents' failure to comply fully with their obligations to file complete records of decision undermined FUL's ability to prosecute the review and has meant that it has had to rely on evidence put up by itself, sourced from other proceedings in which the respondents were involved, in particular those involving the suspension and discipline of Advocate Breytenbach, a Senior Deputy DPP of the NPA who doggedly insisted on the prosecution of Mdluli. On 30 April 2012 the NDPP suspended Breytenbach pending the outcome of an investigation into a complaint made against her in an unrelated matter some six months before her suspension. Breytenbach has contended in the other proceedings that the complaint was

[8] 1984 (3) SA 623 (A) at 634-635

spurious and the real reason for her suspension was the stance she took in relation to the prosecution of Mdluli. She challenged her suspension by way of an urgent application to the Labour Court, which was struck from the roll for want of urgency. She was ultimately cleared of all charges (additional charges having been preferred against her after her suspension) in a disciplinary hearing held under the auspices of an independent chairperson. In the absence of a complete record of decision, FUL has relied on the affidavits filed in the Labour Court application and the transcript of the cross examination of NPA witnesses in the disciplinary hearing to supplement its evidence.

22. The failure to file complete records timeously contributed to a delay in the proceedings. The review in terms of Part B of the Notice of Motion was heard almost two years after it was first instituted. Throughout that time, Mdluli remained suspended on full pay. Despite the incomplete records of decision, FUL filed its supplementary founding affidavit on 8 October 2012, and a further supplementary founding affidavit, necessitated by the paucity of the records filed and by further documents becoming publicly available, on 14 March 2013. It meant that the respondents had to file answering papers by no later than 02 May 2013. None of the respondents filed answering papers in the review by that date.

23. Ultimately the Deputy Judge President ("the DJP") directed the respondents to file answering papers by 24 June 2013, to enable the matter to be heard on 11 and 12 September 2013. Even then, the second and sixth respondents filed their answering papers only on 25 June 2013, and the first and third respondents filed theirs on 4 July 2013 – nine court days late. The NDPP and Mrwebi in addition did not file their heads of argument on 12 August 2013 as directed by the DJP, preferring to do so a month late on 9 September 2013, two days before the hearing, much to the inconvenience of the court and the other parties. The respondents filed additional affidavits in the afternoon of the day before the hearing. Despite being ambushed in this way, the applicant did not object to their admission, no doubt because it preferred not to have the matter postponed. I indicated to the parties that the creditworthiness of the averments made in the late filed supplementary affidavits would have to be assessed in the light of the applicant not having had a right of reply to them. It was agreed by all parties to proceed on that basis.

24. The reasons for the various delays, and late filing, are sparse and mostly 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 it to say that the conduct of the respondents is unbecoming of persons of such high rank in the public service, and especially worrying in the case of the NDPP, a senior officer of this court with weighty responsibilities in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold.

25. FUL submitted that the respondents' conduct in delaying the proceedings, their lack of transparency and their attitude to disclosure and the admission of any hearsay evidence gives rise to an inference that they lack adequate justification for the decisions at issue. The legitimacy of that submission is borne out by the analysis which follows.

The facts

26. As stated, the facts giving rise to the application are for the most part common cause. Mdluli joined SAPS on 27 August 1979. He rose through the ranks and was finally appointed as the Head of the Crime Intelligence Division of SAPS on 1 July 2009. The position is one of the senior leadership positions within SAPS and in the intelligence community of the state. The incumbent exercises complete control over all surveillance that any division of SAPS carries out in any investigation, and has access to highly sensitive and confidential information, and to the funds making up the Secret Service Account ("the SSA"). The position calls for an official with an exemplary record of honesty, discretion and integrity.

27. On 31 March 2011, Mdluli was arrested and charged with 18 counts, including murder, intimidation, attempted murder, kidnapping, assault with intent to do grievous bodily harm, and with defeating the ends of justice. These charges alleged that on 17 February 1999 Mdluli was party to the unlawful and intentional killing of Mr Tefo Ramogibe, who at the time was married to Ms Tshidi Buthelezi, a former lover of Mdluli. The charges of attempted murder, kidnapping etc. make allegations that Mdluli and persons associated with him brought pressure upon the relatives and friends of Ramogibe by violence, kidnapping and other threatening means with the aim of bringing the relationship between Ramogibe and Buthelezi to an end. Ramogibe was shot dead during a pointing out while in the company of SAPS officers from Vosloorus Police Station. The pointing out was held ostensibly for the purpose of gathering evidence in relation to a case of attempted murder opened by Ramogibe at the Vosloorus Police Station a few days previously. At the time Mdluli was Branch Commander of the Detective Branch at Vosloorus. Although Mdluli was a suspect in the investigation into the murder and attempted murder of Ramogibe, he was not arrested on the charges and the matter did not proceed to trial. Much of the original docket and certain exhibits have since been lost or have disappeared.

28. Information about the discontinued investigation surfaced shortly after Mdluli was promoted to Head of Crime Intelligence in late 2009. In light of the seriousness of the charges and on the weight of the evidence, the then Commissioner, General Cele, after following due process, suspended Mdluli from office on 8 May 2011 and instituted disciplinary proceedings against him. Mdluli is of the opinion that the allegations have re-surfaced as part of a conspiracy against him by those opposed to his promotion to high rank. In a letter dated 3 November 2011, addressed to President Zuma, the Minister of Police and the Acting Commissioner, Mdluli alleged that Commissioner Bheki Cele, and other senior officers, Generals Petros, Lebeya and Dramat were "working together against" him. In the letter he tactlessly stated:

> "In the event that I come back to work, I will assist the President to succeed next year"

He did not explain how he would assist the President, but it is reasonable to assume that he had in mind the conference of the governing party in 2012 at which President Zuma was re-elected as party leader for a second five year term. His entreaty to the President implies that Mdluli believed he had it in his gift to use his influence and the means at his disposal to the advantage of the President. The Minister later responded by causing the allegations of conspiracy to be investigated by a special task team which ultimately found them to be baseless.

29. Mdluli made various appearances in court on the murder and related charges. The matter was postponed to later dates without Mdluli being asked to plead to the charges.

30. In late September 2011 Mdluli was arrested and charged on further charges of fraud, corruption, theft and money laundering ("the fraud and corruption charges"). The charges relate to the alleged unlawful utilization of funds from the SSA for the personal benefit of himself and his spouse. Mdluli was brought before the Specialized Commercial Crimes Court in Pretoria and granted bail. He was not asked to plead to the charges. The case was postponed to 14 December 2011.

31. The investigation of these charges was conducted by Colonel Viljoen of the Hawks who worked in conjunction with Advocate Smith of the Specialised Commercial Crimes Unit ("the SCCU"). Smith applied for a warrant for the arrest of Mdluli on 1 August 2011. The application was authorised by the magistrate on 6 September 2011, and executed on 20 September 2011.

32. The evidence in relation to the fraud and corruption charges is derived from an affidavit made by Viljoen in support of the application for the warrant of arrest of Mdluli and a report from Colonel Roelofse. Neither officer has deposed to an affidavit in these proceedings on the grounds of conflict of interest. Strictly speaking their evidence is hearsay. However, none of the respondents deny the averments in relation to the nature of the charges or their investigation, and they may be accepted to be common cause.

33. The charges allege that Mdluli received an unlawful gratification in an approximate amount of R90 000 when he used the funds of the SSA to acquire two vehicles supposedly for covert use, but which were recovered from his wife at their home in Cape Town. As part of the transaction, he is alleged to have traded in his own vehicle, which was valued at about R90 000 less than the amount Mdluli owed as outstanding instalments under his credit agreement. The purchase of the new vehicles, apparently for the use of himself and his wife, was allegedly done in such a manner that discounts payable to the Secret Service were applied for Mdluli's personal benefit and extinguished his obligation to pay R90 000 to his credit provider.

34. The charges thus essentially allege that Mdluli abused state financial resources for private gain for his and his wife's benefit. The SSA is controlled by the crime intelligence unit over which Mdluli exercises control. The charges are therefore serious, impacting upon the proper administration of justice and control of state resources, and raise the question of Mdluli's fitness for his position.

35. In his answering affidavit filed in the Part A proceedings, Mdluli dealt mainly with procedural issues related to his suspension, his constitutional right to be presumed innocent, attacks on his integrity in the media, the alleged conspiracy against him and the leaking of classified information. Although expressing doubt about the sufficiency of the evidence against him, he did not address the specifics of the allegations made in respect of the various criminal charges in any detail or disclose his defence in relation to them.

36. The legal representatives of Mdluli addressed, and delivered by hand, written representations to the NDPP on 26 October 2011. They were not disclosed by the respondents, as one might have expected, as part of the Rule 53 process. They are annexed as part of Annexure GB 10 to the affidavit of Breytenbach filed in the Labour Court proceedings. The opening paragraph reads:

> "We hereby make representations to you as to why you should review the preference of charges against our client Lt Gen Mdluli and possibly withdraw the charges against him, as proceeding against him is less likely to result in a conviction on any of the charges preferred against him"

The Acting NDPP, Advocate Jiba, made no mention of these representations in her answering affidavit. Her scant averment on the issue is to the effect that "the decisions" of the Special DPP and the DPP who instructed the charges to be withdrawn "have not been brought to my office for consideration in terms of the regulatory framework"; the implication of her statement being that she has made no decision in relation to the representations.[9]

37. The representations contend for the most part that the charges arose from a conspiracy against Mdluli by fellow officers and others who disapproved of his promotion.

38. Written representations in relation to the fraud and corruption charges, dated 17 November 2011, were delivered by hand to Mrwebi in his capacity as a Special DPP and the head of the SCCU. They record that similar representations, presumably in relation to the murder and related charges, had been made to Chauke, the DPP South Gauteng. In the representations to the Special DPP, Mdluli's legal representatives alleged an abuse of the criminal justice system and stated:

> "Our instructions are that Mdluli's arrest is a continuation of the dirty tricks and manoeuverings relating to the contestation and jostling for the position of Head of Crime Intelligence."

The representations made to Chauke, although alluded to in his record of decision filed in terms of Rule 53, do not form part of the record of this application.

39. Mrwebi in response to the representations made to him requested a report from Breytenbach and sight of the docket. An initial report was submitted to Mrwebi under cover of a memorandum from Breytenbach. Mrwebi was dissatisfied with the report and asked for more information. A final report prepared by Smith was placed before Mrwebi on 2 December 2011. The reports and memorandum argued in favour of pursuing the case against Mdluli.

40. Mrwebi stated in his answering affidavit that after he considered the reports and examined the docket, he concluded that there "were many complications with the matter particularly with regard to the nature and quality of evidence" and how that evidence had been obtained. He was of the view that "there was no evidence, other than suspicion linking the suspects to the alleged crimes". He also had concerns that the evidence had been acquired improperly because documents in relation to the SSA are privileged and that the documents could not be relied on until the IGI waived the privilege. And, thus, he believed there would be problems with the

[9] Para 21 of the confirmatory affidavit of the first respondent at page 1758 of the record.

admissibility of the incriminating documentation. As will appear presently, this account is inconsistent with the objective facts as reflected in contemporaneous correspondence.

41. 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 obviously 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.

42. Mrwebi said that he met with Advocate Mzinyathi, the DPP of North Gauteng, on 5 December 2011 to "discuss" the matter. He claims that the consultative note was incorrectly dated and was in fact drafted after he met with Mzinyathi. There is some doubt about this, but because in the final analysis not much turns on the issue I am prepared to accept that the note was written on 5 December 2011. The consultative note is addressed to Mzinyathi and Breytenbach. The opening paragraph records that Mrwebi had consulted with the DPP North Gauteng, as required by section 24(3) of the NPA Act. Mzinyathi in a confirmatory affidavit, filed on the day before the application was enrolled for hearing, contradicts this. His averments in that affidavit create the distinct impression that his engagement with Mrwebi on 5 December 2011 was in the way of a brief encounter in which the issues were not fully canvassed. They did however meet again on 9 December 2011 and had a more substantive discussion. In the consultative note, Mrwebi expressed his essential view in relation to the prosecution as follows:

> "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 the Intelligence Services Oversight 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 investigations can never be complete without access to such documents and information."

Later in the note, after briefly referring to the investigation, Mrwebi stated:

> "However, because of the view I hold of the matter, I do not propose to traverse the merits of the case and the other questions any further. Whether there was evidence in the matter or not, is in my view, not important for my decision in the matter. The proposition which I allude to below, should alone and without any further ado, be dispositive of the matter."

43. The proposition in question, and thus the sole reason for his decision to instruct the charges to be withdrawn, was his belief that those charges fell within the exclusive preserve of the IGI in terms of section 7 of the Intelligence Services Oversight Act.[10] It is common cause that Mrwebi did not consult the SAPS or the IGI prior to withdrawing the charges and that Mzinyathi and Breytenbach informed Mrwebi at the meeting with him on 9 December 2011 that the IGI was not authorised to conduct criminal investigations. However, their advice did not prompt him to change his stance.

44. In his answering affidavit, as I mentioned earlier, Mrwebi attempted to cast a different spin on his reasons for passing the matter to the IGI. He referred it to the

[10] Act 40 of 1994

IGI, he said, because he believed "that the IG would not only help with access to documents and information" but could also resolve the issue of privilege. He was merely postponing the matter until the IGI sorted out the evidentiary problems.

45. Subsequent events do not bear that out. In particular, correspondence from the IGI to the Acting Commissioner dated 19 March 2012 indicates that she understood the matter to have been referred to her to investigate and institute proceedings. This letter was forwarded to the NDPP and Mrwebi on 23 March 2012, after the IGI's legal adviser had prevailed unsuccessfully upon Mrwebi to re-instate the charges against Mdluli. In her letter the IGI commented on Mrwebi's consultative note as follows:

> "The IGI derives her mandate from the Constitution of the Republic of South Africa, 1996 and the Intelligence Services Oversight Act, 1994…which provides for the monitoring of the intelligence and counter-intelligence activities of the Intelligence Services…Any investigation conducted by the IGI is for the purposes of intelligence oversight which must result in a report containing findings and recommendations…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 that the reasons advanced by the NPA in support of the withdrawal of the criminal charges are inaccurate and legally flawed. We therefore recommend that the matter be referred back to the NPA for the institution of the criminal charges."

Her perception is patent. She appreciated that Mrwebi had instructed the charges to be withdrawn and discontinued the criminal proceedings. Both Breytenbach and Mzinyathi understood the position likewise. Mrwebi took no apparent steps to heed the advice of the IGI.

46. In his answering affidavit, and in the consultative note, Mrwebi stated that he consulted with Mzinyathi on 5 December 2011 in terms of section 24(3) of the NPA Act before making his decision. The provision requires that a Special Director may only discontinue criminal proceedings "in consultation" with the relevant DPP. The nature and extent of the consultation that occurred is a matter of dispute. The record of Breytenbach's disciplinary proceedings indicates that it may have fallen short of the statutory requirement.

47. What transpired between Mrwebi and Mzinyathi at their meetings on 5 December 2011 and 9 December 2011 is of decisive importance. It was the subject of extensive and thorough cross examination by Advocate Trengrove SC, counsel for Breytenbach, during her disciplinary proceedings. The respondents have not placed the authenticity, accuracy or reliability of the record in issue. It therefore may be accepted as a correct and complete account of the testimony of Mrwebi and Mzinyathi under oath in those proceedings. Considering that Mrwebi and Mzinyathi are senior officers of the court, one may assume the evidence was given with due consideration to the need for propriety and appropriate candour.

48. After lengthy cross examination by Mr. Trengrove, Mrwebi conceded that when he took the final decision, either on 4 December 2011 or 5 December 2011, to withdraw the charges and discontinue the prosecution of Mdluli on the fraud and corruption charges, he did not know Mzinyathi's view of the matter and did not have his concurrence in the decision. He admitted that he took the decision prior to writing the consultative note and did so relying on representations made to him in

confidence by anonymous people, who he was not prepared to name and whose input he did not share with Mzinyathi. Mzinyathi's views were conveyed to Mrwebi for the first time in an email on 8 December 2011 in response to the consultative note, after Mrwebi had already informed Mdluli's attorney that the charges would be withdrawn.

49. Mzinyathi acknowledged such to be the case during his evidence in the disciplinary proceedings. He was referred during cross examination to the email and affirmed the correctness of its content. In the email Mzinyathi stated:

> "I am concerned that you indicate in your memorandum to me that you will advise the attorneys of Mr. Mdluli of your instruction that charges 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 instruction that the charges will be withdrawn."

50. Mzinyathi also confirmed that at the meeting on 9 December 2011 (attended by the two of them and Breytenbach), Mrwebi took the position that he was *functus officio* because he had already informed Mdluli's attorneys of the intended withdrawal. Mzinyathi and Breytenbach, unable to persuade Mrwebi to reverse the decision, then prevailed on him to withdraw the charges provisionally, to which he agreed. Mzinyathi retreated somewhat from this testimony in his confirmatory affidavit filed on the day before the application was enrolled to be heard. His explanation of events in the affidavit differs from his testimony at the disciplinary hearing with regard to the degree of concurrence. His exchange with Advocate Trengrove is therefore important. The most relevant part merits quoting in full:

> **Trengrove:** Now when you, when you then saw him the following day on the 9th….he told you that he was *functus officio*, do you remember that?
>
> **Mzinyathi:** He did indeed.
>
> **Trengrove:** Because he had already informed the attorneys of his decision to withdraw the charges.
>
> **Mzinyathi:** Yes
>
> **Trengrove:** Do you know that he sent off that letter to the attorneys withdrawing the charges, at the same time sending you those memos (including the consultative note)?
>
> **Mzinyathi:** Oh, I was not aware.
>
> **Trengrove:** That is what he told us in evidence. So, by the time he met with you on 9 December 2011 he said he was *functus officio*, correct?
>
> **Mzinyathi:** Yes
>
> **Trengrove:** And we all know that *functus officio* means that I have taken my decision and I no longer have the power to reopen it, correct?
>
> **Mzinyathi:** Yes
>
> **Trengrove:** So that presented you with a *fait accompli*, the horse had bolted, the case will have to be withdrawn.
>
> **Mzinyathi:** Indeed.

51. In the supplementary founding affidavit, delivered in March 2013, six months before the application was heard, FUL dealt comprehensively with Mzinyathi's involvement, his evidence in the disciplinary enquiry and the contention that the failure to consult him rendered the withdrawal of the charges illegal. Mzinyathi, it may be re-called is the DPP for North Gauteng, the most senior public prosecutor in Pretoria. The record shows he has been involved in this dispute from the beginning. His evidence in the Breytenbach disciplinary hearing was that he disagreed with the decision which had been presented to him as a *fait accompli*. This was the factual basis upon which FUL relied in the founding and supplementary affidavits, as well as its heads of argument, to submit that the withdrawal of the charges was illegal.

52. Mrwebi in his answering affidavit did not deal with Mzinyathi's testimony at the disciplinary enquiry (or for that matter with any of the averments in the supplementary founding affidavit). His account of the events between 5 December 2011 and 9 December 2011 takes the form of a general narrative which does not admit or deny the specific allegations in the supplementary founding affidavit. He nonetheless maintained that he had consulted Mzinyathi. The answering affidavit was not accompanied by a confirmatory affidavit from Mzinyathi, who therefore initially did not confirm Mrwebi's general account. In his confirmatory affidavit filed at the eleventh hour, the day before the hearing, without any explanation whatsoever for it being filed six months after the delivery of the supplementary founding affidavit, Mzinyathi, differing from his evidence at the hearing, confirmed the allegations in Mrwebi's affidavit as they relate to him, thus saying in effect for the first time that he had indeed concurred in the decision.

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

54. Taking account of how it was placed before the court by Mzinyathi, after FUL's heads of argument were filed, without explanation for its lateness, and its inconsistency with his testimony at the disciplinary 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 un-creditworthy. The affidavit is a belated, transparent and unconvincing attempt to re-write the script to avoid the charge of unlawfulness. The version in the supplementary founding

affidavit, originally uncontested by Mzinyathi, and corroborated by Mzinyathi's testimony in the disciplinary hearing, must be preferred and accepted as the truth.

55. In light of the contemporaneous evidence, Mrwebi's averment in the answering affidavit that he consulted and reached agreement with Mzinyathi before taking the decision is equally untenable and incredible to a degree that it too falls to be rejected.

56. That a decision to withdraw the charges and discontinue the prosecution had been made without the concurrence of Mzinyathi is borne out not only by Mzinyathi's email of 8 December 2011 and his evidence at the disciplinary hearing, but also by Mrwebi's own interpretation of events. In his answering affidavit, Mrwebi described the purpose of the visit by Breytenbach and Mzinyathi to his office on 9 December 2011 as being "to discuss their concerns that they do not agree *with my decision*". After discussing the evidentiary issues, according to Mrwebi, they agreed with his position that the case against Mdluli was defective, had been enrolled prematurely and could be reinstated at any time. Breytenbach, he said, agreed to pursue the matter and would come back to him with further evidence. Breytenbach failed to pursue the matter diligently and did not come back to him. He then considered the matter "closed", as he stated in a letter to General Dramat of the Hawks, on 30 March 2012. The court, on the basis of this account, is asked to accept that the reason the prosecution has not been re-instated is that Breytenbach failed in her duty to obtain additional evidence and report back, as she had promised at the meeting of 9 December 2011.

57. Breytenbach, as mentioned, was suspended from her position as Regional Director of the SCCU in late April 2012, on numerous unrelated charges of which she was later acquitted at the disciplinary hearing.

58. Mrwebi's reference to "*my decision*" in his answering affidavit implies that he believed the decision to withdraw the charges against Mdluli was his decision and one made prior to the meeting of 9 December 2011 without the concurrence of Mzinyathi. His use of the term "closed" in the letter to Dramat, albeit a few months later, supports Mzinyathi's evidence that Mrwebi viewed himself as *functus officio*, was unwilling to re-instate the charges and that the decision was presented to him as a *fait accompli*. The subsequent agreement to categorise the withdrawal of charges as "provisional" was a concession to his concerns, which did not alter Mrwebi's prior unilateral decision and instruction that the charges should be withdrawn. Mrwebi's own evidence thus supports a finding that the decision to withdraw the fraud and corruption charges was taken by him alone before the meeting of 5 December 2001, and prior to his writing of the consultative note, without the concurrence of Mzinyathi.

59. Had Mrwebi genuinely been willing to pursue the charges after 9 December 2011, one would have expected him to have acted more effectively. He justified his supine stance on the basis that Breytenbach had not come back to him with additional evidence to cure the defects in the case. He implied that had she done her job, the charges would have been re-instated.

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

> "106. Advocate Mrwebi's version as set out in this paragraph is, I submit, palpably implausible and in conflict with his *ipsissima verba*. In its ordinary meaning 'closed" is unequivocal. As it is used in Advocate Mrwebi's letter to General Dramat, seen in the context, there can in my submission be no doubt that Advocate Mrwebi was implacably opposed to any prosecution against General Mdluli.
>
> 107. Indeed, I submit that the very attempt to adhere to the untenable casts serious doubt on the veracity of the deponent and moreover casts a shadow over the propriety of his decision to block the prosecution of General Mdluli."

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

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

63. The memo is a credible indication that the decisions were indeed brought to the attention of the Acting NDPP for consideration. The NDPP in her answering affidavit, though not dealing directly with the memo, maintained that the decisions to withdraw charges had not come to her office for consideration "in terms of the regulatory framework". Be that as it may, the memo leaves no doubt that Breytenbach did not consider the case against Mdluli to be "defective". She was confident that there was a good *prima facie* case and reasonable and probable cause for a prosecution, so much so that she wanted a review by the NDPP of the Special DPP's decision and requested permission to re-enrol the charges and to pursue additional charges in relation to Mdluli's misuse of the funds of the SSA. Her firm conviction that there was a good case against Mdluli was the reason she wrote the memo. Breytenbach concluded:

> "Our professional ethics dictate that we pursue the matter to its logical conclusion, which may include, of necessity, taking further steps if there is no agreement between us"

64. Breytenbach's attempts to have the charges re-instated were not successful. She was suspended about two weeks later on 30 April 2012.

65. Mrwebi offered no detail at all in his answering affidavit of any continuing investigation into the fraud and corruption charges by SAPS or the NPA, nor did he name any person supposedly seized with them. He also did not comment on the recommendation of the IGI that criminal proceedings should be instituted against Mdluli. His averments in the answering affidavit regarding continuing investigations, on the face of them, are unsubstantiated and hence unconvincing. He sought belatedly to supplement his deficient evidence in these respects in his supplementary answering affidavit filed on 10 September 2013.

66. Motivated in part, as he said, by a need to respond to what he considers to be a withering attack by Justice Kriegler on his integrity, credibility, and the propriety of his decisions, and hence by implication his suitability to hold his office, Mrwebi delivered the supplementary answering affidavit (making averments going beyond the challenge to his integrity) on the day before the matter was enrolled for hearing, two months after the replying affidavit was filed and one month after the applicant filed its heads of argument. His reasons for taking so long are not compelling and pay little heed to the fact that his timing ambushed the applicant and denied it the opportunity to deal with the allegations made in the affidavit.

67. For the most part, the affidavit does not take the matter further and basically repeats his assertion that the decision was not unilateral and that investigations are continuing. Mrwebi referred for the first time in this affidavit to five written reports from members of the prosecuting authority who are investigating the matter, the contents of which he was disinclined to share with the court for strategic and tactical reasons on the grounds that disclosure will hamper and prejudice the investigation. He was however prepared to share with the court the fact that the NPA has experienced “challenges” in relation to the declassification of documents. Moreover, on 25 June 2013, three months before the hearing of the application, it was established by investigating prosecutors that the evidence of the main witness (who is not identified by name) will have to be ignored in its entirety because it is apparently a fabrication not reflecting the true version of events. The exact nature of that evidence and the basis for its refutation is not disclosed.

68. For reasons that should be self-evident, it is not possible to attach much weight to this evidence. The applicant has been denied the opportunity to respond to it, and by its nature it is vague and unsubstantiated. Mrwebi, by his own account, and for reasons he does not explain, sat on this information for three months before disclosing it to the court on the day before the hearing. The averments accordingly can carry little weight on the grounds of unreliability. The conduct of the Special DPP, again, I regret, as evidenced by this behaviour, falls troublingly below the standard expected from a senior officer of this court.

69. Accordingly, in the final result, I am compelled to find that Mrwebi took the decision to withdraw the charges against Mdluli without the concurrence of Mzinyathi and decided to discontinue the prosecution.

70. The fraud and corruption charges were formally and “provisionally” withdrawn in the Specialised Commercial Crimes Court on 14 December 2011. FUL submits that a provisional withdrawal which has endured for two years may be considered to be a

permanent withdrawal. The characterisation of the withdrawal as provisional, as I explain later, would not normally deflect from any proven illegality or irrationality of the decision.

71. The charges of murder and related offences were withdrawn on 14 February 2011 by Chauke, the DPP for South Gauteng, based in Johannesburg, the area of jurisdiction in which the alleged offences were committed. Chauke determined to withdraw the charges on 1 February 2012 and publicly announced the fact on 2 February 2012. In his reasons for decision and in his supporting answering affidavit, Chauke explained that given the seriousness of the charges and the lack of direct evidence to sustain the charge of murder, he decided to withdraw the charges provisionally and for an inquest to be held to determine the cause of death of Ramogibe. Chauke withdrew the 17 other charges of intimidation, assault, attempted murder and kidnapping because he wanted to avoid fragmented trials.

72. An inquest is an investigatory process held in terms of the Inquests Act[11] which is directed primarily at establishing a cause of death where the person is suspected to have died of other than natural causes. Section 16(2) of the Inquests Act requires a magistrate conducting an inquest to investigate and record his findings as to the identity of the deceased person, the date and cause (or likely cause) of his death and whether the death was brought about by any act or omission that *prima facie* amounts to an offence on the part of any person. The presiding officer is not called on to make any determinative finding as to culpability.

73. In his supporting answering affidavit, Chauke explained that he took the decision to withdraw the charges and to refer the murder allegations to an inquest in response to the written representations made on behalf of Mdluli to the DPP South Gauteng in November 2011. He did not annex a copy of those representations to his affidavit.

74. The inquest was held during the course of April and May 2012. The magistrate handed down his reasons six months later on 20 November 2012. The reasons suffer a measure of incoherence and the ultimate findings are contradictory. He found first that an inference of Mdluli's involvement would be consistent with the facts but not the only inference. He then concluded:

> "The death was brought about by an act *prima facie* amounting to an offence on the part of unknown persons. There is no evidence on a balance of probabilities implicating Richard Mdluli….."

75. The magistrate found correctly that the inquest had no jurisdiction to deal with the other charges against Mdluli.

76. In its supplementary founding affidavit delivered in March 2013, FUL submitted that the evidence put up in the inquest discloses a *prima facie* case against Mdluli of murder, kidnapping, assault with intent to do grievous bodily harm and defeating the end of justice.

77. In relation to the killing of the deceased, given that he was shot three times by unknown assailants, there is no doubt that an offence was involved. The only question for the magistrate, in terms of section 16(2) of the Inquest Act, was whether

[11] Act 58 of 1959.

the death was brought about by conduct *prima facie* amounting to an offence on the part of any person. A *prima facie* case will exist if the allegations, as supported by statements and real documentary evidence available, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict.[12] The magistrate's conclusion that an inference of Mdluli's involvement would be consistent with the proved facts amounts to a finding that Mdluli has a *prima facie* case to answer. The magistrate in effect (but perhaps unconsciously) accepted that although a case had not been established beyond reasonable doubt or on a balance of probabilities, there was a *prima facie* case of murder against Mdluli. It was not the responsibility of the magistrate to establish culpability either beyond reasonable doubt or on a balance of probabilities.

78. The affidavits before the inquest and the evidence as summarised by the magistrate in his written reasons do indeed support a conclusion that there is a *prima facie* case against Mdluli on the murder and related charges. The magistrate found the following to be common cause. Mdluli and Ramogibe, the deceased, were both in a relationship with the same woman, Buthelezi, from 1997 until the murder of the deceased in 1999. Ramogibe had secretly married Buthelezi during the period in question. Mdluli was upset about the relationship "and on a number of occasions addressed the issue". On 23 December 1998 Ramogibe was the victim of an attempted murder. He reported the incident to the Vosloorus SAPS. Ramogibe was requested to report to the Vosloorus police station to meet with the investigating officer and to point out the scene of the attempted murder. On 17 February 1999, Ramogibe was taken to the scene in Mdluli's official vehicle, a green Volkswagen Golf. Ramogibe was murdered at the scene on that day while pointing it out to the investigating officer.

79. In its supplementary founding affidavit, FUL highlighted the following key attributes of the evidence demonstrating a *prima facie* case against Mdluli, and upon which the magistrate's inference of Mdluli's involvement is soundly based.

80. The deceased's mother, Ms Maletsatsi Sophia Ramogibe, testified that during 1998 Mdluli came to her home looking for the deceased, obviously unhappy with the fact that the deceased was in a relationship with Buthelezi. A few days later, Mdluli came and fetched her and took her to the police station. There she found her son bleeding with his shirt covered in blood. Mdluli insulted her son in his presence and warned him to keep away from Buthelezi. Her son was killed a few days later. After his death, Ms Ramogibe's daughter, Jostinah, was kidnapped and raped (confirmed by her in a confirmatory affidavit). She later received a call from an unknown caller who warned her that if she proceeded to press the case of her son's murder all her daughters would be killed.

81. Ms Alice Manana, an acquaintance of the deceased and Buthelezi, described how in August 1998 she was allegedly kidnapped, intimidated and assaulted by Mdluli and two fellow officers of the Vosloorus SAPS, and forced to disclose the whereabouts of the couple and to take the police to them at Orange Farm. The deceased and Buthelezi were then taken to Vosloorus police station where they were assaulted for 30 minutes before being discharged. On 17 October 1998, Ms Manana was repeatedly shot by an assailant who shot her at the front door of her

[12] Du Toit, *Commentary on the Criminal Procedure Act* Juta at 1-4T-7

home. During the shooting, she saw Mdluli sitting in the driver's seat of a green Volkswagen Golf, which she knew belonged to him, parked outside her house.

82. Buthelezi, now deceased, stated in an affidavit deposed to before her death that she and the deceased had been kidnapped and assaulted by Mdluli and his colleagues.

83. Five other witnesses, including the deceased's father, testified that Mdluli had visited them repeatedly looking for the deceased and informed them that he would kill Ramogibe if he did not end his relationship with Buthelezi. Mr Steven Buti Jiyane testified that Ramogibe had periodically stayed at his family home because Mdluli was threatening to kill him.

84. Mary Lokaje in her affidavit heard the shooting of Ramogibe outside her house and saw three uniformed policeman running away from the scene, and saw the Golf being driven away.

85. Various affidavits by police officers who investigated the murder were filed confirming that Mdluli was the main suspect in the case although there was no evidence of his direct involvement in the murder and dealing with the loss of the dockets and evidence linked to some of the charges.

86. The magistrate did not reject any of this evidence. He in fact accepted it. In the conclusion to his reasons, the magistrate stated:

> "But be this as it may, their evidence of Mdluli being to such a degree upset with Oupa's (Ramogibe) relationship with an estranged Tshidi (Buthelezi) that they deemed it necessary to have reported it and mentioned it in their affidavits shortly after Oupa's death, runs like a golden thread through the murky waters of their evidence. Evidence that he passed threats to kill Oupa, whether made repeatedly or not, against the background of the strong current of Mdluli's emotions at the time, is in my opinion *overwhelmingly probable*" (emphasis supplied).

He then found that it had been proved on a balance of probabilities that Mdluli was "highly upset and humiliated" by Ramogibe's relationship with his former lover, had not come to terms with the fact that Buthelezi had ended their relationship, had made threats to kill Ramogibe and that his family would mourn him and had wanted Ramogibe out of Buthelezi's life in the hope that he could rescue his relationship with her. He, however, went on to point out that it might be difficult to link the threats, intimidation and alleged kidnapping to the ultimate fatal shooting of Ramogibe. The inability to call Buthelezi, now deceased, was in his opinion a complicating factor. These weaknesses (and others) in the evidence led the magistrate to conclude that an inference of Mdluli's involvement was permissible but not conclusive. His ultimate conclusion that there was no evidence on a balance of probabilities "implicating" Mdluli is wrong and inconsistent with his otherwise correct assessment and evaluation of the evidence.

87. Neither the Acting NDPP nor Chauke dealt meaningfully in their answering affidavits with the incriminating evidence against Mdluli, FUL's submissions regarding the evidence, or the finding of the magistrate that an inference of Mdluli's involvement was consistent with the facts.

88. The Acting NDPP, after setting out the legal and policy framework, confined herself to the following averments in paragraphs 19-24 of her answering affidavit:

> "19. When Advocate Chauke decided to withdraw the criminal charges of murder and related charges against the Fifth Respondent (Mdluli), he was authorised to do so by the Act, the Policy and the Policy Directives.
>
> 20. I am aware that Advocate Chauke referred the matter to an inquest by a magistrate and that the magistrate found that there was no evidence on a balance of probabilities implicating the Fifth Respondent and his co-accused in the death of Mr Ramogibe.
>
> 21. The decisions of the Third Respondent and Advocate Chauke on this matter have not been brought to my office for consideration in terms of the 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 section 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(2)(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 party whom I consider to be relevant.
>
> 23. At this stage there was no policy contravention and/or representations received by me to warrant my intervention as set out above.
>
> 24. This therefore makes the application to review the withdrawal of charges by this honourable court premature."

The Acting NDPP fails to mention the representations made to her by Breytenbach, or that Mdluli's written representations of 26 October 2011 were in fact addressed to her. Nor does she refer to the magistrate's finding that an inference of Mdluli's involvement was consistent with the proven facts.

89. Chauke in his answering affidavit similarly ignored some of the inquest findings, saying simply that the magistrate had found there was no evidence implicating Mdluli. Clearly there is evidence implicating Mdluli. The magistrate's conclusion is anyhow not decisive. Guilt or innocence is a matter for the trial court tasked with the responsibility of determining culpability. Section 16(2) of the Inquests Act only requires a magistrate conducting an inquest to determine whether the death was brought about by any act or omission that amounts *prima facie* to an offence on the part of any person and, insofar as this is possible, a finding as to whom the responsible offenders might be.[13] The DPP is besides not bound by the findings of the inquest.

90. Chauke added that resources should not be wasted pursuing inappropriate cases where there is no prospect of success. On that basis he concluded that it would be "presumptuous and foolhardy" to proceed with the prosecution. He, in other words, is of the opinion that the charges provisionally withdrawn should now be finally withdrawn. He also contended that an inappropriate or "wrong" decision to prosecute would undermine the community's confidence in the prosecution system. FUL's predictable rejoinder is that his withdrawal of the charges has already done so.

[13] *Marais NO v Tiley* 1990 (2) SA 899 (A) at 901E-H.

91. It is difficult to fathom why the DPP of South Gauteng has not proceeded with the 17 charges of attempted murder, assault, kidnapping etc. after the inquest. His reason for provisionally withdrawing them in his reasons for decision was that he wanted to avoid fragmented trials. The inquest resolved that problem. If he did not want to pursue the murder charge on the basis of the inquest finding, he had a duty to continue with the balance of the charges and has given no reason for not proceeding. The evidence given in relation to them during the inquest, on the limited information available, looks reasonably cogent and compelling.

92. In terms of the prosecution policy and directives issued in terms of the NPA Act, there is a duty to pursue a prosecution where there is a reasonable prospect of success, and regard should always be had to the nature and seriousness of the offence and the interests of the broader community. Despite the obvious anomalies in the inquest findings, the evidence as a whole, read particularly with the witness statements, establishes *a prima facie* case and points to more than a reasonable prospect that a prosecution on the murder and related charges may meet with success on at least some of the counts.

93. Two weeks after the criminal charges against Mdluli were withdrawn, on 29 February 2012, the Acting Commissioner withdrew the disciplinary charges against him and disciplinary proceedings were terminated. Mdluli was therefore re-instated and resumed office from 31 March 2012. During April 2012, his role was extended to include responsibility for the unit which provides VIP protection to members of the National Executive, including President Zuma.

94. However, shortly afterwards, as a result of the serious allegations of conspiracy that he had levelled against other senior members of the SAPS, the Minister announced, on 9 May 2012, that Mdluli would be re-deployed from his post as Head of Crime Intelligence whilst those allegations were investigated by a ministerial task team. It will be re-called also that on 19 March 2012 the IGI recommended that Mdluli be prosecuted on the fraud and corruption charges.

95. The applicant launched these proceedings on 15 May 2013. On the same day the Acting Commissioner re-initiated disciplinary proceedings and brought charges against Mdluli, the nature and extent of which remain unknown. Mdluli was suspended for a second time on 25 May 2012 pending the outcome of that new process. As mentioned earlier, this court on 6 June 2012 granted the relief sought in Part A of the notice of motion and interdicted Mdluli from discharging any function or duty as a member and senior officer of the SAPS pending the outcome of this review; and further interdicted the Commissioner and the Minister from assigning any function or duty to him.

96. In a press statement issued by SAPS on 5 July 2012 it was announced that the ministerial task team, headed by Chief State Law Adviser, Mr Enver Daniels, had found that there was no evidence of a conspiracy against Mdluli and that the officials and his colleagues who had accused him of criminal conduct had acted professionally, in good faith and with a proper sensitivity to the issues at hand.

97. No steps have been taken to re-instate the murder or related charges against Mdluli since that date – even though, to repeat, the evidence put up in the inquest proceedings discloses at least *prima facie* cases of murder, kidnapping, attempted

murder, assault to do grievous bodily harm and defeating the ends of justice against Mdluli. Chauke has given no indication of whether the murder investigation is being continued or not.

The structure of the prosecuting authority and the power to withdraw charges against an accused person

98. Before considering the grounds of review, it will be useful to examine the legislative provisions governing the structure and functioning of the prosecuting authority.

99. Section 179(1) of the Constitution establishes a single national prosecuting authority in the Republic, which is required to be structured in terms of an Act of Parliament. The relevant statute is the National Prosecuting Authority Act [14] ("the NPA Act"), which was enacted shortly after the Constitution was adopted. The NPA Act must be read together with Chapter 1 of the Criminal Procedure Act[15] ("the CP Act") titled "Prosecuting Authority", which has been amended to reflect the post-constitutional arrangements established by the NPA Act.

100. In terms of section 179(1) of the Constitution the prosecuting authority consists of the NDPP, who is the head of the prosecuting authority, and is appointed by the President; and DPPs and prosecutors as determined by the NPA Act.[16] The single prosecuting authority consists of the Office of the NDPP and the Offices of the prosecuting authority at the High Courts.[17] The Office of the NDPP consists of the NDPP, Deputy NDPPs, Investigating Directors and Special Directors and other members of the prosecuting authority appointed at or assigned to the Office.[18]

101. The powers of a Special Director are relevant to this case. A Special Director is defined in section 1 of the NPA Act to mean a DPP appointed under section 13(1)(c), which provides that the President, after consultation with the Minister and the NDPP, may appoint one or more DPP as a Special Director 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.

102. Section 6 of the NPA Act establishes an Office for the prosecuting authority at the seat of each High Court in the Republic. Each Office established by this section consists of the head of the Office, who is required to be a DPP or a Deputy DPP, and other Deputy DPPs and prosecutors appointed in terms of section 16(1) of the NPA Act. Prosecutors are appointed on the recommendation of the NDPP or a member of the prosecuting authority designated for that purpose by the NDPP. They can be appointed to the Office of the NDPP, the Offices at the seat of a High Court, to the lower Courts or to an Investigating Directorate established by the President in terms of section 7.

[14] Act 32 of 1998
[15] Act 51 of 1977
[16] Section 4 of the NPA Act
[17] Section 3 of the NPA Act
[18] Section 5 of the NPA Act

103. Section 179(2) of the Constitution provides that 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. Section 179(4) importantly provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

104. The power to institute and conduct criminal proceedings as contemplated in section 179(2) of the Constitution is given legislative expression in section 20(1) of the NPA Act, which reads:

> "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."

105. All DPPs and Deputy DPPs in Offices at the seat of a High Court, as well as DPPs who are Special Directors in the Offices of the NDPP, are entitled to exercise the powers in section 20(1) in respect of the area of jurisdiction for which he or she has been appointed.[19] There is an important qualification though in respect of Special Directors which has obvious relevance to this case. Section 24(3) of the NPA Act provides:

> "A Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director: Provided that if such powers, duties and functions include any of the powers referred to in section 20(1), they shall be exercised, carried out and performed in consultation with the Director of the area jurisdiction concerned."

The intended effect of the proviso to section 24(3) is that whenever a Special Director based in the office of the NDPP wishes to institute, conduct or discontinue criminal proceedings he or she is obliged to act "in consultation with" the DPP of the High Court in the area of jurisdiction concerned.

106. Prosecutors are competent to exercise the power in section 20(1) to the extent that they have been authorised by the NDPP or a person designated by the NDPP. The powers of DPPs, Deputy DPPs and Special Directors to carry out the duties and functions contemplated in section 20(1), are to be exercised subject to the control and directions of the NDPP.[20]

107. Section 22 of the NPA Act defines the scope of the powers, duties and functions of the NDPP. Section 22(1) provides that the NDPP as head of the prosecuting authority shall have the authority over the exercising of all the powers,

[19] Section 20(3) and (4) of the NPA Act
[20] Section 20(3) and (4). of the NPA Act

and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority. Section 22(2) gives verbatim effect to section 179(5) of the Constitution. Section 179(5) reads:

> "The National Director of Public Prosecutions -
>
> (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
>
> (b) must issue policy directives which must be observed in the prosecution process;
>
> (c) may intervene in the prosecution process when policy directives are not complied with; and
>
> (d) may review a decision to prosecute or not to prosecute, after consulting the relevant 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."

108. The power of the NDPP to issue policy directives contemplated in section 179(5)(a) and (b) must be exercised with the concurrence of the Minister and after consulting the DPPs.[21]

109. Section 22(4) bestows additional powers, duties and functions on the NDPP. They include a duty to maintain close liaison with DPPs *inter alia* to foster common policies and practices and to promote co-operation in relation to the handling of complaints in respect of the prosecuting authority;[22] as well as a duty to assist DPPs and prosecutors in achieving the effective and fair administration of criminal justice.[23]

110. The powers, duties and functions of DPPs are set out in section 24 of the NPA Act. They include the power to institute and conduct criminal proceedings. Although section 24(1) makes no express reference to the power to discontinue proceedings, such power vests in a DPP by virtue of section 20(3) which confers on DPPs the authority to exercise the powers in section 20(1), including the power to discontinue proceedings in terms of section 20(1)(c). Section 24(1)(d) is a general provision which empowers DPPs to "exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of this Act". As I will discuss presently, section 6 of the CP Act confers the power to withdraw charges or to stop a prosecution upon DPPs and prosecutors. There can accordingly be no doubt that DPPs have the power to discontinue criminal proceedings. However, as I have explained, the power of a Special Director, who is by definition a DPP, is qualified by the proviso to section 24(3). Similarly, only a DPP who is not a

[21] Section 21 of the NPA Act
[22] Section 22(4)(b) of the NPA Act
[23] Section 22(4)(d) of the NPA Act

Special Director[24] may give written directions to a prosecutor within his or her area of jurisdiction who institutes or carries on prosecutions[25].

111. Section 6 of the CP Act provides:

> **"Power to withdraw charge or stop prosecution.**- An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may -
> (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
> (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto."

The withdrawal of charges and the stopping of a prosecution after plea have different consequences. If the charge is withdrawn before plea, an accused is not entitled to an acquittal and the charges can be re-instated at some future date. The stopping of a prosecution, as envisaged in section 6(b), involves a conscious act to terminate the proceedings after a plea has been entered, in which event an accused will be entitled to an acquittal and to raise the plea of *autrefois acquit* (double jeopardy) if the prosecuting authority should attempt to re-institute criminal proceedings on the same or substantially similar charges. A stopping of a prosecution may occur only at the instance of a DPP[26] or with his consent. A prosecutor, however, may withdraw charges. At issue in this case is whether a Special Director may withdraw charges or instruct a prosecutor to withdraw charges without the consent of a DPP, a matter to which I will return when discussing the grounds of review.

112. The NDPP, acting in terms of section 21 of the NPA Act, has issued a Policy Manual containing a Prosecution Policy and Policy Directives. They set out relevant policy considerations which normally should inform any decision to review a prosecution or to discontinue proceedings by withdrawing charges or stopping a prosecution. The NDPP has stated in her answering affidavit that the review of a case is a continuing process taking account of changing circumstances and fresh facts which may come to light after an initial decision to prosecute has been made. This may occur, and I imagine often does occur, after the prosecuting authority has heard and considered the version of the accused and representations made on his or her behalf.

113. Paragraph 4(c) of the Prosecution Policy provides that once a prosecutor is satisfied that there is sufficient evidence to provide reasonable prospects of a conviction a prosecution should normally follow, unless "public interest demands otherwise". It continues:

[24] i.e. one appointed in terms of section 13(1)(a)
[25] Section 24(4)(c)(ii)(bb) of the NPA Act
[26] A DPP is the equivalent of an Attorney-General under the old legislation.

> "There is no rule of law which states that all provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice."

The policy further provides that when considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender.

114. Part 5 of the Policy Directives deals with the withdrawal and stopping of cases. The guidelines draw a clear distinction between withdrawing charges and the stopping of a prosecution. Paragraphs (8) and (9) of Part 5 note that the stopping of a prosecution in terms of section 6(b) of the CPAct effectively means that the prosecuting authority is abandoning the case and accordingly, as a rule, criminal proceedings should only be stopped when it becomes clear during the course of the trial that it would be impossible to obtain a conviction or where the continuation thereof has become undesirable due to exceptional circumstances.

115. Likewise, in relation to the withdrawal of charges, paragraph (1) of Part 5 states that once enrolled, cases may only be withdrawn on compelling grounds "e.g. if it appears after thorough police investigation that there is no longer any reasonable prospect of a successful prosecution". Paragraph (5) provides that no prosecutor may withdraw any charges without the prior authorisation of the NDPP or the DPP where the prosecution has been ordered by either the NDPP or DPP; while paragraph (6)(a) stipulates that the advice of the NDPP or DPP should be sought where the case is of a sensitive or contentious nature or has a high profile.

116. Part 6 of the Policy Directives governs the question of representations. It generally provides that representations should be given earnest attention. Paragraphs (5) and (6) have assumed importance in this case. They read:

> . Where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter, representations should be directed to the Senior or Control Prosecutor, and thereafter to the DPP, before the final appeal is made to the NDPP. Potential representors should, where possible, be advised accordingly.
>
> As a matter of law and policy, the NDPP requires that the remedy of recourse to the DPP be exhausted before representors approach the NDPP."

The reviewability of prosecutorial decisions

117. The NDPP in paragraph 47.7 of her written submissions argued that section 179(5)(d) of the Constitution, allowing her to review decisions to prosecute or not to prosecute, excludes the power of the courts to review non-prosecution. Mr Hodes SC, on behalf of the NDPP, initially persisted in argument with the contention that the Constitution vests exclusive power in the NDPP to review prosecutorial decisions. The courts, he submitted, have no power to review any prosecutorial decision, only the NDPP may do so and her decision will be final and not reviewable. That can never be; if only because the SCA has already pronounced that prosecutorial decisions are subject to rule of law review. It is inconceivable in our constitutional

order that the NPA would be immune from judicial supervision to the extent that it may act illegally and irrationally without complainants having access to the courts. Considering the implications, one can only marvel at the fact that senior lawyers are prepared to make such a submission. The mere existence of a permissive extra-judicial measure allowing the NDPP to review decisions to prosecute or not to prosecute taken by subordinates on policy, evidentiary and public interest grounds, does not deny an aggrieved party access to court. Section 179(5)(d) of the Constitution does not aim to oust the constitutional and statutory jurisdiction of the courts to review on grounds of legality, rationality and administrative reasonableness.

118. During the course of argument counsel's line of reasoning evolved and transformed, as it had to, into two principal assertions: first, granted that judicial review of prosecutorial decisions is constitutionally ordained, it is restricted to extremely limited grounds; and second, resort to the courts is excluded until the process envisaged in section 179(5)(d) of the Constitution has been exhausted. I deal in this part only with the nature and extent of the power to review prosecutorial decisions. I will consider counsel's contention that the section 179(5)(d) process must be exhausted before resort to the courts is permitted at a later stage in this judgment.

119. At times it would be naïve of the courts to pretend to be oblivious to the political context and consequences of disputes before them.[27] In politically contentious matters, the courts should expect to be called upon to explicate the source, nature and extent of their powers. There has been much public commentary in the media in relation to this case which has sought to represent the issue of contestation to be about the extent of judicial power in relation to the executive. There is an important and legitimate element of truth in that. A danger exists though in the arising of a false perception that the courts when exercising judicial review of prosecutorial decisions may trespass illegitimately into the executive domain.

120. It accordingly seems to me imperative, in light of counsel's submissions, to deal comprehensively with the power of the courts in relation to executive decisions of this kind. I do so in the hope of dispelling the myth that the courts are untowardly assuming powers of review, and to illustrate that the powers of the courts to review prosecutorial decisions are clearly defined and are consistently exercised within the parameters set by the Constitution and Parliament.

121. The discretion of the prosecuting authority to prosecute, not to prosecute or to discontinue criminal proceedings is a wide one. Nonetheless, as is reflected in the Prosecution Policy Directives, the prosecuting authority has a duty to prosecute, or to continue a prosecution, if there is a *prima facie* case and if there is no compelling reason for non-prosecution.

122. Courts all over the world are reluctant to interfere with a prosecuting authority's *bona fide* exercise of the discretion to prosecute. In *R (On the Application of Corner House Research and Others) v Director of the Serious Fraud Office*[28] the House of Lords (per Lord Bingham) expressed the need for deference and caution, stating that

[27] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 8.
[28] [2008] UKHL 60 at paras 30-32

courts should disturb the decisions of an independent prosecutor only in "highly exceptional cases". Courts recognise that at times it will be within neither their constitutional function nor practical competence to assess the merits of decisions where the polycentric character of official decision-making, including policy and public interest considerations, mean they are not susceptible or easily amenable to judicial review.[29] The constitutional requirement that the prosecuting authority be independent, and should exercise its functions without fear, favour or prejudice, justifies judicial restraint.

123. However, judicial restraint can never mean total abdication. The discretions conferred on the prosecuting authority are not unfettered. In the United Kingdom, for instance, prosecutors must exercise their powers in good faith and so as to promote the statutory purpose for which they are given, direct themselves correctly in law, act lawfully, exercise an objective judgment on the relevant material available to them, and be uninfluenced by any ulterior motive, predilection or prejudice.[30] Hence, although following a deferential approach, in the UK review of all prosecutorial decisions is permissible on legality and rationality grounds.

124. Our law is not significantly different. Courts will interfere with decisions to prosecute where the discretion is improperly exercised (illegal and irrational),[31] *mala fides*,[32] or deployed for ulterior purposes.[33] They will do so on the ground that such conduct is in breach of the principle of legality. The constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith.[34] The standard applies irrespective of whether or not the exercise of power constitutes administrative action in terms of the Promotion of Administrative Action Act[35] ("PAJA"), our legislative code of administrative law which gives effect to the constitutional right to administrative action which is lawful, reasonable and procedurally fair,[36] and which to a considerable extent shapes the separation of powers between the judiciary and the executive. PAJA provides a broader range of review grounds than the principle of legality. Section 1(ff) of PAJA, however, excludes decisions *to institute or continue a prosecution* from the definition of administrative action.

125. The law in relation to decisions *not to prosecute or to discontinue a prosecution* is in some respects different. The CC has recognized in an *obiter dictum* that different policy considerations may apply to a decision to prosecute and a decision not to prosecute.[37] The SCA has also referred to the policy considerations underpinning the exclusion of decisions to prosecute from administrative review.[38] In

[29] *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 735-736.
[30] *R (On the Application of Corner House Research and Others) v Director of the Serious Fraud Office [*2008] UKHL 60 at para 32
[31] *Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order* 1994 (1) SA 387 (C)
[32] *Mitchell v Attorney-General Natal* 1992 (2) SACR 68 (N).
[33] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 38.
[34] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paras 48-49; *Masetlha v the President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at paras 78-81.
[35] Act 3 of 2000
[36] In section 33 of the Constitution.
[37] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) at para 84
[38] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 35 .

National Director of Public Prosecutions v Zuma[39]Harms DP acknowledged in an *obiter dictum* the possibility of a judicial review of a decision not to prosecute and held that such review had not been excluded by PAJA. In *Democratic Alliance and Others v Acting National of Public Prosecutions and Others*[40] Navsa JA, without referring to the view of Harms DP in *Zuma*, seemed to intimate, also in an *obiter dictum,* that a decision to discontinue a prosecution might not be reviewable under PAJA, but held that a decision to discontinue a prosecution was in any event subject to a rule of law review. The learned judge of appeal said:

> "While there appears to be some justification for the contention that a 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(ff) of PAJA, it is not necessary for us to finally decide that question. Before us it was conceded…that a decision to discontinue a prosecution was subject to a rule of law review. That concession in my view was rightly made …[I]n *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) this court noted that the office of the NDPP was integral to the rule of law and to our success as a democracy. In that case this court stated emphatically that the exercise of public power…must comply with the Constitution."

126. So whether or not PAJA applies, decisions not to prosecute or to discontinue a prosecution are subject to legality and rationality review. Legality review, if I may state the obvious, is concerned with the lawfulness of exercises of public power. Decisions must be authorised by law and any statutory requirements or preconditions that attach to the exercise of the power must be complied with. Rationality review is concerned with the relationship between means and ends and asks whether the means employed are rationally related to the purpose for which the power was conferred. The process followed in reaching a decision must also be rational.[41] As pointed out by the CC in *Democratic Alliance v President of the Republic of South Africa and Other*[42] a rationality standard prescribes a low threshold of scrutiny, and hence validity, for executive or administrative action. It is the minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.

127. Rationality review also comprises a procedural element. A refusal to include relevant and interested stakeholders in a process, or a decision to receive representations only from some to the exclusion of others, may render a decision irrational. In *Albutt v Centre for the Study of Violence and Reconciliation and Others*[43] the CC held that the exclusion of victims from participation in a special pardon dispensation was irrational because it disregarded the objective of nation building and reconciliation in the legislative scheme.

128. Decisions coloured by material errors of law, based on irrelevant considerations or ignoring relevant considerations could arguably be considered to be illegal or irrational. Traditionally these grounds are acknowledged as distinct review grounds, like the ground of unreasonableness, which permits review of decisions that no reasonable person could have so decided. These grounds are available in our law

[39] 2009 (2) SA 277 (SCA) para 36 fn 33.
[40] 2012 (3) SA 486 (SCA) at para 27
[41] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).
[42] 2013 (1) SA 248 (CC) at para 42
[43] 2010 (3) SA 293 (CC) at paras 65-68.

under PAJA in respect of decisions that fall within the definition of "administrative action". As some of the challenges made by the applicant to the decisions of the respondents in this case are predicated upon such grounds, it is necessary to consider if they are available. This requires me to make a finding whether or not a decision to discontinue a prosecution (or to withdraw charges) is administrative action within the meaning of that term as defined in section 1 of PAJA.

129. Section 1(ff) of PAJA, as mentioned, explicitly excludes decisions to institute or continue a prosecution from the definition of administrative action, and hence such are patently not reviewable under PAJA. The legal position with regard to decisions not to prosecute or to discontinue a prosecution is less clear. The CC has not pronounced finally on whether the decision not to prosecute constitutes administrative action; and the SCA, as mentioned, has expressed two different *prima facie* opinions on the matter.

130. In general, a decision will constitute administrative action if it is made under an empowering provision and taken by an organ of state exercising a power in terms of the Constitution, or exercising a public power or performing a public function in terms of legislation, which adversely affects the rights of any person and which has a direct, external legal effect.[44] The SCA and the CC have interpreted the definition to include a decision which has the capacity to affect legal rights and where it impacts directly and immediately on individuals.[45]

131. The NDPP and the DPPs, making up the prosecuting authority in terms of the Constitution and the NPA Act, are unquestionably organs of state. In addition, the power of non-prosecution is a corollary to the power to institute and carry out criminal prosecutions.[46] The power derives from s 179(2) of the Constitution which provides that 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. It follows that a decision by the prosecuting authority to withdraw charges or to stop a prosecution constitutes the exercise of a power in terms of the Constitution. It involves exercising a public power in terms of legislation, namely the NPA Act; and has a direct, external legal effect. It results in a prosecution being stopped or avoided. And, lastly, it adversely affects the rights of the public, and at least the complainants, who are entitled to be protected against crime through, amongst other measures, the effective prosecution thereof. A decision to withdraw criminal charges or to discontinue a prosecution accordingly meets each of the definitional requirements of administrative action.

132. A purely textual interpretation of the definition of administrative action thus confirms that prosecutorial decisions in general do indeed constitute administrative action and are subject to review under PAJA. This is affirmed further by the fact that section 1(ff) excludes from the definition of administrative action specific instances of prosecutorial discretion, namely the institution and continuance of a prosecution, thus implying *ex contrariis* that other prosecutorial decisions, most especially the

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[44] Section 1 of PAJA.
[45] *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 23; and *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) at para 30
[46] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 64.

decision not to institute or to discontinue a prosecution, are not so excluded.[47] That choice by the legislature appears to have been deliberate, and is based on sound policy considerations. Professor Cora Hoexter in her seminal work, *Administrative Law in South Africa*, comments on the exclusionary clause as follows[48]:

> "The intention behind this provision, as reflected by the draft Administrative Justice Bill appended to the South African Law Commission's 1999 report, was to confine reviews under PAJA to decisions *not* to prosecute. There is less need to review decisions to prosecute or to continue a prosecution as types of administrative action, since such decisions will ordinarily result in a trial in a court of law."

I would accordingly respectfully disagree with the *obiter dictum* of Navsa JA, in *Democratic Alliance and Others v Acting National of Public Prosecutions and Others,*[49] that a decision to discontinue a prosecution is of the same *genus* as a decision to prosecute. For the reasons stated by Professor Hoexter, a decision of non-prosecution is of a different *genus* to one to institute a prosecution. It is final in effect in a way that a decision to prosecute is not.

133. In addition to the language of the definition of administrative action incorporating prosecutorial decisions within its ambit, as well as the implication of the text of the exclusionary clause, (that but for its terms a decision to prosecute would have fallen within the definition and would have constituted administrative action), the original historical intent, as evidenced in the context and the *travaux preparatoire* mentioned by Professor Hoexter, fortifies the proposition that the intention of the legislature was to limit the extent of the exclusion and bestow a more extensive power of review over decisions not to prosecute or to discontinue a prosecution. Added to that, as already intimated, there are legitimate structural and prudential arguments justifying the distinction. There is no need to review decisions to prosecute because the lawfulness and rationality of the decision can be challenged in the subsequent criminal trial; but there is perhaps a need for wider review of a decision not to prosecute because without it there will be inadequate supervision.

134. Consequently, the preponderance of all the modalities of interpretation, the text, historical intent, the ethos of our culture of justification, prudential and structural considerations, and doctrine, points inexorably to the conclusion that it was the intention of Parliament, pursuant to its obligation in section 33(3) of the Constitution to enact PAJA, that decisions not to prosecute or to discontinue prosecutions would be subject to judicial review in terms of PAJA.

135. Such a finding, I trust, will not be viewed as a case of the courts assuming the power of review on the basis of casuistic practice or doctrine, or worse still, a judicial whim, as the media and social commentators appear sometimes mistakenly to believe. It is not the judiciary which has mandated judicial review of decisions not to prosecute or to discontinue prosecution. It is Parliament that has done so. In fulfilment of its obligation to define the parameters of the doctrine of the separation of powers, Parliament enacted PAJA.

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[47] *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 712

[48] 2ed (Juta & Co, Cape Town, 2012) at 241-242, citing the South African Law Commission (Project 115) "*Report on Administrative Justice*" (August 1999)

[49] 2012 (3) SA 486 (SCA) at para 27

136. I make the point, and most likely labour it, because the bald submission was made in argument, repeatedly, and at times vociferously, that a court exercising a power to review a decision of the prosecuting authority to discontinue prosecution *ipso facto* will trespass on the executive domain. The constitutional ethos and the governing legislative provisions, textually and contextually, demonstrate that proposition to be false. Arguments of this order are predicated on an incorrect understanding of the principle of the separation of powers. They misstate the proper legal position and carry the danger of demeaning the courts in the eyes of the public by misrepresenting the nature and legitimacy of the judicial function.

137. In conclusion, therefore, the law enacted by Parliament, in compliance with the obligation entrusted to it by the founders of our Constitution, imposes a duty on judges to review certain prosecutorial decisions. Far from trespassing into the executive domain, any judge in the South African constitutional order who declines deferentially to review a decision not to prosecute, in the mistaken belief that he or she is mandated by the doctrine of the separation of powers to do so, will ironically be acting in violation of the doctrine of the separation of powers. PAJA has separated the powers. And the power to review a decision not to prosecute has been constitutionally and legislatively separated to the judiciary.

138. A similarly misplaced argument calling for deference was advanced in the CC in *Democratic Alliance v President of the Republic of South Africa and Others*[50] in an attempt to persuade the court to adopt restraint in a rationality review of a decision of the President on the ground that review would violate the separation of powers. The argument was rejected as follows:

> "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 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"

139. By the same token, the submission, made on behalf of the NDPP in this case, that the court should not exercise a review power over prosecutorial decisions or, if it does so, should decline from ordering a prosecution because that would offend against the principle of the separation of powers, is, as I have said, equally unsustainable. Either the decision is administrative action or it is not. If it is, it may be reviewed on the grounds enunciated in section 6 of PAJA and one of the remedies provided for in section 8 of PAJA must be appointed. Our law, unlike that of other countries, rests upon a fundamental right to administrative justice and a legislative code unambiguously bestowing a power to review decisions not to prosecute or to discontinue a prosecution on the courts.

[50] 2013 (1) SA 248 (CC)

140. There is in any event no logical reason to confine review of non-prosecution to grounds of illegality and irrationality, while excluding grounds such as reliance on irrelevant considerations, ignoring relevant considerations or even unreasonableness. These standards are judicially determinable and just as capable of application as the standards of legality and rationality. It seems to me, therefore, inherently wrong to allow laxity to prosecutors, by permitting them to act unreasonably or unfairly, when there is no compelling policy or moral reason for doing so, especially in an era where throughout the world corruption and malfeasance are on the rise. Our Parliament in permitting review of non-prosecution on these grounds is patently of similar persuasion.

The withdrawal of the fraud and corruption charges

141. The first impugned decision is the one of 5 December 2011 taken by Mrwebi to withdraw the fraud and corruption charges preferred against Mdluli on 20 December 2011. The charges essentially allege that Mdluli abused the State's financial resources for private gain for his and his wife's benefit. The SSA, as I have mentioned, is controlled by the crime intelligence unit over which Mdluli exercises control.

142. FUL contends that that decision by Mrwebi to withdraw the fraud and corruption charges is liable to review on five alternative grounds. First, in terms of the Constitution, only the NDPP is entitled to discontinue a prosecution. The decision was therefore *ultra vires*. Second, the decision was unlawful because it was taken by Mrwebi alone, when he could only take such decision in consultation with the DPP of North Gauteng. Third, the decision was irrational because it was taken without properly consulting the prosecutors and investigators directly involved in the case. Fourth, the decision was arbitrary because it was taken in the face of overwhelming evidence in support of prosecution. Fifth, the decision was based on Mrwebi's incorrect belief that the fraud and corruption charges could only be investigated by the IGI and was thus based on a material error of law.

143. The first ground rests on an interpretation of section 179(5)(d) of the Constitution, which empowers the NDPP to review a decision to prosecute or not to prosecute, after consulting with the relevant DPP, the accused, the complainant and any other relevant person. In *National Director of Public Prosecutions v Zuma* [51] the SCA held that the power of review conferred on the NDPP by section 179(5)(d) of the Constitution "can only be an 'apex' function, in other words, a function of the head of the NPA qua head", which according to FUL suggests that no other functionary within the NPA may exercise the power of review.

144. Section 179(3)(b) of the Constitution provides that national legislation must ensure that DPPs are responsible for prosecutions in specific jurisdictions, but specifically adds that the provision is subject to subsection (5). The cross reference to subsection (5) implies that the DPPs are answerable to the NDPP who in terms of the various paragraphs of the subsection has the power to determine prosecution policy and the right to intervene in the prosecution process to ensure compliance with policy directives, as well as the right of review conferred in paragraph (d). The

[51] 2009 (2) SA 277 (SCA) at para 55 *et seq*.

rationale for such arrangement, according to FUL, would appear to be that once commenced a prosecution should continue to conclusion unless there are weighty considerations justifying cessation. In order to avoid inappropriate influence in that regard, the Constitution consciously assigned the function of review to a more impartial official at the apex, removed from the jurisdiction in which the prosecution was commenced. FUL accordingly submits that only the NDPP is entitled to re-visit a decision to prosecute made by a member of the NPA and to withdraw the charges; and then only after proper consultation as contemplated by section 179(5)(d). If correct, it would follow that Mrwebi had no power to withdraw the fraud and corruption charges at all. It was incumbent on him to refer the matter to the NDPP. He did not do that. His decision would accordingly be *ultra vires*, and could be set aside on that basis alone.

145. I am not persuaded that this submission is correct. I doubt its merit from a pragmatic and policy perspective. It would be onerous indeed if every decision to discontinue a prosecution taken by prosecutors throughout the country had to pass across the desk of the NDPP. The argument also takes insufficient account of the context and legislative scheme enacted by the NPA Act, section 6 of the CP Act and the Prosecution Policy which, as the Acting NDPP has pointed out in her answering affidavit, allow DPPs to discontinue a prosecution and more junior prosecutors to withdraw charges and stop prosecutions.

146. As head of the SCCU, Mrwebi was a Special DPP, appointed in terms of section 13(1)(c) of the NPA Act. A Special Director is entitled to exercise the powers and perform the functions assigned to him pursuant to his appointment. In terms of section 24 of the NPA Act, a DPP may institute and conduct criminal proceedings and carry out functions incidental thereto as contemplated in section 20(3). They include the powers in section 20(1) to institute and conduct criminal proceedings on behalf of the State; carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and to discontinue criminal proceedings. Both a DPP and a Special DPP may therefore discontinue a prosecution.[52]

147. Moreover, a DPP, or a more junior prosecutor, is empowered by section 6 of the CP Act to withdraw charges or stop a prosecution in circumscribed circumstances with the only limitation being that the prosecution shall not be stopped in terms of section 6(b) unless the DPP or any person authorized thereto by the DPP, whether in general or in any particular case, has consented thereto. Likewise, a prosecutor may withdraw a charge in terms of section 6(a), but where the NDPP or the DPP has ordered the prosecution he or she will need prior authorisation. Where the case is of a sensitive or contentious nature or has high profile, then in terms of the Policy Directives the prosecutor is only required to seek the advice (not even the permission) of the NDPP or DPP.

148. It is therefore evident from section 20(1)(c) of the NPA Act, section 6 of the CP Act and various provisions of the Policy Directives that legislation and prevailing practice permit prosecutors in many cases to withdraw charges without referring the question to the NDPP for permission or review. The Acting NDPP is accordingly correct in her submission that in terms of the NPA Act and the Policy Directives

[52] Provided when a Special DPP does so, he or she acts in consultation with the relevant DPP proviso to section 24(3) of NPA Act.

Mrwebi did not need to refer the decision to withdraw the fraud and corruption charges to the NDPP.

149. In my opinion, section 179(5)(d) of the Constitution does not reserve an exclusive power to the NDPP to discontinue a prosecution. It merely empowers the NDPP to review a decision of her subordinates to prosecute or not to prosecute, and specifies the procedure he or she should follow. The use of the verb "may" in section 179(5)(d) is indicative of a permissive discretion rather than a mandatory pre-condition. The NDPP may review decisions to prosecute or not to prosecute, at his or her own instance or on application from affected and interested persons. The intention of the drafters of the constitutional provision was not that all withdrawals of charges have to be approved by the NDPP.

150. Be that as it may, and whatever the case, there is no need to pronounce finally on this ground because the decision to withdraw the charges was in fact illegal for other non-constitutional reasons.

151. Mrwebi, as I have said, is a Special DPP appointed by President Zuma as such on 1 November 2011 under proclamation 63 of 2011 published in Government Gazette no. 34767 of 25 November 2011 and in terms of section 13(1)(c) of the NPA Act. The section allows the President after consulting the NDPP and the Minister to appoint "special" DPPs. These are not ordinary DPPs or prosecutors. They have special duties and functions. In terms of the subsection they are "to exercise certain powers, carry out certain duties and to perform certain functions conferred or imposed or assigned to him or her by the President by proclamation in the Gazette." In terms of the proviso to section 24(3) of the NPA Act a Special DPP may only exercise the powers referred to in s 20(1) of the NPA Act, including the power to discontinue criminal proceedings, in consultation with the Director of the area of jurisdiction concerned.[53] The rationale for this arrangement is that certain key decisions of a Special Director should be subject to the supervision of the most senior ordinary prosecutor in the area of jurisdiction. In this case, the relevant Director was the DPP of North Gauteng, Mzinyathi.

152. The requirement in section 24(3) of the NPA Act that the Special Director exercise any power to discontinue proceedings "in consultation with" the DPP meant that he could only do so with the concurrence or agreement of the DPP.[54] In *MacDonald v Minister of Minerals and Energy*[55] the principle was explained as follows:

> "Likewise, where the law requires a functionary to act 'in consultation with' another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act 'after consultation with' another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary."

153. The NPA Act in various provisions reflects that distinction, by requiring certain powers to be exercised "after consultation with" a specified functionary, while others

[53] The proviso to section 24(3) of the NPA Act.
[54] *President of the RSA v SARFU* 1999 (4) SA 147 (CC) at para 63.
[55] 2007 (5) SA 642 (C) at para 18.

can only be taken "in consultation with" the functionary.[56] Parliament in enacting legislation is presumed to have known of the rulings of the courts on the interpretation of terms enacted in the legislation, and thus to have consciously adopted and used them in the same sense.[57]. By using the term "in consultation with" in the proviso to section 24(3) of the NPA Act, Parliament consciously and deliberately introduced a requirement that a Special DPP may only discontinue a prosecution with the concurrence of the DPP in the area of jurisdiction.

154. The evidence, extensively analysed above, shows that Mrwebi did not consult with Mzinyathi before taking the decision to withdraw the charges, let alone obtain his concurrence. By the time he met Mzinyathi he had formed a fixed, pre-determined view and was not open to persuasion never mind willing to submit to disagreement. Both he and Mzinyathi confirmed under oath in the Breytenbach disciplinary proceedings that the decision to withdraw was a *fait accompli* by the time Mrwebi raised it with Mzinyathi. Under cross examination by counsel for Breytenbach, Mrwebi conceded that he had taken the decision to withdraw the charges before he wrote the consultative note. It is evident from both Mzinyathi's email of 8 December 2011 and his testimony that Mrwebi did not seek Mzinyathi's concurrence because he believed he was *functus officio*.

155. Mrwebi did not claim in his answering affidavit that Mzinyathi assented to the withdrawal of the charges at the 5 December 2011 meeting. He hardly could because Mzinyathi repeatedly confirmed that he did not support the withdrawal of the fraud and corruption charges against Mdluli. It is clear from the contemporaneous correspondence and his evidence in the disciplinary proceedings that Mzinyathi wished the case to continue. Mzinyathi's changed version of the position he took in the meeting of 9 December 2011, set out in his belatedly filed confirmatory affidavit, for the reasons stated, is not credible or reliable.

156. Hence, Mrwebi's claim in paragraphs 27-29 of his answering affidavit that Mzinyathi and Breytenbach agreed on 9 December 2011 that the case against Mdluli was defective and should only proceed with the assistance of IGI and the Auditor General is both irrelevant and improbable. It is irrelevant because Mrwebi by that time on his own admission had already taken the decision to withdraw the charges, without obtaining the consent of the DPP, North Gauteng. It is improbable for the same reasons, and also because it is in conflict with the contemporaneous and subsequent documents prepared by Breytenbach and Mzinyathi, with their conduct and with their testimony on the course of events. On the basis of that evidence it is clear that Mrwebi took the decision to withdraw the fraud and corruption charges without first securing the DPP's consent, which is a jurisdictional prerequisite under the NPA Act. His decision was unlawful for want of jurisdiction and must be set aside for that reason alone in accordance with the principle of legality.

157. There was some debate in argument about whether Mrwebi's decision and his consequent instruction to Breytenbach and Smith to withdraw the charges constituted a discontinuance of criminal proceedings as contemplated in section 20(1)(c) of the NPA Act. If it did not, there was no requirement for Mrwebi to have obtained the concurrence of the DPP.

[56] See, for example sections 13(1)(c), 16(3), 22(6)(a) and 43A(9)(b) of the NPA Act.
[57] *De Villiers v Sports Pools (Pty) Ltd* 1975 (2) SA 253 (RA) at 261

158. The applicable legislation uses three expressions with regard to the powers involved in a cessation of enrolled criminal proceedings. Section 6 of the CP Act speaks of the power to withdraw a charge and the power to stop a prosecution. The NPA Act refers to the power to discontinue criminal proceedings. The question arising is whether the powers in section 6 of the CP Act are specific instances of the more general power to discontinue a prosecution. Logically and linguistically it would seem they are. The *Oxford English Dictionary* gives as the first meaning of the word "discontinuance":

> "the action of discontinuing or breaking off; interruption (temporary or permanent) of continuance; cessation"

"Cessation" in turn means:

> "ceasing, discontinuance, stoppage, either permanent or temporary".

This meaning was accepted as the definitive meaning of the word in *Cape Town Municipality v Frerich Holdings*.[58] In *Mazibuko v City of Johannesburg,* [59] however, it was held that the cessation was required to be of a more permanent nature to amount to discontinuance. The meaning of the term naturally will depend on its context.

159. The withdrawal of charges in terms of section 6 of the CP Act has as its immediate consequence the interruption or stoppage, permanent or temporary, of a prosecution. The stopping of a prosecution, because of the resultant availability of the plea of *autrefois acquit*, will always be permanent. The possibility of a permanent cessation in both instances justifies the conclusion that they are species of the same *genus*, namely discontinuance. Accordingly, a decision by a DPP to withdraw charges under section 6(a) of the CP Act constitutes an exercise of the discretion to discontinue criminal proceedings in section 20(1)(c) of the NP Act. To repeat: in terms of section 24(3) of the NPA, a Special DPP like Mrwebi may only exercise that discretion with the concurrence of the DPP. On the facts he did not have it.

160. It has always been a principle of our common law that where a statute confers power on a public functionary subject to certain preconditions or jurisdictional facts, a failure to comply with the preconditions will render the exercise of the power illegal. Such jurisdictional facts are a necessary pre-requisite to the exercise of the statutory power.[60] If the jurisdictional fact does not exist, the power may not be exercised and any purported exercise of the power will be illegal and invalid. It is trite that all exercises of public power are reviewable on the same grounds for non-compliance with the constitutional requirements of the rule of law.[61] The decision of Mrwebi and his instruction to withdraw the fraud and corruption charges consequently falls to be set aside irrespective of its categorisation as administrative action or not. If we accept that the decision did constitute administrative action as defined, it is reviewable in terms of section 6(2)(b) and section 6(2)(i) of PAJA which provide that a court has power to review administrative action if a mandatory and material

[58] 1981 (3) SA 1200 (AD)
[59] 2010 (4) SA 1 (CC) at para 120
[60] *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34G-H
[61] *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) at para 27.

procedure or condition prescribed by an empowering provision was not complied with, or if the action is otherwise unconstitutional or unlawful.

161. The decision and instruction are similarly vulnerable to review on other grounds. In deciding to withdraw the corruption and fraud charges against Mdluli, Mrwebi considered representations from Mdluli's lawyers, and from further unnamed operatives. He did not, however, call for or consider representations from the investigators in the case, the Hawks, the IGI or the Acting Commissioner of Police. Nor did he consult the prosecutors directly involved in the case on his decision to refer the matter to the IGI. He contends that he was not required to do so. FUL has argued he was obliged to consult with these stakeholders in terms of section 179(5)(d) of the Constitution, which compels the NDPP to consult with the accused, the complainant and any relevant party whenever she reviews a decision to prosecute. That duty, according to FUL, applies equally to subordinate functionaries performing the same role in terms of legislation. Section 20(3) of the NPA Act provides that the powers in section 20(1) of a DPP to discontinue a prosecution are subject to the Constitution.

162. The provisions of section 20(1)(c) of the NPA Act and section 6 of the CP Act are silent on the question of consultation. It may be that an argument could be advanced that these provisions read with the Policy Directives violate section 179(5)(d) of the Constitution, which infringement might be cured by reading the procedural requirements of section 179(5)(d) into these sections. That argument was not made before me. The less adventurous submission made by Mr Maleka SC on behalf of FUL, if I understand it correctly, is that section 20(1)(c) of the NPA Act must be read in conformity with the constitutional provision.

163. While it is correct that the Constitution requires legislation to be interpreted, where possible, in ways which give effect to its fundamental values and in conformity with it, reading words into a statutory provision should only follow upon a pronouncement of constitutional invalidity under s 172(1)(a) of the Constitution. A court, however, should still prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided it can be reasonably ascribed to the provision. Legislation, which is open to a meaning which would be unconstitutional but is reasonably capable of being read and applied in conformity with the scheme envisaged by the Constitution, should be so read, but the interpretation and application of it may not be unduly strained.[62]

164. I hesitate to pronounce definitively on whether the requirements of the Constitution should be read directly into the legislation solely on the basis that the powers in section 20(1) of the NPA Act are stated to be subject to the Constitution. There is no need to do so. The decision, as I have found, is illegal for not complying with the duty to consult the DPP and it is unnecessary to resort to the Constitution to introduce, as a concrete requirement, jurisdictional facts which the legislation has not expressly enacted. More compelling though, in my possibly pedantic view, and in the end of equal consequence, is FUL's argument that the failure properly to consult was fatal to the validity of Mrwebi's decision in this case because it did not meet the requirements of rationality. An interpretation that the powers conferred by the

[62] *Minister of Safety and Security v Sekhoto and Another* [2011] 2 All SA 157 (SCA)

legislation should be exercised rationally in conformity with the Constitution will not be unduly strained and will give sufficient effect to the fundamental values.

165. The constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith.[63] The standard applies irrespective of whether or not the exercise of power constitutes administrative action in terms of PAJA. Rationality review, as explained earlier, is concerned with the relationship between means and ends and asks whether the means employed are rationally related to the purpose for which the power was conferred. The process followed in reaching a decision must be rational.[64] A refusal to include relevant and interested stakeholders in a process, or a decision to receive representations only from some to the exclusion of others, may render a decision irrational.[65]

166. Given the purpose and objectives of the power to discontinue a prosecution, to ensure justice in the prosecutorial process, once Mrwebi decided to consider representations from any relevant person, the standard of rationality required him to deal with all stakeholders even-handedly and to consider representations both from those in favour of withdrawal and those against.[66] The process by which he reached his decision was arbitrary, and the consequent decision irrational, because the means were not rationally linked to the purpose. He could not do justice without hearing all relevant stakeholders. At the very least, he had to observe the Policy Directives, which he also failed to do. The Prosecution Policy requires the advice of the NDPP to be sought where a sensitive, or contentious, or high profile case is to be withdrawn.[67] My understanding of the position of the NDPP is that Mrwebi's decision was not referred to her.

167. For those reasons also, the decision to withdraw the fraud and corruption charges was irrational and consequently illegal.

168. FUL has lastly argued that Mrwebi's decision was coloured by material errors of law, based on irrelevant considerations and, though it does not say so in so many words, intimated that the decision was so unreasonable that no reasonable person could have so decided. Strictly speaking, because of my findings that the decision was illegal and irrational in violation of the principle of legality, I do not need to deal with these submissions. However, in view of the possibility of an appeal, it seems appropriate to make a finding on the merit or otherwise of these review grounds as well.

169. To recap briefly: a decision to discontinue prosecution is administrative action within the meaning of that term as defined in section 1 of PAJA. Mrwebi's decision to withdraw the fraud and corruption charges and to discontinue the prosecution is

[63] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paras 48-49; *Masetlha v the President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at paras 78-81.
[64] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).
[65] *Albutt v Centre for the Study of Violence and Reconciliation and Others Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at paras 65-68.
[66] That obligation flows from the rule of law and para 3 of Part 5 of the Prosecution Policy.
[67] Prosecution Policy para 6(a).

accordingly susceptible to review on PAJA grounds other than illegality and irrationality.

170. The charges of fraud, corruption and money-laundering were initiated against Mdluli as a result of a comprehensive investigation by Colonel Viljoen that uncovered the evidence in support of his prosecution. The prosecutors, the DPP, and the IGI all opposed the withdrawal of those charges. Breytenbach, the regional head of the SCCU, wrote a detailed memorandum to the NDPP cogently motivating why the charges should not be withdrawn. The Prosecution Policy requires that cases should only be withdrawn on compelling grounds.

171. Mrwebi, however, advanced only two reasons for his decision to withdraw the charges, which were recorded in his consultative note of 4 December 2011, and which were far from compelling. First, he was concerned that the charges initiated against Mdluli may have been pursued with an ulterior motive. Second, he found that the offences with which Mdluli had been charged fell within the mandate of the IGI and could only be investigated by her offices. Mr Maleka submitted that each of these findings was unfounded, and was based on irrelevant considerations and material errors of law and fact.

172. The factual claim of a conspiracy against Mdluli by his colleagues was investigated and rejected by an inter-ministerial task team established for that purpose. The evidentiary basis for that decision is not before me and I am unable to assess its probative value. But, in any event, an improper motive would not render an otherwise lawful prosecution unlawful[68] and would not excuse a prosecutor from engaging with the merits of the case. Mrwebi at the outset stated openly in his consultative note of 4 December 2011 that he saw no need to engage with the merits of the case against Mdluli. In accordance with his incorrect understanding that it was a matter for the IGI he considered it unnecessary to traverse the merits or to evaluate the evidence. He believed the referral to the IGI was "dispositive of the matter". He took the decision without regard to the merits of a prosecution in the interests of justice and thus ignored mandatory relevant considerations.

173. The purported referral to the IGI was equally misdirected. The IGI's oversight role over the intelligence and counter-intelligence services is restricted to monitoring their compliance with the Constitution and other laws, and to receive complaints of misconduct.[69] As mentioned by the IGI in her letter of 19 March 2012 to the Acting Commissioner, the IGI's mandate does not extend to criminal investigations. Mrwebi's decision to withdraw the fraud and corruption charges because he apparently believed them to fall within the exclusive purview of the IGI was accordingly based on a material error of law. Yet, despite being aware of the IGI's view, as appears from his reasons for decision dated 12 July 2012, he irrationally adhered to his position.

174. These were the only reasons advanced by Mrwebi at the time he decided to withdraw the charges. His decision was thus evidently based on errors of law and fact. He took account of irrelevant considerations and ignored relevant

[68] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 37.
[69] Section 7(7) of the Intelligence Services Control Act 40 of 1994.

considerations. The decision is therefore liable to review in terms of sections 6(2)(b), and 6(2)(e)(iii) of PAJA. In so far as the decision was attended by factual errors, and in view of Mrwebi's stance overall, the decision was not rationally connected to the information before him and the purpose of the NPA Act, and is thus reviewable also under section 6(2)(f)(ii)(bb) and (cc) of PAJA.

175. As discussed earlier, in his reasons filed pursuant to Rule 53 and in his answering papers, Mrwebi took a different tack. He there claimed that there was insufficient evidence to support a successful prosecution against Mdluli and that he referred the matter to the IGI so that she could investigate or facilitate access to the privileged documentation required. The withdrawal of the charges, he said, was merely provisional, to allow for further investigation to take place. This version is at odds with the contemporaneous reasons Mrwebi gave for his decision, and the evidence of Breytenbach and Mzinyathi in the disciplinary proceedings. Even if the charges were supposedly provisionally withdrawn in court, Mrwebi's pronouncements at the time evinced an unequivocal intention to stop proceedings altogether. He considered the referral to the IGI as "dispositive"; and in his letter of 30 March 2012 to General Dramat he referred to the matter as "closed". In the circumstances, his new version is implausible and probably invented after the fact, in what FUL submits was "a last-ditch attempt to explain his otherwise indefensible approach". But even if the decision was in fact "provisional", its qualification as such does not save it from illegality, irrationality and unreasonableness. A provisional decision which languishes for two years without any noticeable action to alter its status may be inferred to have acquired a more permanent character.

176. For all of the many reasons discussed, the decision and instruction by Mrwebi to withdraw the fraud and corruption charges must be set aside. It was illegal, irrational, based on irrelevant considerations and material errors of law, and ultimately so unreasonable that no reasonable prosecutor could have taken it.

The withdrawal of the murder and related charges

177. The second decision challenged by FUL is the decision of Chauke, the DPP of South Gauteng, to withdraw the murder charge and refer the issue of Ramogibe's death to an inquest and to withdraw all the other charges against Mdluli, to avoid "fragmented trials" in order to allow Mdluli to stand one trial where he could answer all of the charges against him. FUL challenges the decision on three grounds: it was taken by the DPP, South Gauteng when only the NDPP is entitled to review a decision by another official of the NPA to discontinue a prosecution; it was taken without proper consultation; and was unfounded and irrational.

178. I have already addressed FUL's contention that the NDPP has exclusive power to review and withdraw a decision to prosecute. The power conferred on the NDPP to review the decision of a subordinate to prosecute or not to prosecute by section 179(5)(d) of the Constitution and section 22 of the NPA Act, in my estimation, does not directly exclude or limit the power conferred upon a DPP by section 20(1)(c) of the NPA Act to discontinue criminal proceedings and by section 6 of the CP Act to withdraw charges or to stop a prosecution. It was never intended in enacting the constitutional provisions that the NDPP would be the sole repository of the power to discontinue a prosecution.

179. However, as I explained in the analysis of the first impugned decision, any decision by an official of the prosecuting authority to discontinue a prosecution will need to be properly informed by relevant considerations if it is to be upheld as rational. The failure to consult with affected and interested parties often, if not invariably, will have the consequence that vital relevant information is ignored and the decision will be coloured by irrationality because there is no rational connection between the information available to the official, the purpose of the empowering provision, the decision and the reasons for it.

180. Accordingly, I accept FUL's submission that the rule of law and the requirement of rationality constrained Chauke to consider representations from the complainants and victims of the alleged crimes. Chauke did not deny the averments made in the founding affidavit and the supplementary founding affidavit that he did not seek input from the victims and other role players. He referred only to representations from the legal representatives of Mdluli. Moreover, the Policy Directives also obliged him to seek the advice of the Acting NDPP before withdrawing the murder and related charges. Both the Acting NDPP and Chauke confirm in their affidavits that he did not refer the matter to her. The decision to withdraw those charges was accordingly taken without the legal and rational prerequisites to the exercise of the power being met. The process leading to the decision being taken was irrational because it lacked input from crucial stakeholders in the process. It also appears to have given no weight at all to the evidence of the victims of the other crimes as alleged in the 17 non-murder charges, from which it may be inferred symptomatically that Chauke failed to apply his mind to all the relevant considerations mandated by the Constitution, and in the ultimate analysis acted capriciously; meaning that his decision was reviewable in terms of section 6(2)(e)(vi) of PAJA.

181. The details of the investigation that led to the murder and related charges being preferred against Mdluli are painstakingly set out in a report by the investigating officer, Colonel Roelofse, which strictly speaking is hearsay, but with the content of which none of the respondents has taken issue. The evidence against Mdluli also appears from the affidavits filed in the inquest proceedings, which, as discussed, include affidavits from different witnesses claiming that they were personally intimidated, assaulted and/or kidnapped by Mdluli; and affidavits from seven witnesses who personally witnessed Mdluli threatening to kill Ramogibe, or threatening and assaulting other people. This evidence presents a compelling *prima facie* case against Mdluli.

182. In terms of the Prosecution Policy Directives, Chauke may only withdraw charges in the face of such formidable evidence if there are compelling reasons to do so. Yet, he has advanced none. Instead, he has stated puzzlingly that he is disinclined to prosecute because there is no direct evidence linking Mdluli to the murder of Ramogibe. He has offered no evaluation of the cogency of the circumstantial evidence against Mdluli. And although circumstantial evidence involves an additional tier of inferential reasoning, it is incorrect to assume such evidence in the end will prove less cogent than direct evidence. All involved in the administration of criminal justice, including I imagine Chauke, the most senior public prosecutor in Johannesburg, know that circumstantial evidence at times can be more persuasive than direct evidence. In any event, there is in fact direct evidence in

relation to the charges of attempted murder, kidnapping and assault, which were withdrawn as a corollary to the decision to avoid prosecuting Mdluli on a piecemeal basis.

183. Chauke's reliance on the inquest finding for his decision not to proceed is patently irrational. An inquest, as I explained when discussing the facts, is an investigatory process directed primarily at establishing a cause of death where the person is suspected to have died of other than natural causes. It is not aimed at establishing anyone's guilt and, indeed, could not competently do so.[70] The presiding officer is not called on to make any finding as to culpability. An inquest is no substitute for a criminal prosecution because it cannot determine guilt. In fact, once criminal charges have been brought in relation to a particular death, an inquest will generally be precluded, since the two processes should not run concurrently.

184. Chauke's motive for referring the matter to an inquest was therefore dubious. The identity of the deceased was known, as was the cause of his death. The only outstanding issue is the culpability of Mdluli. Chauke could never have hoped to establish Mdluli's culpability, and to resolve the criminal prosecution, by referring the matter to an inquest. The inquest findings are not binding on the prosecuting authority. Chauke's statement in his affidavit that in the light of the inquest finding "it would be presumptuous and foolhardy" to prosecute is accordingly wrong in law and symptomatic of the irrationality of his decision, evincing as it does a lack of rational connection between the purpose of his decision, the various empowering provisions, the evidence before him and the reasons he gave for his action.

185. In any event, to state the blatantly obvious, and as the magistrate himself was at pains to point out, the inquest could only deal with the murder charges. It could not, and did not, address the remaining 17 charges of kidnapping, assault, intimidation and defeating the ends of justice that were preferred against Mdluli. It follows that a referral to inquest proceedings could never have provided a sufficient basis to withdraw those remaining charges. The justification of avoiding fragmented trials fell away on 2 November 2012, almost a year ago, when the magistrate handed down his reasons. Chauke has failed to address these other charges (and the purported basis for their withdrawal) in his answering affidavit at all. As Mr Maleka correctly submitted, that must be because he has not properly applied his mind to those charges, and the correctness of their withdrawal; or, more troublingly, perhaps because he is acting capriciously and with an ulterior purpose.

186. Accordingly, the decision to withdraw the murder and related charges was taken in the face of compelling evidence for no proper purpose, is irrational and therefore reviewable on legality and rationality grounds, as well as in terms of section 6(2)(e) and (f) of PAJA and falls to be set aside.

The NDPPs arguments on reviewability and the duty to exhaust internal remedies

187. In both his written submissions and in argument, counsel for the NPA gave little attention to the review grounds raised by FUL in relation to the two impugned decisions, and concentrated instead upon the contention that the court had no power

[70] *De'ath (substituted by Tiley) v Additional Magistrate, Cape Town* 1988 (4) SA 769 (C) at 775G.

to review the decisions of a DPP or Special Director. As he put it in paragraph 12 of his heads of argument:

> "The most significant aspect that this Honourable Court will be required to decide is whether it does in fact have the right (sic) to review these two decisions."

The submission was developed in paragraphs 42-43 of the heads as follows:

> "These statutory provisions have been the subject matter of numerous judicial decisions. Nevertheless, despite commentary and statements to the contrary, it has never been judicially pronounced that there is in fact a right to review a decision by a Director of Public Prosecutions or the National Director of Public Prosecutions to provisionally withdraw criminal charges against an accused person.
>
> Put somewhat differently, the Applicant's legal representatives are challenged to identify any matter in which such an application for review has succeeded and resulted in a decision by the First Respondent or any of its subordinates to withdraw charges being set aside and the First Respondent being compelled to forthwith reinstate criminal charges and prosecute them without delay, which is the relief sought herein against the First and Third Respondents."

188. After analysing the judgment of Harms DP in *National Director of Public Prosecutions v Zuma*[71] in some detail, counsel submitted that the decision was authority for various propositions, only three of which are relevant for present purposes (the others have been disposed of in the preceding analysis). In paragraph 47 of the heads he submitted: firstly, a prosecutorial review is not an administrative decision that is subject to review in the normal course or in terms of PAJA; secondly, a decision to withdraw charges pending the receipt of further evidence and to prosecute or not to prosecute is not necessarily final; and thirdly a decision to prosecute or not to prosecute is not subject to judicial review.

189. As to the first proposition, if by a "prosecutorial review" is meant an exercise by the NDPP of her discretion under section 179(5)(d) of the Constitution, then the contention is not sustainable. As I have said, and it bears repeating, it is inconceivable that the Constitution intended to exclude judicial review of such decisions entirely. Whether the decision would be administrative action or not is possibly debatable, but the authorities already discussed leave no doubt that any action in terms of that provision will still be subject to a rule of law review on grounds of legality and rationality. However, it is important to note, we are not here concerned with a review under section 179(5)(d). Although Mdluli's initial representations were addressed to the NDPP, it does not seem that she acted on them. Mrwebi and Chauke took the impugned decisions. The decisions at issue are in fact decisions to withdraw charges in terms of section 6 of the CP Act

190. The third proposition, presumably with section 6 of the CP Act in mind, is plainly wrong. For the reasons spelt out earlier, when discussing the reviewability of prosecutorial decisions, a decision to prosecute is subject to rule of law review and a decision not to prosecute or to discontinue a prosecution is subject to rule of law review and in addition to review in terms of PAJA. Nor do I accept Mr Hodes' related

[71] 2009 (2) SA 277 (SCA)

submission that the possibility of obtaining a certificate of *nolle prosequi* and the right to pursue a private prosecution in terms of section 7 of the CP Act ousts the review jurisdiction of the courts. The existence of this procedure cannot be read to give the NDPP *carte blanche* to act without regard to the requirements of legality, rationality and reasonableness. The suggestion is preposterous and no more need be said.

191. The second proposition does however pose a legitimate challenge. It forms the basis of the argument counsel developed in court that resort to the court should be denied until internal remedies are exhausted. All the deponents who filed affidavits on behalf of the NPA highlighted the alleged "provisional" nature of the decision to withdraw charges. And, the Acting NDPP consciously pleaded that the decisions to discontinue the prosecutions "have not been brought to my office for consideration in terms of the regulatory framework" and submitted that the application to review the withdrawal of the charges by the court was accordingly "premature".

192. The regulatory framework to which the NDPP refers is of course section 179(5)(d) of the Constitution read with section 22(2)(c) of the NPA Act which permit her to review decisions of her subordinates to prosecute or not to prosecute. It includes also Part 6 of the Policy Directives, in particular paragraphs (5) and (6) which provide that where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter, representations should be directed to the Senior or Control Prosecutor, and thereafter to the DPP, before the final appeal is made to the NDPP. It is explicitly stated that as a matter of law and policy, the NDPP requires that the remedy of recourse to the DPP be exhausted before representors approach the NDPP. Unfortunately, these provisions were not referred to in argument and I do not have the benefit of counsel's submissions regarding their content or status. They normally would require compliance, and do indicate an intention to introduce a duty to exhaust internal remedies by representors (which FUL is not) where representations have been made. However, for reasons I will elucidate presently, non-compliance is not fatal to this review application.

193. First of all, the categorisation of the withdrawal of charges as "provisional" is inconsequential. All withdrawals which do not amount to the stopping of a prosecution in terms of section 6(b) of the CP Act are provisional in the sense that it always remains possible to re-institute charges withdrawn under section 6(a) of the CP Act. The withdrawal of charges under section 6(a) of the CP Act, as explained, and as I suspect is the case in the majority of withdrawals, can easily become permanent. The mere characterisation of an illegal, irrational or unreasonable decision as provisional would not automatically save it from review. Provisional or not, an illegal decision will normally be set aside.

194. The fact of the matter, and the more relevant truth, is that the NDPP can review any decision "not to prosecute" in terms of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act; and the real inquiry therefore is whether the decisions of Mrwebi and Chauke to discontinue the prosecution of Mdluli on the respective charges could only be reviewed in court once the applicant had exhausted the remedy of a review before the NDPP under those provisions.

195. FUL's response to the contention that the application is premature is somewhat cryptic. In paragraph 78 of the replying affidavit it first rejects the proposition that only

the NDPP may review the decisions of DPPs and Special DPPs to discontinue a prosecution and then in paragraph 79 states:

> "In any event, it is plain that the first respondent has long since been aware of the relevant decisions and at the very least tacitly confirmed them."

The Acting NDPP did not make any replicating averment in answer to this plea. In the belatedly filed supplementary answering affidavit, Mrwebi merely re-asserted that the court has no power at all to review prosecutorial decisions, which is patently wrong, and, as Justice Kriegler rightly says, a little worrying to hear from a senior prosecutor. In fairness though, Mrwebi did add that the application was in any event "premature". However, Mrwebi did not take issue with the allegation that the NDPP had tacitly confirmed the decisions to withdraw. She clearly has done exactly that.

196. The dispute that forms the subject matter of this application has been on-going for more than 18 months since February 2012. Given its high profile nature and the outcry about it in the media and other quarters, there can be no doubt that the NDPP was aware of it, and its implications, from the time the charges were withdrawn. Mdluli's representations were sent to her and she referred them down the line; probably rightly so. But she was nonetheless empowered by section 179 of the Constitution to intervene in the prosecution process and to review the prosecutorial decisions *mero motu;* yet despite the public outcry she remained supine and would have us accept that her stance was justified in terms of the Constitution. She has not given any explanation for her failure to review the decisions at the request of Breytenbach made in April 2012. Her conduct is inconsistent with the duty imposed on all public functionaries by section 195 of the Constitution to be responsive, accountable and transparent.

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

198. At common law the mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted before bringing a rule of law review.[72] As I have said, I consider the power in section 179(5)(d) of the Constitution to be permissive. There is nothing in the provision itself, or expressly stated or necessarily implied in the legislative scheme as a whole, which overtly requires a person aggrieved by a decision to discontinue a prosecution to first take the matter on review to the NDPP.

[72] See generally Hoexter *Administrative Law in South Africa* at 538 et seq

199. Moreover, in *Maluleke v MEC for Health and Welfare, Northern Province*,[73] Southwood J remarked, correctly in my respectful opinion, that the duty to exhaust internal remedies, if one exists, will seldom be enforced where the complaint is one of illegality, or, I would add, one of irrationality, or in cases where the remedy would be illusory. It is reasonable to infer from the Acting NDPP's supine attitude that any referral to her would be a foregone conclusion and the remedy accordingly of little practical value or consequence in this case. Her stance evinces an attitude of approval of the decisions. Had she genuinely been open to persuasion in relation to the merits of the two illegal, irrational and unreasonable decisions, she would have acted before now to assess them, explain her perception, and, if so inclined, to correct them.

200. Section 7(2)(c) of PAJA is more stringent than the common law and permits exemption from the duty to exhaust internal remedies only in exceptional circumstances on application. I am satisfied that there are exceptional circumstances in this case, being those pleaded by FUL. Admittedly, there is no formal application for exemption, primarily I imagine because the special plea, if that, was so abstrusely pleaded; which is sufficient basis to grant condonation. In *Koyabe v Minister of Home Affairs*[74] the Constitutional Court stated that these requirements should not be rigidly enforced and should not be used by officials to frustrate the efforts of an aggrieved person or to shield the decision-making process from judicial scrutiny. Furthermore, and most importantly in this case, the remedy in question must be available, effective and adequate in order to count as an existing internal remedy. For the reasons I have stated, a referral to the NDPP in this case would be illusory. Had the NDPP truly wanted to hold the remedy available, instead of simply asserting that the application to court was premature, as a senior officer of the court she would (and should) have assisted the court by reviewing the decisions and disclosing her substantive position in relation to them and their alleged illegality and irrationality. She has not pronounced at all on the decisions or for that matter the evidence implicating Mdluli. Her stance is technical, formalistic and aimed solely at shielding the illegal and irrational decisions from judicial scrutiny.

201. In any event, if I am wrong in this, the more stringent PAJA standard does not apply to a rule of law review, and the duty to exhaust internal remedies before resorting to such a review may be dispensed with on the grounds and for the reasons to which I have already alluded.

202. In the result, the failure of FUL to resort to a review in terms of section 179(5)(d) of the Constitution is no bar to this application or the jurisdiction of the court.

The withdrawal of the disciplinary proceedings and the reinstatement of Mdluli

203. FUL challenges the decision to withdraw the disciplinary charges against Mdluli, made by the Acting Commissioner, Lieutenant-General Mkhwanazi, on 29 February 2012, as well as the related decision of 27 March 2012 to lift his suspension and to

[73] 1999 (4) SA 367 (T) at 372G-H
[74] 2010 (4) SA 327 (CC) para 38

re-instate him to his position, on two grounds: firstly, it contends that the Acting Commissioner took those decisions acting on the dictates of another, and therefore failed to discharge his duties under s 207(2) of the Constitution; and in taking those decisions, the Acting Commissioner failed to protect the integrity of the SAPS, and to give effect to the SAPS Act and Regulations.

204. The Commissioner has raised defences that FUL has no standing to challenge the decisions, and the court no jurisdiction to hear them, because they are disciplinary labour matters within the prerogative of the Commissioner and any dispute in that regard within the exclusive jurisdiction of the Labour Court. She contended further that the review of the disciplinary proceedings have become moot since new disciplinary proceedings were initiated on 15 May 2012 and Mdluli was re-suspended on 25 May 2012.

205. Section 207(2) of the Constitution provides:

> "The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing."

206. As the official responsible for managing and controlling the SAPS, it fell to the Acting Commissioner to take disciplinary decisions concerning high-level officials. He had to exercise the discretion conferred on him himself, and could not abdicate his decision-making power to another, nor act on the instructions of a functionary not vested with those powers.[75]

207. In paragraph 45 of the founding affidavit FUL, alleged that the Acting Commissioner publicly stated in Parliament that he took the decisions to withdraw the disciplinary charges on instruction from authorities "*beyond*" him. It added that by acting on the instructions of authorities beyond him, the Acting Commissioner failed to act independently in the discharge of his functions, and accordingly acted inconsistently with section 207 of the Constitution. Mkhwanazi in his answering affidavit filed in the proceedings related to Part A of the notice of motion, did not deny making the statement or the inference drawn. In paragraph 4 of his affidavit he admitted that he had read FUL's founding affidavit and the annexures thereto but went on only to deal with points *in limine*, without admitting or denying any of the averments in the founding affidavit.

208. A respondent in motion proceedings is required in the answering affidavit to set out which of the applicant's allegations he admits and which he denies and to set out his version of the relevant facts. A failure to deal with an allegation by the applicant amounts to an admission. An admission, including a failure to deny, will be binding on the party and prohibits any further dispute of the admitted fact by the party making it, as well as any evidence to disprove or contradict it.[76] Mkhwanazi must accordingly be taken to have admitted that he acted under dictation, without independence and inconsistently with his constitutional duties.

[75] *President of the Republic of South Africa and Others v SARFU* 2000 (1) SA 1 (CC) at paras 38- 41
[76] *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* 1994 (2) SA 588 (A) 605H.

209. In paragraph 47 of her answering affidavit, the Commissioner (who was appointed subsequent to the events at issue in these proceedings) in response to the averments in paragraph 45 of the founding affidavit stated:

> "General Mkhwanazi was quoted out of context. As I understood and this is what he later clarified was that his response was in relation to the issue of the withdrawal of charges, which falls within the domain of the NPA, which invariably in his view affected the purpose of the continued suspension and disciplinary charges then. General Mkhwanazi never obtained instructions from above. His confirmatory affidavit will be obtained in this regard. Should time permit, I will ensure that the copy of Hansard being the minutes or the transcription of the parliamentary portfolio committee meetings is obtained and filed as a copy which will clarify the issue."

210. No confirmatory affidavit was filed on behalf of Mkhwanazi, despite the issue being raised repeatedly and it being evident that the court would be called upon to assess the probative value of the statement and to make a factual finding about whether he had acted under dictation or not.

211. In paragraph 14 of his judgment in the Part A proceedings, Mokgoba J expressed concern about the allegations of political interference in the disciplinary process and noted that Mkhwanazi had not disputed them in his answering affidavit. The learned judge subtly pointed to the need for the allegations to be addressed.

212. As the issue was not adequately dealt with in the answering affidavits, FUL, in paragraph 64 of the replying affidavit, contested the explanation by the Commissioner, noted that the confirmatory affidavit and objective evidence had not been delivered, and intimated that it would argue that the appropriate factual finding should be made. It did so again more fully in paragraph 83 of its heads of argument. Despite all of these calls to the Commissioner to file an affidavit from Mkhwanazi explaining the statement, the Commissioner did not oblige.

213. When the matter was raised in argument before me, Mr Mokhari SC, counsel for the Commissioner, asserted implausibly that the non-filing of a confirmatory affidavit by Mkhwanazi was merely an oversight. He undertook to file an affidavit by the close of proceedings. It was made clear to him that absent a confirmatory affidavit, the hearsay averment of the Commissioner could not be accepted as a tenable and creditworthy denial and that the averment of FUL was likely to be preferred. After all, Mkhwanazi is available as a witness and the Commissioner in her answering affidavit gave an undertaking to file a confirmatory affidavit. After an adjournment, Mr Mokhari informed the court that his instructions were that no affidavit from Mkhwanazi would be filed. Nor has any objective evidence of his alleged statements been provided, notwithstanding the Commissioner's tender in this regard. Mr Maleka predictably submitted that the most credible explanation for the non-filing is that neither Mkhwanazi nor Hansard supports the Commissioner's interpretation. The allegation has always been that Mkhwanazi acted under the unauthorised and unwarranted dictates of persons who had no constitutional or legal authority over or interest in the decision. Despite having had ample opportunity, he has not refuted that allegation.

214. In the premises, the Commissioner's explanation is untenable and must be rejected. The explanation is irreconcilable with the Acting Commissioner's clear statement. The statement that he was instructed by authorities "*beyond*" him is

unambiguous and cannot bear the meaning that the Commissioner contends for. Mkhwanazi was not subject to the authority of or any instruction by the NPA.

215. That Mkhwanazi dropped the disciplinary charges on orders from above, is furthermore borne out by the Rule 53 record filed on his behalf. The record he supplied comprises nothing more than two letters addressed to Mdluli, one notifying him of the withdrawal of the disciplinary charges against him and the other advising him of his re-instatement. There is no charge sheet or correspondence dealing with the allegations or the process to be followed. From this it may be reasonably inferred that Mkhwanazi did not apply his mind to the facts at all, because he was inclined on the basis of instructions from beyond to stop the process irrespective of the merit or otherwise of that action.

216. The inescapable finding is that the decisions of the Acting Commissioner to withdraw the disciplinary charges and to re-instate Mdluli as head of Crime Intelligence were taken in an attitude of subservience pursuant to an unlawful dictation from a person unknown, who was "beyond" the Acting Commissioner. They were therefore unlawful and invalid. An abdication of power violates the principle that the responsibility for a discretionary power rests with the authorised body and no one else.

217. The second prong of FUL's attack on these decisions is that the Acting Commissioner failed to protect the integrity of SAPS and to abide by its legislative framework. Every organ of state is required to exercise the powers conferred upon it accountably, responsively and openly, and to protect the integrity of the institution by ensuring the proper exercises of powers by its functionaries.[77] Congruent with that, the Commissioner is required to maintain an impartial, accountable, transparent and efficient police service.[78] The SAPS, in turn, is tasked with preventing, combating and investigating crime, and with upholding and enforcing the law.[79]

218. To ensure the proper functioning of the SAPS, the Commissioner, in discharging his obligations under section 11 of the SAPS Act, must protect and give effect to SAPS Discipline Regulations.[80] These provide that serious misconduct must be referred to disciplinary proceedings[81] and that, where there is strong evidence to suggest that the member will be dismissed, the member must be suspended.[82] A suspension is a precautionary measure.

219. By withdrawing the disciplinary proceedings against Mdluli and allowing him to resume his senior position in the SAPS when there were serious and unresolved allegations of misconduct against him, which called into question his integrity, the

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[77] Section 195(1) of the Constitution; see also *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) at para 66

[78] Section 11(1) of the SAPS Act. See also section 195(1)(e)(f) and (g) of the Constitution.

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

[80] GNR 643 GG 28985 3 July 2006.

[81] Regulation 12(1) provides:

> " Subject to regulation 6 (2), a supervisor who is satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing, must ensure that the investigation into the alleged misconduct is completed as soon as reasonably possible and refer the documentation to the employer representative to initiate a disciplinary enquiry."

[82] Regulation 13.

Acting Commissioner frustrated the proper functioning of the SAPS Act and the Discipline Regulations. He also undermined the integrity of the SAPS and failed to ensure that it operated transparently and accountably. His conduct could only serve to damage public confidence in the SAPS, particularly where no reasons were advanced for that decision and in the face of public disquiet about possible political interference.

220. The decisions to withdraw the disciplinary charges and to re-instate Mdluli were accordingly taken in dereliction of the Acting Commissioner's constitutional and statutory duties to control and manage the SAPS in any open, transparent, accountable, impartial and efficient manner, and fall also to be set aside on that basis.

221. On both legs, the review sought by FUL is a rule of law review and it is unnecessary to locate the review grounds within the provisions of PAJA, or to determine whether the action constituted administrative action for that purpose.[83] The decisions are illegal for both the reasons advanced.

Standing, jurisdiction and mootness in relation to the decision to withdraw the disciplinary charges

222. Rather than engaging with the substance of the claims of illegality, the Commissioner confined herself to formal defences. As mentioned, she contended that FUL lacks *locus standi* to bring this review, that this court has no jurisdiction over it, and that the review of the decisions is, in any event, moot or academic.

223. Neither the Commissioner nor the NDPP questioned FUL's public interest standing to review the withdrawal of criminal charges against Mdluli. But the Commissioner contended that FUL has no standing to challenge the decision to withdraw disciplinary charges against Mdluli and to re-instate him to his post on the grounds that those decisions are labour decisions that are only liable to challenge by a party to the employment contract at issue. This is not correct. As discussed, the Commissioner is required, under s 207(2) of the Constitution, to manage the SAPS and to maintain the discipline and integrity of the force. The disciplinary powers are public powers and the fitness of Mdluli to hold a high ranking position in the SAPS is a matter of public concern. As Mr Maleka submitted, the issues have implications for public order and legitimacy of SAPS as a law-enforcement body. For as long as the disciplinary allegations against Mdluli remain unresolved, his presence in the senior echelons of the SAPS will diminish public confidence. The disciplinary decisions are

[83] The decisions to suspend Mdluli and to institute disciplinary proceedings against him were made pursuant to the powers conferred by the SAPS Discipline Regulations. The revocation of those decisions was in terms of the same public power. A decision by an organ of state to abandon disciplinary proceedings against a high-ranking police official and to re-instate him to his post while matters concerning his honesty and respect for the law remain unresolved is public in nature. It affects the security and the stability of South Africa, and goes to the accountability of its officials. The decisions have direct external legal effect, and affect the public's right to have the alleged misconduct against a high-level police official assessed and finally determined. For those reasons, FUL submits, not unconvincingly, that the decisions constitute administrative action liable to review under PAJA.

therefore public in nature, and liable to review on the grounds of illegality, at the instance of FUL acting in the public interest.

224. The Commissioner's claim that this court has no jurisdiction in terms of section 157(1) and (2) of the Labour Relations Act[84] ("the LRA") to review the disciplinary decisions is similarly unfounded. These provisions read:

> (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
>
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -
>
> (a) employment and from labour relations;
>
> (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
>
> (c) the application of any law for the administration of which the Minister is responsible."

225. The Commissioner argued that the relief sought by FUL is in effect a suspension from employment. The order obtained in Part A proceedings interdicted Mdluli from discharging any function or duty as an employee of SAPS. Consequently, Mdluli has been suspended from his employment. It was argued that the suspension of Mdluli can only be done in compliance with the SAPS Discipline Regulations read with section 186(2) of the LRA. Since the Labour Court has exclusive jurisdiction in terms of section 157(1) to deal *inter alia* with unfair labour practices, it was submitted that the High Court may not adjudicate such matters. The argument went further, asserting in addition that the High Court can only assume jurisdiction over a labour matter if it involves a Bill of Rights violation as contemplated by section 157(2) of the LRA.

226. Section 157(1) of the LRA confirms that the Labour Court has exclusive jurisdiction over any matter which the LRA prescribes should be determined by it, which includes the power to review unfair labour practice determinations by bargaining councils or the Commission for Conciliation Mediation and Arbitration ("the CCMA"). In terms of section 191 of the LRA, disputes about unfair labour practices must be referred either to the CCMA or a bargaining council with jurisdiction, and the award of such body is reviewable by the Labour Court. The labour forums, it is correct, do indeed have exclusive power to enforce LRA rights to the exclusion of the High Courts. However, the High Courts and the Labour Courts have concurrent jurisdiction to enforce common-law contractual rights and fundamental rights entrenched in the Bill of Rights insofar as their infringement arises from employment.[85]

[84] Act 66 of 1995

[85] *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at para 18, and section 157(2) of the LRA

227. The argument that the jurisdiction of the High Court is excluded on account of the dispute being one regarding an unfair labour practice is fundamentally misconceived and wrong, being based upon a misunderstanding of the relevant statutory provisions. It is predicated on the false supposition that the present case involves an unfair labour practice. It most certainly does not. The relevant part of the definition of an unfair labour practice in section 186(2) of the LRA reads:

> "Unfair labour practice" means any unfair act or omission that arises between an employer and an *employee* involving—(b) the unfair suspension of an employee"

It must be read with section 191(1) of the LRA which provides:

> "(1) (*a*) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
> (i) a council……; or
> (ii) the commission, if no council has jurisdiction"

It is thus clear from the definition that an unfair labour practice can only "arise between an employer and an employee" and from the procedural provision that only an employee can refer an unfair labour practice dispute to the CCMA or a bargaining council.

228. Notwithstanding section 157(1) of the LRA, other existing common law and statutory causes of action remain available to litigants, even in cases that arise factually out of an employment relationship between an organ of state and an individual. In *Gcaba v Minister of Safety and Security and Others*[86] the CC explained the position thus:

> "Furthermore, the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies to the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be meant to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour-and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies"

229. The only jurisdiction removed from the High Court by section 157 of the LRA, therefore, is that in respect of those causes of action which the LRA prescribes should be dealt with by the Labour Court, and for the most part that is confined to the review of unfair dismissal and unfair labour practice awards, and the adjudication of operational requirement dismissals and unfair employment discrimination. The High Court retains its jurisdiction over all other causes of action. In fact, section 157(2) of the LRA takes nothing away from the High Court's jurisdiction. It merely confers a concurrent human rights jurisdiction on the Labour Court in respect of Bill of Rights violations in the employment context, which it otherwise would not have enjoyed. It does not restrict the jurisdiction of the High Court, as the Commissioner incorrectly assumes. The purpose of the provision is to give jurisdiction to the Labour Court not

[86] 2010 (1) SA 238 (CC) at para 73

to remove it from the High Court. There is accordingly no merit at all in the submission that the High Court must establish a Bill of Rights violation before it may "assume jurisdiction" over a labour matter. The Commissioner's argument misconstrues the wording and import of the subsection; she has it the wrong way round.

230. Likewise, FUL's challenge to the Acting Commissioner's disciplinary decisions does not involve an unfair act or omission that arises between an employer and an employee *involving the unfair suspension* of an employee. The mere fact that the remedy appointed by the court may be akin to a suspension is not sufficient for the dispute to be categorised as an unfair labour practice. A dispute in order to be an unfair labour practice, as I have said, must be between an employee and his or her employer and must arise in the employment relationship. The dispute between FUL and the Commissioner is not one which falls within the employer-employee nexus, but one which raises issues concerning the legality (and, consequently, the constitutionality) of the Acting Commissioner's decisions, and his application and interpretation of the SAPS Act and the Regulations. It is also a matter that affects the complainants' and the public's constitutional rights to the protection of the rule of law. The effects of the decisions on Mdluli, which may well be the subject of an employment dispute, are not the subject of this application.

231. The review of the Acting Commissioner's disciplinary decisions accordingly falls within the jurisdiction of this court.

232. The Commissioner's contention that the review of the Acting Commissioner's disciplinary decisions has become academic cannot be sustained either. She says the issue is now moot because disciplinary proceedings have been "instituted" against Mdluli and he is currently under suspension. The original disciplinary charges against Mdluli were dropped and he was re-instated in March 2012. It is common cause that Mdluli was re-suspended on 25 May 2012, shortly after this application was launched. Although it has been stated that the intention was to discipline Mdluli it is not clear on what disciplinary charges. Neither the charges in the original disciplinary proceedings nor the new disciplinary charges have been disclosed in the Rule 53 record on behalf of the Commissioner, or in any of the answering affidavits. There is no evidentiary basis to assume that the disciplinary charges and reasons underlying the most recent suspension are the same as the previous occasion; indeed, to the contrary, there are indications that his suspension may relate to other charges related to the defrauding of the SSA. The relief sought by FUL is for Mdluli to be arraigned on all of the original charges.

233. But even if we accept that the charges are the same, the court has not received any assurance from the Commissioner that she will not allow them to be dropped again. Indeed, but for the order of Makgoba J, Mdluli would have been within his rights to return to work in late July 2012. In terms of the Discipline Regulations, if an employee is suspended with full remuneration, the employer must hold a disciplinary hearing within sixty calendar days from the commencement of the suspension. Upon the expiry of the sixty days, the chairperson of the hearing must take a decision on whether the suspension should continue or be terminated.[87] It follows that a failure to

[87] Regulation 13(4).

convene disciplinary proceedings will result in the suspension automatically lapsing. Mr Mokhari was unable to give the court an assurance that a hearing had been convened at which the chairperson had taken a decision on whether the suspension should continue or be terminated. The suspension in terms of the regulations has accordingly probably lapsed. That fact alone disposes of the claim of mootness.

234. Moreover, there is no evidence of any serious intent to proceed with the disciplinary process or to finalise the matter, despite Mdluli having been suspended again more than a year ago. Yet the Commissioner in these proceedings seeks to discharge the interdict granted by Makgoba J on the spurious jurisdictional grounds just discussed, without conceding that the disciplinary proceedings should not have been withdrawn and without furnishing any undertakings that they will be pursued to finality. The Commissioner wants the interdict discharged and is happy for the disciplinary process to lapse. She apparently sees no need to place any obstacle in the way of Mdluli's return to work, despite her constitutional duty to investigate the allegations against him and the unfeasibility of his holding a position of trust at the highest level in SAPS until the truth is established in a credible process. For as long as there are serious unresolved questions concerning Mdluli's integrity, he cannot lawfully act as a member and senior officer of the SAPS, or exercise the powers and duties associated with high office in the SAPS.[88]

235. The review of the Acting Commissioner's decisions is for those reason by no means academic. There remains a live dispute between the parties, and any relief granted will have practical effect.[89]

Remedies

236. The automatic consequence of my findings in relation to the withdrawal of the criminal charges is that the charges will revive. FUL however seeks in addition an order directing that the fraud and corruption charges be re-enrolled and prosecuted without any further delay. Such is permissible in terms of section 172(1)(b) of the Constitution and section 8 of PAJA which empower the court on review to grant an order that is just an equitable. Given the respondents' equivocal stance and their dilatory and obstructive approach to these proceedings, it is necessary to expedite the prosecution not only in the public interest but also in the interests of Mdluli who cannot resume his duties while the charges are pending.

237. Counsel for the NDPP has argued in relation to the criminal charges that they should be referred back to the NDPP for a fresh decision instead of the court ordering a prosecution. There may be polycentric issues around the prosecution in relation to the evidence and possible defences, so he contended, which will make the prosecution difficult. I would venture the old adage: "where there is a will there is a way". In the hands of skilled prosecutors, defence counsel and an experienced trial judge, I am confident that justice will be done on the evidence available, leading as the case may be to convictions or acquittals on the various charges in accordance with the law and justice. But more than ever, justice must be seen to be done in this case. The NDPP and the DPPs have not demonstrated exemplary devotion to the

[88] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248(CC).
[89] *President, Ordinary Court Martial and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC) at para 16

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

238. The same can be said with regard to those responsible for the disciplinary process.

239. Accordingly, the orders sought by FUL are appropriate, just and equitable.

240. With regard to the question of costs, Mr Maleka, assisted by Ms Yacoob and Ms Goodman, together with their instructing attorneys, acted on behalf of FUL *pro bono* and in the public interest. A costs order must accordingly be restricted to the recovery of disbursements.

Orders

241. The following orders are made:

(a) The decision made on or about 5 or 6 December 2011, as the case may be, by the third respondent in terms whereof the criminal charges of fraud, corruption and money laundering instituted against the fifth respondent under case number CAS 155/07/2011 were withdrawn, is hereby reviewed and set aside

(b) The decision made on 2 February 2012 by or on behalf of the first respondent in terms whereof the criminal charges of murder, kidnapping, intimidation and assault with intent to cause grievous bodily harm and defeating the ends of justice under case number CAS 340/02/99 were withdrawn, is hereby reviewed and set aside.

(c) The decision made on 29 February 2012 by or on behalf of the second respondent in terms whereof the disciplinary proceedings instituted by the second respondent against the fifth respondent were withdrawn, is hereby reviewed and set aside.

(d) The decision made on 31 March 2013 by or on behalf of the second respondent in terms whereof the fifth respondent was reinstated as Head of Criminal Intelligence in the South African Police Services with effect from 31 March 2012, is hereby reviewed and set aside.

(e) The first and third respondents are ordered to reinstate forthwith the criminal charges which were instated against the fifth respondent under case number CAS 155/07/2011 and case number 340/02/99 and to take such steps as are necessary to ensure that criminal proceedings for the prosecution of the criminal charges under the aforesaid cases are re-enrolled and prosecuted diligently and without delay.

(f) The second respondent is ordered to reinstate disciplinary charges which had been instituted against the fifth respondent but were subsequently withdrawn on 29 February 2012, and to take such steps as are necessary to institute or reinstate disciplinary proceedings that are necessary for the prosecution and finalisation of the aforesaid disciplinary charges, diligently and without delay.

(g) The first, second, third and sixth respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved on the basis that the applicant's attorneys and counsel appear *pro bono*.

(h) The Taxing Master is directed that the applicant's costs nevertheless should include all the disbursements and expenses of the applicant's attorneys of record.

JR MURPHY
JUDGE OF THE HIGH COURT

Counsel for the applicant: Adv V Maleka SC assisted by Adv S Yacoob and Adv I Goodman; instructed by Cliffe Dekker Hofmeyr Inc.

Counsel for the first and third respondents: Adv L Hodes SC assisted by Adv N Manaka and Adv E Fasser; instructed by the State Attorney.

Counsel for the second and sixth respondents: Adv WR Mokhari SC assisted by Adv M Zulu and Adv DM Matlou; instructed by the State Attorney

Date heard: 11 and 12 September 2013
Date of judgment: 23 September 2013

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 67/2014

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST APPELLANT**
THE HEAD: SPECIALISED COMMERCIAL CRIME UNIT	**SECOND APPELLANT**
THE NATIONAL COMMISSIONER: SOUTH AFRICAN POLICE SERVICE	**THIRD RESPONDENT**
RICHARD NAGGIE MDLULI	**FOURTH APPELLANT**
v	
FREEDOM UNDER LAW	**RESPONDENT**

Neutral citation: *National Director of Public Prosecutions v Freedom Under Law* (67/14) [2014] ZASCA 58 (17 April 2014).

Coram: Mthiyane DP, Navsa, Brand, Ponnan *et* Maya JJA

Heard: **1 April 2014**

Delivered: **17 April 2014**

Summary: Review application – decisions to withdraw criminal charges by National Prosecuting Authority – reviewable on principle of legality not under the Promotion of Administrative Justice Act 3 of 2000 – decisions by Commissioner of Police to terminate disciplinary proceedings and lift suspension of member – reviewed and set aside under s 6 of PAJA – not competent for the high court to issue mandatory interdicts to compel prosecution and disciplinary charges.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Murphy J sitting as court of first instance):

1 The appeal succeeds only to the extent that paragraphs (b), (e) and (f) of the order of the court a quo are set aside

2 The orders in paragraphs (*a*), (*c*), (*d*), (*g*) and (*h*) of the order by the court a quo are confirmed but re-numbered in accordance with the changes necessitated by the setting aside of the orders in paragraph 1.

3 It is recorded that the following undertaking has been furnished on behalf of the first respondent:

(a) To decide which of the criminal charges of murder and related crimes that were withdrawn on 2 February 2012, are to be reinstituted and to make his decision known to the respondent within 2 months of this order.

(b) To provide reasons to the respondent within the same period as to why he decided not to reinstitute some – if any – of those charges.

4. There shall be no order as to costs in respect of the appeal.

JUDGMENT

Brand JA (Mthiyane DP, Navsa, Ponnan *et* Maya JJA concurring):

[1] This is an appeal against an order of the high court granted at the behest of the respondent. In substance the order reviewed and set aside four decisions taken by or on behalf of the first three appellants in favour of the fourth appellant and directed the first three respondents to reinstate criminal prosecutions and disciplinary proceedings against him. The appeal is with the leave of the court a quo. More precise details of the order appealed against will appear from the exposition of the background that follows. I find it convenient to start that exposition by presentation of the parties.

The Parties

[2] The first appellant is the National Director of Public Prosecutions (NDPP). Advocate Nomgcobo Jiba was appointed on 28 December 2011 as the acting NDPP by the President of the Republic after the suspension from that office of the then incumbent, Mr Menzi Simelane in consequence of a judgment of this court. The second appellant is Advocate Lawrence Mrwebi (Mrwebi) who was appointed on 1 November 2011 as Special Director of Public Prosecutions as the Head of the Specialised Commercial Crimes Unit (SCCU) of the National Prosecuting Authority.

[3] The third appellant is the National Commissioner of the South African Police Service (the Commissioner). During the time period relevant to these proceedings that position was occupied first by General Bheki Cele, thereafter by Lieutenant General Nhlanhla Mkhwanazi, in an acting capacity and finally by General Mangwashi Victoria Phiyega. The fourth appellant, who took centre stage in these proceedings, is Lieutenant General Richard Mdluli (Mdluli) who held the office of National Divisional Commissioner: Crime Intelligence in the South African Police Service (SAPS), a position also described as Head of Crime Intelligence, since 1 July 2009.

[4] The respondent, Freedom Under Law, is a public interest organisation, registered as a non-profit company with offices in South Africa and Switzerland. It is actively involved, inter alia, in the promotion of democracy and the advancement of respect for the rule of law in the Southern African region. Both its board of directors and its advisory board are composed of respected lawyers, judges and other leading figures in society at home and abroad.

Background

[5] It is common cause that on 31 March 2011 Mdluli was arrested and charged with 18 criminal charges, including murder, intimidation, kidnapping, assault with intent to do grievous bodily harm and defeating the ends of justice. The murder

charge stemmed from the killing of Mr Tefo Ramogibe (the deceased) on 17 February 1999. From about 1996 until 1998 the deceased and Mdluli were both involved in a relationship with Ms Tshidi Buthelezi. The deceased and Buthelezi were secretly married during 1998. Mdluli was upset about this and addressed the issue on numerous occasions with Ms Buthelezi and the deceased and members of their respective families. At the time Mdluli held the rank of senior superintendent and the position of commander of the detective branch at the Vosloorus police station. Charges of attempted murder, intimidation, kidnapping, et cetera, rested on allegations by relatives and friends of the deceased and Ms Buthelezi that Mdluli and others associated with him – including policemen under his command – brought pressure to bear upon them through violence, assaults, threats, kidnappings and in one instance rape, with the view to compelling their co-operation in securing the termination of the relationship between the deceased and Ms Buthelezi. According to one of the complainants who is the mother of the deceased, Mdluli had on occasion taken her to the Vosloorus police station where she found the deceased injured and bleeding. In her presence Mdluli then warned the deceased to stay away from Ms Buthelezi. The deceased was killed a few days thereafter.

[6] On 23 December 1998 the deceased was the victim of an attempted murder. He reported the incident to the Vosloorus police station. On 17 February 1999 the deceased and the investigating officer, Warrant Officer Dhlomo, drove to the scene in Mdluli's official vehicle for the stated purposes of the deceased participating in a pre-arranged pointing out. According to Dhlomo they were attacked by two unknown assailants at the scene who shot at them and took away his firearm and the vehicle in which they were travelling. He ran to a nearby tuck-shop to summon the police. Upon his return he found that the deceased had been killed. At the time, the matter never proceeded to trial. Much of the original docket and certain exhibits have since been lost or have disappeared.

[7] Information about the discontinued investigation re-surfaced after Mdluli was appointed the Head of Crime Intelligence in 2009. Two senior officers of the

Directorate of Priority Crime Investigation (the Hawks), Colonel Roelofse and Lieutenant-Colonel Viljoen, were appointed to assist in the renewed investigations and Mdluli came to be arrested on these charges – to which I shall refer as the murder and related charges – on 31 March 2011. In the light of the seriousness of these charges, the then Commissioner of Police, General Bheki Cele, suspended Mdluli from office on 8 May 2011 and instituted disciplinary proceedings against him.

[8] After Mdluli's arrest on the murder and related charges, some members of Crime Intelligence came forward with information concerning alleged crimes committed by some of its members, including Mdluli. Lieutenant Colonel Viljoen, who was involved in the investigation of the murder and related charges, was instructed to investigate these allegations in conjunction with Advocate C Smith of the Specialised Commercial Crime Unit (SCCU). Following upon these investigations, Smith successfully applied for a warrant for Mdluli's arrest on charges of fraud and corruption which was executed on 20 September 2011.

[9] What emerges from the papers filed of record is that the charges of fraud and corruption originate from the alleged unlawful utilisation of funds held in the Secret Service account – created in terms of the Secret Services Act 56 1978 – for the private benefit of Mdluli and his wife, Ms Theresa Lyons. Broadly stated it is alleged that one of Mdluli's subordinates, Colonel Barnard, purchased two motor vehicles ostensibly for use by the Secret Service but structured the transaction in such a manner that a discount of R90 000 that should have been credited to the Secret Service account, was utilised for Mdluli's personal benefit. The further allegation was that those two motor vehicles were then registered in the name of Mdluli's wife and appropriated and used by the two of them.

[10] On 3 November 2011 Mdluli wrote a letter to President Zuma, the Minister of Safety and Security and the Commissioner stating that the charges against him were the result of a conspiracy among senior police officers – including the then

Commissioner, General Bheki Cele, and the head of the Hawks, General Anwar Dramat. The letter also stated, rather inappropriately, that '[i]n the event that I come back to work, I will assist the President to succeed next year' which was an obvious reference to the forthcoming presidential elections of the ruling African National Congress in Mangaung towards the end of 2012. The allegations of a conspiracy led to the appointment by the Minister 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 acted in good faith.

[11] On 17 November 2011 Mdluli's legal representatives made representations to Mrwebi in his capacity as Special DPP and head of the SCCU, seeking the withdrawal of the fraud and corruption charges. These representations again contended that the charges against Mdluli resulted from a conspiracy against him involving the most senior members of the South African Police Service. The representations also indicated that a similar approach had been made to Advocate K M A Chauke, the DPP South Gauteng, for withdrawal of the murder and related charges. Mrwebi, in response to the representations made to him, requested a report from Smith and his immediate superior, Advocate Glynnis Breytenbach, who both responded with a motivation that the charges should not be withdrawn. Despite this motivation, Mrwebi decided to withdraw these charges and notified Mdluli's representatives of his decision to do so on or about 5 December 2011. The circumstances under which Mrwebi's decision was arrived at is central to one of the disputes in this case. I shall revert to this in due course.

[12] On 1 February 2012 Chauke decided to withdraw the murder and related charges as well. He explained that after he received the representations by Mdluli's legal representatives, he realised that there was no direct evidence implicating Mdluli in the murder charge. He therefore decided that an inquest should be held before he proceeded with that charge and that the murder charge should therefore be provisionally withdrawn pending the outcome of the inquest. To prevent

fragmented trials, so he said, he decided that the 17 charges related to the murder should also be provisionally withdrawn, pending finalisation of the inquest.

[13] I pause to record that at Chauke's request the inquest was held in terms of the Inquests Act 58 of 1959 by the magistrate of Boksburg who handed down his reasons and findings on 2 November 2012. His ultimate conclusions make somewhat peculiar reading, namely that:

'The theory of Mdluli being the one who had orchestrated the death of [the deceased] is consistent with the facts.'

And that:

'The death [of the deceased] was brought about by an act *prima facie* amounting to an offence on the part of **unknown persons**. There is **no evidence** on a balance of probabilities implicating Richard Mdluli [and his co-accused persons] in the death of the deceased.'

[14] I say peculiar, because s 16(2) of the Inquests Act required the magistrate to determine whether the death of the deceased was brought about by any act or omission amounting to an offence on the part of any person. The evidence before him clearly established a prima facie case against Mdluli. That appears to be borne out by the first conclusion. The second conclusion, which appears to contradict the first seems to be both unhelpful and superfluous. It was not for the magistrate to determine Mdluli's guilt on a murder charge, either beyond reasonable doubt or on a balance of probabilities. But if Chauke had any uncertainty about the import of the magistrate's findings he could have asked for clarification or even requested that the inquest be re-opened in terms of s 17(2) of the Inquests Act. Furthermore, it is clear that the magistrate's findings were wholly irrelevant to the 17 related charges. Nonetheless it is common cause that no further steps have since been taken by the prosecuting authorities to reinstitute any of the 18 charges.

[15] I return to the chronological sequence of events. On 29 February 2012 the Acting National Commissioner of Police at the time, General Mkhwanazi, withdrew

the disciplinary proceedings against Mdluli and on 31 March 2012 he was reinstated and resumed his office as Head of Crime Intelligence. In fact, shortly thereafter, his duties were extended to include responsibility for the unit which provides protection for members of the national executive.

[16] On 15 May 2012 FUL launched the application, the subject of the present appeal. The notice of motion contemplated proceedings in two parts. Part A sought an interim interdict, essentially compelling the Commissioner to suspend Mdluli from office pending the outcome of the review application in part B. In part B FUL sought an order reviewing and setting aside four decisions, namely:

(a) The decision made by Mrwebi on or about 5 December 2011 to withdraw the charges of fraud and corruption.

(b) The decision by Chauke on or about 2 February 2012 to withdraw the murder and related charges.

(c) The decision by the Commissioner of Police on or about 29 February 2012 to terminate the disciplinary proceedings; and

(c) The decision by the Commissioner on or about 31 March 2012 to reinstate Mdluli to his office.

[17] Apart from the orders setting aside the four impugned decisions, FUL also sought mandatory interdicts:

(a) directing the prosecution authorities to reinstate the criminal charges against Mdluli and to ensure that the prosecution of these charges are enrolled and pursued without delay; and

(b) directing the Commissioner of Police to take all steps necessary for the prosecution and finalisation of the disciplinary charges.

On 6 June 2012 the interim interdict sought in part A was granted by Makgoba J. The application for leave to appeal against that order was unsuccessful and the interim interdict is thus extant. The review application came before Murphy J who granted an order (a) setting aside the four impugned decisions as well as (b) the mandatory interdict sought together with (c), an order for costs in favour of FUL

against the respondents. His judgment has since been reported sub nom *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP).

FUL's locus standi

[18] I now turn to the appellant's contentions on appeal and I deal first with those arising from challenges by the NDPP and Mrwebi. These relied mainly on formal and procedural objections rather than the merits of the case. Included amongst these formal objections was a challenge to FUL's legal standing. However, this challenge was not pursued in argument. Suffice it therefore to say that in my view the objection to FUL's standing was unsustainable from the start. FUL's mission to promote accountability and democracy and to advance respect for the rule of law and the principle of legality in this country has been recognised by this court (see eg *Freedom Under Law v Acting Chairperson Judicial Service Commission & others* 2011 (3) SA 549 (SCA) paras 19-21). In addition, I agree with the finding by the court a quo that the matter is one of public interest and national importance (para 1 of its judgment). What I do find somewhat perturbing is the court's high praise for Dr Mamphela Ramphele and Justice Johan Kriegler who deposed to FUL's founding and replying affidavits respectively (see para 4). It needs to be emphasised that all litigants, irrespective of their status, should be treated equally by our courts. Judges must therefore be wary of creating the impression – which would undoubtedly be unfounded in this case – that they have more respect for some litigants or their representatives than for others.

Reviewability of decisions to withdraw a prosecution

[19] The next challenge by the NDPP, which was embraced by Mrwebi and Mdluli, related to the reviewability of a prosecutorial decision to discontinue a prosecution. The issue arising from this is a narrow one. This is so because it is not contended by the NDPP that decisions of this kind are not reviewable at all. On the contrary, the NDPP conceded that these decisions are subject to what has become known as a principle of legality or a rule of law review by the court. The allied issue is whether

these decisions are reviewable under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Although the answer to that question is by no means decisive of the matter. I nonetheless believe the time has come for this court to put the issue to rest. This belief is motivated by two considerations. First, because the court a quo had pronounced on the question and held that PAJA is of application (paras 131-132 of the judgment). Secondly, and more fundamentally, by the considerations that appear from the following statement by Ngcobo J in *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another* as Amici Curiae) 2006 (2) SA 311 (CC) paras 436-438:

'Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on s 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to s 33, is applicable, is, in my view, inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under s 33 and the common law . . . Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question . . . It follows that the SCA . . . erred in failing to consider whether PAJA was applicable. The question whether PAJA governs these proceedings cannot be avoided in these proceedings.'

[20] The domain of judicial review under PAJA is confined to 'administrative action' as defined in s 1 of the Act. The definition starts out from the premise that 'administrative action' is 'any decision taken, or any failure to take a decision, by . . . a natural or juristic person . . . when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has direct, external legal effect . . .'. Mrwebi and Chauke derived their power to withdraw the criminal charges against Mdluli from the provisions of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). On the face of it, their decisions sought to be impugned in this case clearly constituted 'administrative action'. But s 1(*ff*) of the definition excludes 'a decision to institute or continue a prosecution'. The question in the present context is thus – does the

exception extend to its converse as well, namely a decision not to prosecute or to discontinue a prosecution?

[21] Cora Hoexter *Administrative Law in South Africa* (2 ed, 2012) at 241-242 is of the firm view that the intention behind the exception 'was to confine review under the PAJA to decisions *not* to prosecute. There is less need to review decisions to prosecute or to continue a prosecution as types of administrative action, since such decisions will ordinarily result in a trial in a court of law'. Thus far our courts have, however, been less decisive. In *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC) para 84 Chaskalson CJ acknowledged that:

'In terms of the [PAJA] a decision to institute a prosecution is not subject to review. The Act does not, however, deal specifically with a decision not to prosecute. I am prepared to assume in favour of the applicants that different considerations apply to such decisions [as opposed to the decision to institute a prosecution] and that there may possibly be circumstances in which a decision not to prosecute could be reviewed by a Court. But even if this assumption is made in favour of the applicants, they have failed to establish that this is a case in which such a power should be exercised.'

[22] The implication is therefore that decisions not to prosecute are not necessarily excluded from the application of PAJA. Conversely, in *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) para 27 Navsa JA stated:

'While there appears to be some 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 s 1(*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 a decision to discontinue a prosecution was subject to a rule of law review. That concession in my view was rightly made.'

[23] The court a quo (in paras 131-132 of its judgment) found itself in disagreement with what it described as the *obiter dictum* of Navsa JA that a decision to discontinue prosecution is of the same genus as a decision to prosecute. 'For the reasons stated by Professor Hoexter' so it held, 'a decision of non-prosecution is of a different genus to one to institute a prosecution. It is final in effect in a way that a decision to prosecute is not'.

[24] However, unlike the court a quo I am not persuaded by the reasoning advanced by Professor Hoexter for the view that she proffers. To say that the validity of a decision to prosecute will be tested at the criminal trial which is to follow, is, in my view, fallacious. What is considered at the criminal trial is a determination on all of the evidence presented in the case of the guilt or lack thereof of the accused person, not whether the preceding decision to prosecute was valid or otherwise. The fact that an accused is acquitted self-evidently does not suggest that the decision to prosecute was unjustified. The reason advanced by the court a quo itself, namely, that a decision not to prosecute is final while a decision to prosecute is not, is in my view equally inaccurate. Speaking generally, both these decisions can be revisited through subsequent decisions by the same decision-maker, by in the one case re-instituting the prosecution, and by withdrawing the prosecution in the other.

[25] What is called for, as I see it, is to focus on the policy considerations that underlie the exclusion of a decision to institute or continue to prosecute from the ambit of PAJA and to reflect on whether or not the same considerations of policy will apply to a decision not to prosecute or to discontinue a prosecution. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 35 fn 31 Harms DP cited a line of English cases that emphasised the same policy considerations that underlie the exclusion of decisions to prosecute from the PAJA definition of administrative action. These included *Sharma v Brown-Antoine and others* [2007] 1 WLR 780 (PC) para 14 and *Marshall v The Director of Public Prosecutions (Jamaica)* [2007] UKPC 4 para 17. The first principle established by these cases, as I see it, is that in England, decisions to prosecute are not immune from judicial

review but that the courts' power to do so is sparingly exercised. The policy considerations for courts limiting their own power to interfere in this way, appear to be twofold. First, that of safeguarding the independence of the prosecuting authority by limiting the extent to which review of its decisions can be sought. Secondly, the great width of the discretion to be exercised by the prosecuting authority and the polycentric character that generally accompanies its decision-making, including considerations of public interest and policy.

[26] As I see it, the underlying considerations of policy can be no different with regard to decisions not to prosecute or to discontinue a prosecution. This view is supported by English authorities dealing with non-prosecution. So, for instance it was said in *R v Director of Public Prosecutions, Ex Parte Manning* [2001] QB 330 para 23:

'[T]he power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the [prosecutor] as head of an independent, professional prosecuting service, answerable to the [National Director of Public Prosecutions] in his role as guardian of the public interest, and to no-one else.'

And by Kennedy LJ in *R v Director of Public Prosecutions, Ex Parte C* [1995] 1 Cr App R 136 at 139G-140A:

'It has been common ground before us in the light of the authorities that this Court does have power to review a decision of the Director of Public Prosecutions not to prosecute, but the authorities also show that the power is one to be sparingly exercised.'

At 141B-C Kennedy LJ then continued to say:

'From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions . . . arrived at the decision not to prosecute . . .'

Whereupon, he proceeded to set out the grounds recognised by the English courts for interference in decisions not to prosecute. Suffice it to say these grounds are substantially similar to the ones recognised by our courts as justification for a rule of law review. The dictum from *Kaunda* does not indicate that a PAJA review might be available, but on the assumption made, the suggestion appears to be that in appropriate circumstances a rule of law review might be apposite.

[27] My conclusion from all this is that:

(a) It has been recognised by this court that the policy considerations underlying our exclusion of a decision to prosecute from a PAJA review is substantially the same as those which influenced the English courts to limit the grounds upon which they would review decisions of this kind.

(b) The English courts were persuaded by the very same policy considerations to impose identical limitations on the review of decisions not to prosecute or not to proceed with prosecution.

(c) In the present context I can find no reason of policy, principle or logic to distinguish between decisions of these two kinds.

(d) Against this background I agree with the *obiter dictum* by Navsa JA in *DA & others v Acting NDPP* that decisions to prosecute and not to prosecute are of the same genus and that, although on a purely textual interpretation the exclusion in s 1(*ff*) of PAJA is limited to the former, it must be understood to incorporate the latter as well.

(e) Although decisions not to prosecute are – in the same way as decisions to prosecute – subject to judicial review, it does not extend to a review on the wider basis of PAJA, but is limited to grounds of legality and rationality.

[28] The legality principle has by now become well-established in our law as an alternative pathway to judicial review where PAJA finds no application. Its underlying constitutional foundation appears, for example, from the following dictum by Ngcobo J in *Affordable Medicines Trust & others v Minister of Health & others 2*006 (3) SA 247 (CC) para 49:

'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'

[29] As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the court some degree of

control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. Currently it provides a more limited basis of review than PAJA. Why I say currently is because it is accepted that '[l]egality is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner' (see *Minister of Health NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC) para 614; Cora Hoexter op cit at 124 and the cases there cited). But for present purposes it can be accepted with confidence that it includes review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute (see *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) paras 28-30).

Impugned decisions to withdraw criminal charges only provisional and not final

[30] This brings me to the further technical challenge by the NDPP, namely that the impugned decisions by Mrwebi and Chauke were not final, but only provisional. The contentions underlying this challenge will be better understood against the statutory substructure of these decisions which is to be found in s 179 of the Constitution, read with the relevant provisions of the NPA Act. Under the rubric 'prosecuting authority' s 179 of the Constitution provides in relevant part:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(*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.

(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.

(3) . . .

(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*)

(*b*)

(*c*)

(*d*) 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.'

[31] The national legislation contemplated in s 179 of the Constitution was promulgated in the form of the NPA Act. The power to institute and conduct criminal proceedings is given legislative expression in s 20 which 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*.

(2) . . .

(3) Subject to the provisions of the *Constitution* and *this Act*, any *Director* [defined in s 1 as a DPP] shall, subject to the control and directions of the *National Director*, exercise the powers referred to in subsection (1) in respect of –

(*a*) the area of jurisdiction for which he or she has been appointed; and

(*b*) . . ..'

[32] Mrwebi and Chauke, who were both DPPs, were therefore authorised by s 20(3), read with s 20(1)(*c*), to withdraw the criminal charges against Mdluli. But because Mrwebi was appointed as a special DPP his powers were limited by the provisions of s 24(3) which provides:

'A Special Director shall exercise the powers . . . assigned to him or her by the President, subject to the directions of the National Director: Provided that if such powers . . . include any of the powers . . . referred to in section 20(1), they shall be exercised . . . in consultation with the Director of the area of jurisdiction concerned.'

[33] According to the NDPP's argument, the withdrawal of the criminal charges in this case must also be understood against the background of s 6 of the Criminal Procedure Act 51 of 1977 (the CP Act). This section draws a distinction between the withdrawal of criminal charges, before an accused person has pleaded – in s 6(*a*) – and the stopping of a prosecution after the accused person has pleaded, as contemplated in s 6(*b*). The latter section provides that where the prosecution is stopped the court is obliged to acquit the accused person, while a withdrawal in terms of s 6(*a*) does not have that consequence. A charge withdrawn under s 6(*a*) can therefore be reinstituted at any time.

[34] The withdrawal of charges by Mrwebi and Chauke, so the NDPP's argument went, was covered by s 6(*a*) and not by s 6(*b*). In consequence, so the argument proceeded, these decisions were only provisional and therefore not

subject to review. Although I am in agreement with the premise of the argument, that both decisions to withdraw were taken in terms of s 6(*a*), my difficulty with its further progression is twofold. First, I can see no reason why, at common law, a decision would in principle be immune from judicial review just because it can be labelled 'provisional' however illegal, irrational and prejudicial it may be. My second difficulty is more fundamental. I do not believe a decision to withdraw a criminal charge in terms of s 6(*a*) can be described as 'provisional' just because it can be reinstituted. It would be the same as saying that because a charge can be withdrawn, the institution of criminal proceedings is only provisional. As I see it, the withdrawal of a charge in terms of s 6(*a*) is final. The prosecution can only be recommenced by a different, original decision to reinstitute the proceedings. Unless and until it is revived in this way, the charge remains withdrawn.

[35] The NDPP's second argument as to why the impugned decisions were not final rests on the provisions of s 179(5)(*d*) of the Constitution. Since in terms of this section the decisions were still subject to review by the NDPP, so the argument went, they were only provisional. I have already expressed my reservations about the proposition that because a decision is provisional it is not subject to challenge, based on legality or rationality. What the NDPP's argument based on s 175(5)(*d*) mutated to was the contention that, because the impugned decisions were subject to an internal review, FUL should have been non-suited for failure to exhaust the internal remedies available to it. That, of course, is a completely different case.

Exhaustion of internal remedy

[36] The NDPP's final argument as to why review proceedings were not competent, was that FUL had failed to exhaust an internal remedy available to it. What this contention relied upon was the provision in s 179(5)*(d),* which enables the NDPP to review a decision not to prosecute at the behest of any person or party who the NDPP considers to be relevant. Since I have found a review under PAJA unavailable, s 7(2) of the Act, which compels exhaustion of internal remedy

as a pre-condition to review, save in exceptional circumstances, does not apply. At common law the duty to exhaust internal remedies is far less stringent. As Hoexter (op cit 539) explains, the common law position is that a court will condone a failure to pursue an available internal remedy, for instance where that remedy is regarded as illusory or inadequate.

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

Challenge to decision to withdraw the fraud and corruption charges

[38] FUL's first challenge of this decision rests on the contention that Mrwebi had failed to comply with the provisions of s 24(3) of the NPA Act in that he did not take the decision to withdraw the charges 'in consultation' with the DPP 'of the area of jurisdiction concerned' as required by the section. As to the legal principles involved, it has by now become well established that when a statutory provision requires a decision-maker to act 'in consultation with' another functionary, it means that there must be concurrence between the two. This is to be distinguished from the requirement of 'after consultation with' which demands no more than that the decision must be taken after consultation with and giving serious consideration to the views of the other functionary, which may be at variance with those of the decision-maker.

[39] An understanding of the factual basis for the challenge calls for elaboration of the facts given thus far. The DPP of the area of jurisdiction concerned, as envisaged by s 24(3), was Advocate Mzinyathi, the DPP of North Gauteng. Mrwebi's version in his answering affidavit is that he briefly discussed the matter with Mzinyathi on 5 December 2011, after which he prepared an internal memorandum addressed to Mzinyathi, setting out the reasons why, in his view, the fraud and corruption charges should be withdrawn. Although Mzinyathi did not agree with him at that stage, there was a subsequent meeting between the two of them, together with Advocate Breytenbach, on 9 December 2011. At that meeting, so Mrwebi said, the other two were initially opposed to the withdrawal of the charges, but that all three of them eventually agreed that there were serious defects in the State's case and that the charges should be provisionally withdrawn. However, the problems with this version are manifold. Amongst others, it is in direct conflict with the contents of Mrwebi's internal memorandum of 5 December 2011 from which it is patently clear that by that stage he had already taken the final decision to withdraw the charges. The last two sentences of the memorandum bear that out. They read:

'The prosecutor is accordingly instructed to withdraw the charges against both Lt-General Mdluli and Colonel Barnard immediately.'

And:

'The lawyers of Lt-General Mdluli will be advised accordingly.'

[40] An even more serious problem with the version presented in Mrwebi's answering affidavit, is that it was in direct conflict with the evidence that he and Mzinyathi gave under cross-examination at a disciplinary hearing of Breytenbach. The transcript of the hearing was annexed to the supplementary founding affidavit on behalf of FUL. The conflict is set out in extensive detail in the judgment of the court a quo (paras 47-48). I find a repetition of that recordal unnecessary. What appears in sum is that Mrwebi conceded in cross-examination that he took a final decision to withdraw the charges before he wrote the memorandum of 5

December 2011; that at that stage he did not know what Mzinyathi's views were; and that he only realised on 8 December 2011 that Mzinyathi did not share his views, at which stage he had already informed Mdluli's attorneys that the charges would be withdrawn. According to Mzinyathi's evidence at the same hearing, Mrwebi took the position at their meeting of 9 December 2011 that the charges had been finally withdrawn and that he was *functus officio,* because he had already informed Mdluli's attorneys of his decision.

[41] In these circumstances I agree with the court a quo's conclusion (para 55) that Mrwebi's averment in his answering affidavit, to the effect that he consulted and reached agreement with Mzinyathi before he took the impugned decision, is untenable and incredible to the extent that it falls to be rejected out of hand. The only inference is thus that Mrwebi's decision was not in accordance with the dictates of the empowering statute on which it was based. For that reason alone the decision cannot stand.

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

The decision to withdraw the murder and related charges

[43] This brings me to the decision by Chauke to withdraw the murder and related charges. It will be remembered that on Chauke's version, he withdrew the murder charge pending the outcome of the inquest that he had requested and that

he withdrew the 17 other related charges to avoid a fragmented trial. The contention by FUL was in essence that this decision was irrational. However, as I see it, the contention has not been substantiated in argument. On the face of it the decision that the findings at an inquest could perhaps enable him to take a more informed view of the prospects of the State's case with regard to the murder charge, was not irrational. It is true that the outcome of the inquest could have no impact on the 17 related charges. But Chauke never thought that it would. As I understand his reasoning, he always intended to reinstate at least some of the charges after the inquest, with or without the murder charge. What he tried to avoid, so he said, was a fragmentation of trials. That line of reasoning I do not find irrational either, particularly since the evidence supporting the related charges would also impact on the murder charge. It is true that he could have asked for a postponement of the 17 related charges pending the inquest, but we know that a postponement is not for the asking. It could be successfully opposed by Mdluli, in which event the fragmentation, which Chauke sought to avoid for understandable reasons, may have become a reality.

[44] FUL's real argument, which found favour with the court a quo (para 183) is that Chauke's failure to proceed with the murder and related charges after the findings of the inquest became available, was irrational. But that decision – or really his failure to apply his mind afresh to the matter after the conclusion of the inquest – was not the subject of the review application. It will be remembered that the review application started in May 2012 while the results of the inquest only became available in November of that year. Stated somewhat more concisely: I do not believe the earlier decision to withdraw the charges – which is the impugned decision – can be set aside on the basis that a subsequent decision, taken in different circumstances, not to reinstate all or some of those charges, was not justified. To that extent the appeal must therefore succeed.

[45] However, having said that, senior counsel for the NDPP conceded, rightly and fairly in my view, that there is no answer to the proposition that at least some

of the murder and related charges are bound to be reinstated. In the light of this concession he undertook on behalf of his client – which undertaking was subsequently elaborated upon in writing:

(a) That the NDPP will take a decision as to which of the 18 charges are to be reinstated and will inform FUL of that decision within a period of 2 months from this order.

(b) If the NDPP decides not to institute all 18 charges, he will provide FUL with his reasons for that decision during the same period.

I can see no reason why this undertaking should not be incorporated in this court's order and I propose to do so.

Jurisdiction of the high court to review the decision to terminate disciplinary proceedings

[46] This brings me to the decisions by the Commissioner of Police, to terminate the disciplinary proceedings against Mdluli and then to reinstate him to his position on 27 March 2012. Not unlike the NDPP, the Commissioner's response to FUL's challenge to these decisions focused mainly on technical objections, rather than to defend the decisions on their merits. The first technical objection was that the high court lacked jurisdiction to review the impugned decisions by virtue of s 157 of the Labour Relations Act 66 of 1995. The court a quo found this argument fundamentally misconceived (para 227) and I agree with this finding. The argument rests on the premise that this is a labour dispute, which it is not. It is not a dispute solely between employer and employee. The mere fact that the remedy sought may impact on the relationship between Mdluli and his employer does not make it a labour dispute. It remains an application for administrative law review in the public interest, which is patently subject to the jurisdiction of the high court.

Mootness

[47] The Commissioner's next technical objection was that the impugned decision had become moot. The factual basis advanced for the contention was that, shortly after the application had been launched, disciplinary charges were again initiated against Mdluli – which charges are currently pending – and that he was again suspended from office, which suspension is still in force. It is common cause, however, that the new disciplinary charges do not pertain to the murder and 17 related charges. Nor do they correspond with the fraud and corruption charges that were withdrawn by Mrwebi. In this light I can find no merit in the mootness argument. The fact that disciplinary proceedings had been instituted on charges A and B obviously does not render moot the challenge of a decision to terminate disciplinary proceedings on charges Y and Z.

Review of a decision to terminate disciplinary proceeding

[48] The Commissioner's powers to institute disciplinary charges and to suspend members of the police derive from regulations published under the South African Police Services Act 68 of 1995. These powers can be traced back to s 207(2) of the Constitution which requires the Commissioner to manage and exercise control over the SAPS. These powers are clearly public powers. That is why they were promulgated by law and not merely encapsulated in a contract between the parties. The Commissioner took the decision to institute disciplinary proceedings against Mdluli and to suspend him pursuant to these powers. When he decided to reverse those decisions, he did so in the exercise of the same public powers. It follows that the latter decisions constituted administrative action, reviewable under the provisions of PAJA.

[49] As the factual basis for the challenge of these decisions, FUL relied in its founding affidavit on a statement by the then Acting Commissioner, Lieutenant-General Mkhwanazi, in Parliament that he was instructed by authorities 'beyond' him to withdraw disciplinary charges and reinstate Mdluli in his office. FUL added that in doing so Mkhwanazi had failed to make an independent decision which

rendered his actions reviewable. Though Mkhwanazi filed an answering affidavit in the interim interdict proceedings in part A of the notice of motion, he did not deal with these allegations. In the answering affidavit filed in part B, the present Commissioner, General Phiyega, said the following in response to these allegations by FUL.

'General Mkhwanazi was quoted out of context. As I understood and this is what he later clarified was that his response was in relation to the issue of the withdrawal of charges, which falls within the domain of the NPA, which invariably in his view affected the purpose of the continued suspension and disciplinary charges then. General Mkhwanazi never received any instructions from above. His confirmatory affidavit will be obtained in this regard. Should time permit, I will ensure that the copy of the Hansard being the minutes or the transcription of the parliamentary portfolio committee meetings is obtained and filed as a copy which will clarify the issue.'

[50] But despite these undertakings, no confirmatory affidavit was filed by Mkhwanazi nor was a copy of Hansard provided. In argument before the court a quo, the Commissioner's representatives again undertook to file an affidavit by Mkhwanazi, but this undertaking was later withdrawn (para 213 of the judgment a quo). In the premises the court a quo held (para 214) that the Commissioner's explanation was untenable and stood to be rejected. I do not believe this finding can be faulted. Moreover, after all is said and done, neither Mkhwanazi nor Phiyega gave any reasons for the impugned decision. The inevitable conclusion is thus that the decisions were either dictated to Mkhwanazi or were taken for no reason at all. In either event they fall to be set aside under s 6 of PAJA. This means that the appeal against the court a quo's order to that effect cannot be sustained.

Appropriate remedy

[51] What remains are issues concerning the appropriate remedy. As we know, the court a quo did not limit itself to the setting aside of the impugned decisions. In

addition, it (a) ordered the NDPP to reinstate all the charges against Mdluli and to ensure that the prosecution of these charges are enrolled and pursued without delay; and (b) directed the Commissioner of Police to reinstate the disciplinary proceedings and to take all steps necessary for the prosecution and finalisation of these proceedings (para 241(*e*) and (*f*)). Both the NDPP and the Commissioner contended that these mandatory interdicts were inappropriate transgressions of the separation of powers doctrine. I agree with these contentions. That doctrine precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner of Police is the authority mandated to manage and control the SAPS. As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. Suffice it to say that in my view this is not one of those rare occasions and I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way. The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings have the effect that the charges and the proceedings are automatically reinstated and it is for the executive authorities to deal with them. The court below went too far.

Costs

[52] As to the court a quo's costs order against the appellants in favour of FUL, I can see no reason to interfere. Although I propose to set aside some of the orders granted by the court a quo, it does not detract from FUL's substantial success in that court. On appeal the position is different. Here it is the appellants who achieved substantial success. Ordinarily this would render FUL liable for the appellants' costs on appeal. But it has by now become an established principle that in constitutional litigation unsuccessful litigants against the Government are generally not mulcted in costs, lest they are dissuaded from enforcing their constitutional rights. (See eg *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC).) Although the rule is not immutable, I find no reason

to deviate from the general approach in this case. Hence I shall make no order as to the costs of appeal.

[53] The order I propose should therefore reflect the intent:

(a) To confirm the setting aside of Mrwebi's decision to withdraw the fraud and corruption charges in para (*a*) as well as the setting aside of the Commissioner's decision to terminate the disciplinary proceedings against Mdluli in para (*c*) as well as the setting aside of Mdluli's reinstatement by the Commissioner on 28 March 2012 in para (*d*) of the order of the court a quo.

(b) To reverse the setting aside of Chauke's decision to withdraw the murder and related charges in para (*b*) of that order.

(c) To set aside the mandatory interdicts in paras (*e*) and (*f*) of the order;

(d) To confirm the costs order in paras (*g*) and (*h*) of the order; and

(e) To give effect to the undertaking on behalf of the NDPP with regard to the reinstitution of the murder and related charges.

[54] In the premises it is ordered that:

1 The appeal succeeds only to the extent that paragraphs (b), (e) and (f) of the order of the court a quo are set aside

2 The orders in paragraphs (*a*), (*c*), (*d*), (*g*) and (*h*) of the order by the court a quo are confirmed but re-numbered in accordance with the changes necessitated by the setting aside of the orders in paragraph 1.

3 It is recorded that the following undertaking has been furnished on behalf of the first respondent:

(a) To decide which of the criminal charges of murder and related crimes that were withdrawn on 2 February 2012, are to be reinstituted and to make his decision known to the respondent within 2 months of this order.

(b) To provide reasons to the respondent within the same period as to why he decided not to reinstitute some – if any – of those charges.

4. There shall be no order as to costs in respect of the appeal.

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F D J BRAND
JUDGE OF APPEAL

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APPEARANCES:

For the 1st and 2nd Appellants:	L Hodes SC (with him N Manaka, E Fasser) Instructed by: State Attorney, Pretoria c/o State Attorney, Bloemfontein
For the 3rd Appellants:	W R Mokhali SC (with him M Zulu) Instructed by: State Attorney, Pretoria c/o State Attorney, Bloemfontein
For the 4th Appellant:	I Motloung Instructed by: Maluleke Seriti Makume Matlala Inc, Germiston c/o Peyper Attorneys, Bloemfontein
For the Respondent:	S Yacoob (with him I Goodman, N van der Walt) Instructed by: Cliffe Dekker Hofmeyr, Johannesburg Matsepes, Bloemfontein

REPORTABLE

IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 4665/2010

In the matter between:

JOHAN WESSEL BOOYSEN — Applicant

and

THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

THE PUBLIC PROSECUTOR — Second Respondent

COLONEL PHARASA DANIEL NCUBE — Third Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — Fourth Respondent

THE DEPUTY NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — Fifth Respondent

THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — Sixth Respondent

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JUDGMENT

GORVEN J

[1] On 18 August 2012 the first respondent issued two written authorisations to charge the applicant (Mr Booysen) with contraventions of s 2(1)(e) and (f) respectively of the Prevention of Organised Crime Act (POCA).[1] In terms of s 2(4) of POCA, a person may only be charged with committing any of the offences created by s 2(1) if a prosecution is authorised in writing by the National Director of Public Prosecutions. Pursuant to the authorisations, Mr Booysen, a Major General in the police at the time, was arrested on 22 August 2012 and has been served with an indictment which confronts him with seven counts, the first two of which relate to the alleged contraventions of POCA. Although the first respondent was, at the time, the Acting National Director of Public Prosecutions, she fulfilled the functions of the National Director and I will refer to her in this judgment as the NDPP.

[2] Mr Booysen seeks to review and set aside the decision to issue the authorisations in question (the first impugned decision) and the decision to prosecute on the counts confronting him (the second impugned decision). Mr Booysen states pertinently that he does not rely on the provisions of the Promotion of Administrative Justice Act (PAJA)[2] but does not enter the debate as to whether the first impugned decision might be excluded from the operation of PAJA.[3] He bases the application directly on the Constitution of the Republic of South Africa, 1996 (the Constitution) and, in particular, relies on the principle of legality. Section 172(1) of the Constitution reads as follows:

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[1] Act 121 of 1998.
[2] Act 3 of 2000.
[3] Section 1(b)(ff) of PAJA provides that administrative action does not include 'a decision to institute or continue a prosecution'.

'(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable....'

The NDPP and the second respondent have opposed the application. The remaining respondents have not entered the lists.

[3] The relief sought by Mr Booysen is in the following terms:

'(a) Declaring the decisions taken by the first respondent purportedly in terms of the provisions of s 2(4), read with s 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998 ("POCA"), on 17 August 2012 to authorise the applicant's prosecution on charges of contravening sections 2(1)(e) and 2(1)(f) of POCA inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid;

(b) Reviewing and setting aside the aforesaid decisions taken by the first respondent on 17 August 2012;

(c) Declaring the decision(s) taken by the first respondent, alternatively second respondent, alternatively first and second respondents, to prosecute the applicant on the charges contained in counts 1and 2 and 8 to 12 of the indictment served upon the applicant on 29 October 2012 ("the indictment") inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid;

(d) Setting aside the first respondent's, alternatively second respondent's, alternatively first and second respondents', decision(s) to prosecute the applicant on the charges contained in counts 1 and 2 and 8 to 12 of the indictment;

(e) Interdicting the first respondent and her successors from authorising the prosecution of the applicant on any charge referred to in s 2(1) of POCA unless and until facts under oath implicating the applicant in the commission of such offences and justifying such prosecution are placed before the first respondent or her successors by an official or officials whose duty it is to place such facts before the first respondent.

(f) Ordering the first respondent and any other respondent who opposes this application to pay the applicant's costs of suit, which costs are to include the costs consequent upon the employment of two counsel.'

Prayers (a) & (c) are sought pursuant to s 172(1)(a) of the Constitution and prayers (b) and (d) pursuant to s 172(1)(b). Mr Booysen submitted in argument that the interdict sought in prayer (e) should be granted within the discretion afforded by the provisions of s 172(1)(b). I will return to this submission later.

[4] Mr Booysen's heads of argument submit, in summary, that:

(a) The impugned decisions are arbitrary and irrational and that such irrationality offends the principle of legality and the rule of law; and

(b) His right to dignity is impaired merely by having to face a prosecution where there are no facts to support a rational decision to authorise his prosecution and to indict him in the first place.

It is clear that a 'rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen … are rationally connected to the ends sought to be achieved.'[4] Mr Booysen therefore need not show an impairment of his rights, such as the right to dignity, in order to succeed on the first ground. The infringement of his right to dignity was not pressed in argument and I do not intend to say anything more about it.

[5] The two counts under POCA allege that Mr Booysen participated in the conduct of an enterprise through a pattern of racketeering activity[5] and

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[4] *Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2014] ZACC 2 (20 February 2014) para 7.

[5] Section 2(1)(e).

managed the operations of such an enterprise.[6] This is alleged to have been done whilst he was in charge of a specialised unit based at the Cato Manor Police Station. The other five counts allege criminal activity conducted with certain members of the South African Police Service who were under his command comprising murder, housebreaking with intent to commit murder, assault, defeating or obstructing the course of justice and unlawful possession of firearms and ammunition. Twenty-nine others were arrested although two of these have since died. There are a total of 116 counts which confront one or more of those presently accused. The trial has not yet commenced.

[6] A point *in limine* raised by the respondents is that, since the impugned decisions were taken in Pretoria and the respondents reside there, this court does not have jurisdiction to entertain the application. Mr Booysen submits that because he has been charged in this division, this court does have jurisdiction. During argument the respondents conceded that this division has jurisdiction, on the basis set out in *Estate Agents Board v Lek*.[7] In my view the concession was appropriate. It was submitted, however, that it is the trial court which should determine an application such as this and that the application is accordingly premature and has been brought in the wrong forum.

[7] The Constitutional Court has expressed itself against pre-trial applications. In an application alleging that evidence had been obtained in a manner which violated a right in the Bill of Rights of the Constitution, Langa CJ said the following:

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[6] Section 2(1)(f).
[7] 1979 (3) SA 1048 (A).

'I nevertheless do agree with the prosecution that this Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to the investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it 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 the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and considered together the pertinent interests of all concerned. If that approach is generally followed the State would be sufficiently constrained from acting unlawfully by the application of s 35(5) and by the possibility of civil and criminal liability.'[8]

[8] The respondents submit that the trial court would be best suited to deal with the authorisations since the issue whether the NDPP had information before her justifying rational decisions to authorise Mr Booysen's prosecution on charges of racketeering 'can only be adjudicated upon' in a trial context. In *S v Chao & others*[9] it was held that a challenge to such a decision making process should be brought by way of a substantive application. In *S v de Vries & others*[10] an attack was launched on authorisations under s 2(4) of POCA during the trial, after the accused had pleaded and evidence had been led. The court held that a special entry would have to be made and that the time to launch any attack on the authorisations was prior to the accused pleading. The court could then assess the matter without, in effect, being asked to review its own proceedings.

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[8] *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma & another v* National *Director of Public Prosecutions & others* 2009 (1) SA 1 (CC) para 65.
[9] 2009 (1) SACR 479 (C) para 57.
[10] 2008 (4) SA 441 (C).

[9] I am in respectful agreement that a proliferation of applications brought prior to a criminal trial must be discouraged. If an accused person has properly been brought before a trial court, that court should generally deal with applications which bear on the outcome of the trial such as admissibility of evidence, the validity of search warrants and the like. However, this matter is clearly distinguishable from a situation where the admissibility of evidence is challenged, as took place in *Thint*. I am in respectful agreement with the reasoning in *Chao* and *De Vries* which addresses the nature of a challenge such as that dealt with in this matter. The issue raised in this matter can and should be dealt with prior to the commencement of the trial since the question is whether Mr Booysen can be charged with the two POCA counts. For this to be competent, the validity of the issuing of the authorisations must be determined. If they are not valid, they may be reviewed and set aside, in which case, an application must make use of Rule 53 as has been done. In addition, because this application relates to only one of a number of accused persons, it can most conveniently be dealt with in a separate application which does not affect the conduct of the trial. I am of the view that in this narrow instance, this court is the appropriate forum and that the appropriate procedure has been adopted. The point *in limine* must therefore fail.

[10] I should mention that there is only evidence as to the date on which, and the person by whom, the first impugned decision was made. None of the parties dealt in evidence with these issues in relation to the second impugned decision. It appears to be accepted, however, that the fate of the second impugned decision must follow that of the first one. I shall therefore deal only with the first impugned decision in analysing the facts. The factual matrix on which the application must be determined will be analysed in due

course. It will be useful to first set out the legal framework governing an application of this nature.

[11] The position of National Director of Public Prosecutions is established by s 179 of the Constitution in the following terms:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive....

(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.'

[12] The definition of 'administrative action' in PAJA specifically excludes a decision to prosecute or continue a prosecution. It is thus not reviewable under PAJA. Without this exclusion, such a decision would clearly amount to administrative action since the definition includes a decision by an organ of state when exercising a power in terms of the Constitution or exercising a public power or performing a public function in terms of any legislation.[11] The impugned decisions are also not policy matters but involve the implementation of legislation.[12]

[13] In *National Director of Public Prosecutions v Zuma*, Harms DP held that a decision to prosecute 'is not susceptible to review'.[13] Despite this unequivocal wording, it is clear that the dictum was limited to a review under PAJA because that was what Harms DP was dealing with in that paragraph

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[11] Section 1(a) of PAJA.
[12] This distinction was drawn in the pre-PAJA era in *President of the Republic of South Africa and others v South African Rugby Football Union & others* 2000(1) SA 1 (CC) para 143.
[13] 2009 (2) SA 277 (SCA) para 35.

and because he went on to hold that the principle of legality nevertheless applies to such a decision.[14] This is clearly correct. It has been said that the 'Constitution constructs and restrains the exercise of public power in our democracy'.[15] The relationship between the common-law grounds of review and the Constitution was considered in *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others*[16] on the basis that the control of public power is always a constitutional matter. In summing up, Chaskalson P said:

'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'[17]

After all, one of the foundational values of the Constitution is the supremacy of the Constitution and the rule of law.[18] These concepts seem to me to have similar, if not identical, content.

[14] The principle of legality is an aspect of the rule of law.[19] In *Fedsure* it was said that the principle of legality expresses the fundamental idea that 'the exercise of public power is only legitimate where lawful'.[20] It is clear that the NDPP exercised a public power in arriving at the impugned decisions. The impugned decisions are therefore subject to the scrutiny of the court based on

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[14] Ibid, para 36.
[15] Per O'Regan J in *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) para 85.
[16] 2000 (2) SA 674 (CC) paras 33-45. It is of interest to note that the common law was invoked to successfully review and set aside a decision to prosecute. See *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order & others* 1994 (1) SA 387 (C) at 394C-H where the court applied the grounds of review set out in *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642. These grounds of review were held to be 'consistent with the foundational principle of the rule of law enshrined in our Constitution' in *Pharmaceutical Manufacturers*, para 83. See also *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) para 30.
[17] Para 44. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 22.
[18] Section 1(c) of the Constitution.
[19] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 56.
[20] Loc cit.

the principle of legality. This begs the question as to the content of the principle of legality in the context of the impugned decisions. The detailed content of the principle of legality must be worked out from the Constitution as a whole. This is an ongoing, incremental process which has been addressed by the Constitutional Court in a series of cases involving non-administrative action. Sachs J, in a minority judgment in *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others*,[21] described the principle of legality as 'an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner'.[22]

[15] In turn, the principle of legality requires that the exercise of public power 'must be rationally related to the purpose for which the power was given.'[23] This is the rationality test. It has been held that rationality is a minimum requirement applicable to the exercise of all public power.[24] 'Decisions must be rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement'.[25] A rational connection means that 'objectively viewed, a link is required between the means adopted by the [person exercising the power] and the end sought to be achieved'.[26] The test is therefore twofold, 'Firstly, the [decision maker] must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the

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[21] 2006 (2) SA 311 (CC).
[22] Para 614. The last phrase echoes that used by O'Regan J in *Rail Commuters Action Group* para 85 as to the approach to be adopted by courts in determining the scope of public power and the duties attached to it.
[23] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 75.
[24] *Pharmaceutical Manufacturers* para 90.
[25] Loc cit.
[26] Per Van der Westhuizen J in *Merafong Demarcation Forum & others v President of the Republic of South Africa & others* 2008 (5) SA 171 (CC) para 62.

power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.'[27]

[16] Professor Hoexter comments that the use of the principle of legality may well give rise to 'a complete parallel universe of administrative law' alongside PAJA.[28] A timely note of caution has been sounded in a recent article regarding the need for courts to respect the separation of powers and to be conscious of not intruding into the territory of either the executive or the legislature.[29] The learned author argues that the principle of legality, and in particular its requirement of rationality has brought about a 'subversion of the Promotion of Administrative Justice Act ... and its underlying scheme as laid down in s 33 of the Constitution through trending "parallelism"'.[30] In addition, she argues, 'the courts may be perceived to be expanding their supervisory review jurisdiction in a manner that amounts to an affront' to the doctrine of the separation of powers.[31] Whether the latter statement is correct or not, it is important to recognise that 'the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'[32] In other words, the courts are themselves constrained to act within the bounds of the powers accorded to them by the Constitution.[33] I prefer to think of it as deference or respect directed, not at the legislature or executive, but at the Constitution and the rule of law. Along with the other

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[27] Per Moseneke DCJ in *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 81.
[28] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 124.
[29] Lauren Kohn *The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?* (2013) 130 *SALJ* 810.
[30] Op cit at 812.
[31] Loc cit.
[32] Per O'Regan J in *Bato Star* para 46.
[33] The constitutional 'job description' of courts has been said to be 'primarily twofold: it requires the courts to uphold zealously the tenets of our Bill of Rights, and it demands that every exercise of public power be subjected to constitutional control'. Per Kohn, op cit at 821 citing Kate O'Regan 'Helen Suzman Memorial Lecture. A forum for reason: Reflections on the role and work of the Constitutional Court.' (2012) 28 *SAJHR* 116 at 126.

tests developed in the jurisprudence of the Constitutional Court, it seems to me that this understanding provides a valuable touchstone for when courts are requested to exercise their judicial review function.

[17] As Professor Hoexter points out,[34] the Constitutional Court has applied the principle of legality in an increasing range of contexts. First, in *Fedsure*, where the municipality was held obliged to exercise its legislative function within the powers lawfully conferred on it.[35] Secondly, in *President of the Republic of South Africa v South African Rugby Football Union*,[36] where it held that 'the [holder of public power] must act in good faith and must not misconstrue [his or her] powers'.[37] Thirdly, in *Pharmaceutical Manufacturers*, where it held 'that the exercise of public power…should not be arbitrary' or irrational.[38] Fourthly, and most extensively, in *Albutt v Centre for the Study of Violence and Reconciliation & others*,[39] where it treated procedural fairness as a requirement of rationality.

[18] In the present matter, as I indicated earlier, Mr Booysen's contention is that the NDPP acted arbitrarily and irrationally and accordingly offended the principle of legality. It is accordingly the need for rationality, arising from the third example referred to in the preceding paragraph, on which Mr Booysen primarily relies.

[19] As regards the first impugned decision, the legislature introduced two formal requirements. First, the decision must be taken by the National Director of Public Prosecutions. For the purpose of s 2(4) of POCA this is

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[34] Op cit at 122-3.
[35] *Fedsure* paras 56 and 58.
[36] Note 12 supra.
[37] Para 148.
[38] *Pharmaceutical Manufacturers* paras 85 & 86.
[39] 2010 (3) SA 293 (CC).

defined to include a Director of Public Prosecutions and a Special Director of Public Prosecutions referred to in s 1 of the National Prosecuting Authority Act.[40] In that Act, a definition is given of the word 'Director' as being a Director of Public Prosecutions appointed under s 13(1). This section refers to the two named officials. It is clear that the National Director, a Director and Special Director are high-ranking officials within the National Prosecuting Authority. Accordingly, the purpose for which the power in s 2(4) of POCA was conferred is to ensure that the decision making process is limited to a few high ranking officials within the National Prosecuting Authority. It seeks to exclude other persons who would be entitled to make such a decision in respect of other offences. The object is clear. The decision should be made by a person of higher position, presumably due to their qualifications and experience.

[20] In the second place, it requires written authorisation as opposed to any other form of authorisation to prosecute. The purpose for this provision also seems clear. It is to facilitate an ability to prove that the requisite, empowered, person has in fact made the decision in question. The existence of writing is a jurisdictional fact required to be in place before a prosecution can proceed. It would be clear from the content of the writing that, first, a decision has been made and, secondly, the person with the requisite authority made the decision.[41] In the present matter the NDPP was the person who took the decision and the authorisations were issued in writing. This was not disputed or placed in issue by Mr Booysen.

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[40] Act 32 of 1998.

[41] In *National Director of Public Prosecutions v Moodley & others* 2009 (2) SA 588 (SCA) para 12, the court held that as long as the requisite authorisations existed at the time of trial, this was sufficient. It left open the question as to the time that it can be said that the accused have been charged as that word is used in s 2(4) of POCA.

[21] The first impugned decision therefore qualifies under the *Fedsure* approach, namely that the person who made the decision was authorised to do so by the legislation in question and did so in the manner specified in the legislation. These criteria satisfy the first aspect of the twofold test referred to by Moseneke DCJ in *Masetla*.[42] The respondents argue that the principle of legality is therefore satisfied and that is an end of the matter. Mr Booysen goes further, however. He submits that, notwithstanding the compliance with the formalities of the legislation, the NDPP must, in addition, have adequately assessed 'the sufficiency and admissibility of evidence to provide reasonable prospects of a successful prosecution' as is required by policy directives issued pursuant to the provisions of s 21 of the National Prosecuting Authority Act.

[22] I do not intend to deal with the specific content of this submission of Mr Booysen. What is actually at issue is whether the second part of the twofold test, the rationality aspect, was satisfied. As we have seen in the legal framework explored earlier, the question is whether the decision of the NDPP, viewed objectively, was rational. This decision is not a polycentric one[43] or one involving the formulation or implementation of policy[44] so the rationality test is somewhat less variable.[45] In the context of the first impugned decision, my view is that the information on which the NDPP relied to arrive at her decision must be rationally connected to the decision taken.

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[42] See footnote 27 supra.
[43] Such as was the case in *Bato Star* where O'Regan J, in dealing with the meaning of reasonableness (not rationality) under s 6(2)(h) of PAJA, recognised that s 2 of PAJA only requires decision makers who have to consider a range of factors to strike a reasonable equilibrium in doing so (para 49).
[44] *Ronald Bobroff and Partners Inc* para 6.
[45] Yacoob J, in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another* 2007 (1) SA 343(CC) para 29 said, as regards variability of the test for rationality 'It must … be borne in mind that the requirement of legality may be more complex in relation to judicial decisions and executive action both of which undoubtedly represent the exercise of public power.'

[23] Mr Booysen submits that the first impugned decision lacked a rational basis since, at the time it was made, the material relied on by the NDPP could not, viewed objectively, support a decision to prosecute him for those offences. He submits that the material did not include any evidence at all of his having contravened the relevant provisions of POCA.

[24] The Notice of Motion in this matter is in the form provided for in Rule 53 and requests a copy of the record and reasons for the impugned decisions, indicating that Mr Booysen may thereafter supplement the founding papers. No record was put up or reasons given by the NDPP or the second respondent. As is evident from their affidavit, they were of the view that because PAJA excluded a decision to prosecute or to continue a prosecution from its operation, the impugned decisions were not reviewable at all. Two requests for any further documents leading to the impugned decision were made prior to the launch of the application. These requests were declined. The approach that the impugned decisions were not subject to judicial review was echoed in their heads of argument and only during argument did they concede that a review based on the principle of legality was competent.

[25] It is common cause that after the indictment was served on Mr Booysen, the NDPP was requested to make available all the documents on which the state intended to rely. In compliance with that request, 23 dockets were made available. These were the only documents furnished to him prior to the launch of this application. Of the 23 dockets, he is mentioned in only two. Of 290 statements in all of the dockets, only three statements even mention him. Two of these say he arrived on the scene of a shooting in a helicopter after the event and the third states that he was noticed on the scene of a shooting after it had taken place. In response to Mr Booysen's assertion that no statements in the dockets implicate him, the NDPP says that she

relied on four statements on oath, copies of which she says she annexed to her answering affidavit. I will return to this response below. What is clear, however, is that this in no way challenges the averment of Mr Booysen that none of the documents in the dockets implicates him in the offences in question.

[26] It is necessary to set out fairly fully what the NDPP says in her answering affidavit about what she considered in arriving at the first impugned decision. Below is what she says in response to the challenge of Mr Booysen that there was no material before her at the time she made the first impugned decision linking him to the offences with which he is now confronted:

'16. After due and careful consideration of the information under oath and the evidence as contained in the dockets (copies of which were made available to the Applicant), the Respondents were, and still are satisfied that there is *prima facie* evidence that an offence has been committed and Applicant is implicated in that:

16.1 From January 2007 to March 2010, the Applicant was a Provincial Commander in charge of KwaZulu-Natal Organised Crime. Subsequent thereto, and in 2010, he was appointed as the Provincial Head of the newly established Directorate for Priority Crime Investigations ("DPCI") in KwaZulu-Natal.

16.2 During 2006, the Serious Violent Crime ("SVC") Section based at Cato Manner was incorporated into the Durban Organised Crime Unit. The Durban Organised Crime Unit form part of the KwaZulu-Natal Provincial Organised Crime structure. The Applicant then conducted it as an enterprise as defined in the Prevention of Organised Crime Act 121 of 1998 ("POCA").

16.3 During 2010, the Organised Crime structures became part of DPCI and as indicated above, the Applicant was heading DPCI in KwaZulu-Natal.

16.4 During May 2008 to September 2011, members of the South African Police Service ("SAPS") under the Applicant's command killed members of the KwaMaphumulo Taxi Association who were in conflict with the Stanger

Taxi Association, as well as ordinary civilians and/or criminal gangs who were suspected of being involved in ATM bombings.

16.5 The information before me suggested that these members of the SAPS, would in most of the killings place a fire-arm next to the deceased person to create the impression that s/he was armed and had attacked the police by shooting at them or endangering their (police) lives.

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 the 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 awards and/or certificates for excellent performance. In this regard, I annex a copy of an example of such a monetary award claim documented as "NJ1" in which *inter alia* the Applicant is recommended for such an award resulting from the deaths of suspects.

17. Particular reference is made in this regard to the statements made by Colonel Rajendran Sanjeevi Aiyer, 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 YouTube. I annex copies of the statements as "NJ2"; "NJ3", "NJ4" and "NJ5", respectively....

21. These are only some of the instances that are referred to in the above-mentioned statements, which were considered together with the other information in the docket before the impugned decisions were made. In this affidavit, I do not intend to detail all of the information that was placed before me prior to me making the decisions in issue. I submit with respect that the aforementioned information is *prima facie* proof that the Applicant was involved in racketeering activities.'

[27] From this it can be seen that the NDPP says that she relied on 'information under oath and the evidence as contained in the dockets' and that the instances relied on by her are 'referred to in the above-mentioned statements, which were considered together with the other information in the docket (*sic*) before the impugned decisions were made.' Whilst she says that she will not detail all the information placed before her prior to her making the first impugned decision, she does not say that any of that undisclosed information was relied on by her. In argument the respondents submitted that because correspondence annexed to the founding affidavit refers to documents which contain prosecution strategy and information concerning informers or sources contained in correspondence between the DPP and NDPP, the inference should be drawn that those documents were also relied on by the NDPP. The insurmountable difficulty with this submission is that the NDPP does not say that she had regard to any such information or documents at the time the impugned decisions were made. She limits herself to the documents dealt with above. Had she said that she had considered such documents, even if the precise contents were not disclosed, this might well have affected the outcome of this application. The provisions of POCA allow for hearsay and similar fact evidence to be led in certain circumstances.[46] Once again, however, the NDPP does not indicate that any reliance was placed on any such evidence.

[28] On a factual level, therefore, she states that there were only two categories of information on which she based the first impugned decision. First, the contents of the dockets. Secondly, statements under oath which she says are annexed as NJ2, NJ3, NJ4 and NJ5.

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[46] Section 2(2) provides that 'The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.'

[29] As regards the contents of the dockets, the respondents conceded in argument that no statements contained in them implicate Mr Booysen in any of the offences with which he has been charged. The dockets could therefore not have provided a rational basis for arriving at the impugned decisions.

[30] This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets on which the NDPP says she based the impugned decisions. She says that they are all statements made under oath. She says, in addition, that they implicate Mr Booysen in one or more of the offences in question.

[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. These are annexures NJ2 and NJ4 respectively. Mr Booysen describes these as statements which concern 'office politics' and submits 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 document 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 can be attributed to the named person and even if it was a 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 regards annexure NJ5, this does not implicate Mr Booysen in any of the offences in question.

[33] In argument, the respondents did not in any way challenge the above factual submissions concerning the nature and content of the annexures in question. The factual submissions appear to me to be accurate.

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

[34] Mr Booysen was clearly within his rights to deal in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this, the invitation of Mr 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 assertion of mendacity on her part, there is a deafening silence. In such circumstances, the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the time. In addition, it is clear that annexure NJ3 is not a sworn statement. Most significantly, the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offences in question. This means that the

documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Mr Booysen for contraventions of s 2(1)(e) and (f) respectively.

[35] Although the question has been left open,[47] a decision to stop a prosecution probably falls within the ambit of PAJA. Professor Hoexter argues that the legislature distinguished between decisions to prosecute and decisions not to prosecute because when a decision is made to stop a prosecution, the public interest requires a review. In a decision to prosecute, however, the public interest would be catered for by a trial in due course.[48] I agree with these observations. An additional consideration may be that a person who is prosecuted will have an action in delict if the prosecution was a wrongful one. Professor Hoexter also argues that 'review in terms of the principle of legality…is currently more limited and less searching than review in terms of the PAJA or s 33, which is what one would expect of a general constitutional principle'.[49]

[36] It is not necessary to attempt to set a threshold for the rationality test applying to the decision to issue authorisations to prosecute under s 2(4) of POCA. Kate O'Regan says that rationality boils down to the 'rhyme or reason' test. 'As long there is some rhyme or reason to what the legislature or executive seeks to do, it will probably pass the rationality test.'[50] Even accepting the least stringent test for rationality imaginable, the decision of the NDPP does not pass muster. I can conceive of no test for rationality, however relaxed, which could be satisfied by her explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore, the rule of law and were unconstitutional.

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[47] *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* para 27.
[48] Hoexter op cit at 242.
[49] Hoexter op cit at 124.
[50] Kate O'Regan op cit p127.

[37] Having come to this conclusion, s 172(1)(a) of the Constitution obliges me to declare the impugned decisions invalid. Mr Booysen is therefore entitled to relief in terms of prayers (a) and (c) referred to in paragraph 3 of this judgment. In addition, I am given a discretion by s 172(1)(b) of the Constitution to make a decision which is just and equitable. Since I have found that there was, at the time the first impugned decision was made, no material which was considered by the NDPP on which to rationally authorise a prosecution of Mr Booysen, the just and equitable consequence of making such declarations of invalidity is to review both of the impugned decisions and set them aside. Mr Booysen is thus entitled to prayers (b) and (d).

[38] I hasten to emphasise that this outcome is based purely on the facts of the present case. It does not provide a basis for opening the floodgates to applications to review and set aside decisions to issue authorisations to prosecute under s 2(4) of POCA. If the respondents had properly understood the principle of legality, it seems to me that their responses to demands for documents or reasons might have been different. As mentioned, there is reference to documents in correspondence and the NDPP states that she will not detail all the information placed before her prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day. The 'rhyme or reason' test for rationality might have been satisfied. The level of disclosure of the NDPP for offences of this nature cannot be such as to prejudice the state in its conduct of a future trial. In my view it will therefore not require an exacting, still less an exhaustive, level of disclosure. *De Vries* found that the consideration of a request for authorisation 'forwarded to the NDPP under cover of a letter summarising the form and content of the

charge-sheet, setting out a detailed background to the charges and summarising the evidence' was sufficient. It is certainly not necessary to disclose every detail of the state's case, strategy or evidence where this is not subject to the criminal discovery process. In the light of the provisions of POCA, it is also not necessary to have before her sworn statements from witnesses on which the state intends to rely. I expressly refrain, however, from making a positive finding as to the level of disclosure necessary in meeting an application such as the present one or the detail required. This can only be assessed on a case to case basis.

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

[40] Prayer (e) in paragraph 3 of this judgment seeks to interdict the NDPP from issuing fresh authorisations in the absence of the NDPP having before her facts under oath implicating Mr Booysen. A final interdict is thus sought. The requisites for a final interdict are well established. A clear right must be shown, an injury actually committed or reasonably apprehended and an absence of an alternative remedy.[51] Mr Booysen has a clear right to a lawful decision making process. He certainly has no right at all to such a decision being taken only if affidavits connecting him to offences are in the possession of the NDPP. I have mentioned above, for example, that hearsay and similar fact evidence is admissible under certain circumstances in respect of offences under s 2(1) of POCA. A further difficulty is found in the other

[51] *Setlogelo v Setlogelo* 1914 AD 221.

two requirements for an interdict. There is no evidence that Mr Booysen has a reasonable apprehension of suffering an injury. Neither can it be said that there is no alternative remedy available to him. It is clear, therefore, that there is no basis for the interdict sought by Mr Booysen in paragraph (e), either in the form sought or in any other form. Outside of the requisites for an interdict and if indeed I have a general discretion to grant such an order (on which I make no finding), I am of the firm view that to do so in these circumstances would amount to an unjustified intrusion into executive territory and would offend the principle of the separation of powers. To make such an order would amount to fettering the discretion of the NDPP to make the decisions in question. This discretion has been given to the NDPP by the requisite legislation and there is no attack on the constitutionality of that legislative provision. No order shall therefore issue in terms of prayer (e).

[40] In the result, an order is granted in terms of paragraphs (a), (b), (c), (d) and (f) referred to in paragraph 3 of this judgment.

DATE OF HEARING:	7 February 2014
DATE OF JUDGMENT:	26 February 2014
FOR THE APPLICANT:	A Katz SC with M Collins, instructed by CARL VAN DER MERWE & ASSOCIATES INC.
FOR THE RESPONDENTS:	LM Hodes SC with N Manaka, instructed by THE STATE ATTORNEY.

Mxolisi M. Nxasana

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

Dear Honourable Minister

Please find letter attached hereto.

Regards,

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

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

Office of the National Director of Public Prosecutions

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Mr J Radebe

The Honourable Minister

Department of Justice & Constitutional Development

22 May 2014

Dear Minister Radebe

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

I refer to the above meeting and confirm the following:

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

5.1 that I did not disclose the fact that during 1985 I was charged with a case of Murder;

5.2 that in about August 2013 I was arrested for Inconsiderate Driving and Resisting Arrest;

5.3 that in about 1998 I was fined by the KwaZulu-Natal Law Society for Failure to lodge and/prosecute a client's claim timeously and expeditiously thus allowing it to prescribe; and lastly

5.4 that I stopped Mr Prince Mokotedi, the Executive Manager of the Integrity Management Unit (IMU) at my office, from investigating me basically interfering with his investigation and that I went on to disband the IMU.

5.5 That Mr Mokotedi has lodged a grievance with the Public Service Commission against me and the latter has written to you and requested that you investigate the matter.

6. I confirm that I responded to the above allegations as follows:

6.1 that whilst I did disclose the case of murder to, amongst others, the CEO, Adv Karen Van Rensburg, the Deputy CEO, Ambassador Beryil Sisulu, my members of EXCO and the Director of Domestic Intelligence SSA, Mr Ntombela it is my belief that I do not have a duty in law to disclose the case in which I was tried and acquitted by a Court of Law.

6.2 It is the same with the case of inconsiderate driving and resisting arrest, I was wrongly arrested and the Senior Public Prosecutor and the Chief Prosecutor declined to even place it on the Court roll. On the other hand I opened a case against the police who arrested me with the help of a police officer from IPID, Durban when the Charge Commander was reluctant to help me. As far as I know the case that I opened against the police is still active. In fact it turned out that the members that arrested me were not Police Officers but Police Reservists.

6.3 I disclosed the complaint where I was fined R2000.00 by the KwaZulu-Natal Law Society and it is there in my vetting documents.

6.4 The allegations leveled against me by Mr Mokotedi are devoid of truth as I have never stopped him from investigating me and neither did I disband the IMU. The members of NPA EXCO and the IMU staff can attest to that.

7. I did point out that I know the people who are behind all this smear campaign who go about bragging and boasting that they will do everything in their power to bring me down. I also pointed out that these people make sure that they drop your name and I am told that they have a direct access to you and they communicate with you behind my back. I know they have been peddling lies about me which I mentioned to you last night.

8. I confirm that you then suggested to me that in view of the fact that I do not have a clearance certificate and in the light of all the aforementioned allegations against me I should step down which was supported by Miss

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

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

Yours faithfully

Mxolisi Nxasana

NDPP

NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998

[ASSENTED TO 24 JUNE 1998] [DATE OF COMMENCEMENT: 16 OCTOBER 1998]
(Unless otherwise indicated)

(English text signed by the President)

as amended by

Judicial Matters Second Amendment Act 122 of 1998
National Prosecuting Authority Amendment Act 61 of 2000
Judicial Matters Amendment Act 42 of 2001
Criminal Law (Sentencing) Amendment Act 38 of 2007
National Prosecuting Authority Amendment Act 56 of 2008

Regulations under this Act

DETERMINATION OF FIXED DATE REFERRED TO IN SECTION 43A(1) *(b)* OF THE ACT (Proc 46 in *GG* 32380 of 3 July 2009)

NATIONAL PROSECUTING AUTHORITY REGULATIONS (GN R1583 in *GG* 14021 of 12 June 1992)

REGULATIONS FOR CONDITIONS OF SERVICE OF SPECIAL INVESTIGATORS IN THE DIRECTORATE OF SPECIAL OPERATIONS (GN R108 in *GG* 22027 of 2 February 2001)

REGULATIONS ON THE LEGAL QUALIFICATIONS FOR PROSECUTORS, 2001 (GN R423 in *GG* 22284 of 18 May 2001)

ACT

To regulate matters incidental to the establishment by the Constitution of the Republic of South Africa, 1996, of a single national prosecuting authority; and to provide for matters connected therewith.

Preamble

WHEREAS section 179 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provides for the establishment of a single national prosecuting authority in the Republic structured in terms of an Act of Parliament; the appointment by the President of a National Director of Public Prosecutions as head of the national prosecuting authority; the appointment of Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament;

AND WHEREAS the Constitution provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority;

AND WHEREAS the Constitution provides that national legislation must ensure that the Directors of Public Prosecutions are appropriately qualified and are responsible for prosecutions in specific jurisdictions;

AND WHEREAS the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice;

AND WHEREAS the Constitution provides that 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;

AND WHEREAS the Constitution provides that the National Director of Public Prosecutions may intervene in the prosecution process when policy directives are not

being complied with, and may review a decision to prosecute or not to prosecute;

AND WHEREAS the Constitution provides that 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;

AND WHEREAS the Constitution provides that all other matters concerning the prosecuting authority must be determined by national legislation;

.....
[Preamble substituted by s. 1 of Act 61 of 2000 and amended by s. 14 of Act 56 of 2008.]

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

INDEX

[Index inserted by s. 21 of Act 61 of 2000.]

[Ss. 19A to 19C inclusive inserted by s. 8 of Act 61 of 2000 and repealed by s. 5 of Act 56 of 2008.]

[Ss. 30 and 31 substituted by s. 14 of Act 61 of 2000 and repealed by s. 9 of Act 56 of 2008.]

[S. 43A substituted by s. 13 of Act 56 of 2008.]

CHAPTER 1
INTRODUCTORY PROVISIONS (s 1)

1 Definitions

In this Act, unless the context otherwise indicates-

'Constitution' means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);

'Deputy Director' means a Deputy Director of Public Prosecutions appointed under section 15 (1);

'Deputy National Director' means a Deputy National Director of Public Prosecutions appointed under section 11 (1);

'Director' means a Director of Public Prosecutions appointed under section 13 (1);

'Directorate of Special Operations' .....
[Definition of 'Directorate of Special Operations' inserted by s. 2 *(a)* of Act 61 of 2000 and deleted by s. 1 *(a)* of Act 56 of 2008.]

'head of an Investigating Directorate' means an Investigating Director referred to in section 7 (3) *(b)* ;
[Definition of 'head of an Investigating Directorate' inserted by s. 2 *(a)* of Act 61 of 2000 and substituted by s. 1 *(b)* of Act 56 of 2008.]

'Investigating Director' -

(a) means a Director of Public Prosecutions appointed under section 13 (1) *(b)* as the head of an Investigating Directorate established in terms of section 7 (1); and

(b) in Chapter 5, includes any Director referred to in section 13 (1), designated by the National Director to conduct an investigation in terms of section 28 in response to a request in terms of section 17D (3) of the South African Police Service Act, 1995 (Act 68 of 1995), by the Head of the Directorate for Priority Crime Investigation;

[Definition of 'Investigating Director' substituted by s. 2 *(b)* of Act 61 of 2000 and by s. 1 *(c)* of Act 56 of 2008.]

'Investigating Directorate' means an Investigating Directorate established by or in terms of section 7;
[Definition of 'Investigating Directorate' substituted by s. 2 *(b)* of Act 61 of 2000.]

'investigation' in Chapter 5, means an investigation contemplated in section 28 (1);
[Definition of 'investigation' inserted by s. 2 *(c)* of Act 61 of 2000.]

'Minister' means the Cabinet member responsible for the administration of justice;

'National Director' means the National Director of Public Prosecutions appointed in terms of section 179 (1) *(a)* of the Constitution;

'Office of the National Director' means the Office of the National Director of Public Prosecutions established by section 5;

'prescribed' means prescribed by regulation made under section 40;

'prosecuting authority' means the single national prosecuting authority referred to in section 2;

'prosecutor' means a prosecutor referred to in section 16 (1);

'Public Service Act' means the Public Service Act, 1994 (Proclamation 103 of 1994);

'Republic' means the Republic of South Africa, referred to in section 1 of the *Constitution* ;

'Special Director' means a Director of Public Prosecutions appointed under section 13 (1) *(c)* ;

'special investigator' .....
[Definition of 'special investigator' inserted by s. 2 *(d)* of Act 61 of 2000 and deleted by s. 1 *(d)* of Act 56 of 2008.]

'specified offence' means any matter which in the opinion of the head of an Investigating Directorate falls within the range of matters as contemplated in section 7 (1), and any reference to the commission of a specified offence has a corresponding meaning;
[Definition of 'specified offence' inserted by s. 2 *(d)* of Act 61 of 2000 and substituted by s. 1 *(e)* of Act 56 of 2008.]

'this Act' includes the regulations.

CHAPTER 2
STRUCTURE AND COMPOSITION OF SINGLE NATIONAL PROSECUTING AUTHORITY (ss 2-7)

2 Single national prosecuting authority

There is a single national prosecuting authority established in terms of section 179 of the *Constitution* , as determined in *this Act* .

3 Structure of prosecuting authority

The structure of the single *prosecuting authority* consists of-

(a) the *Office of the National Director* ;

(b) the offices of the *prosecuting authority* at the High Courts, established by section 6 (1).

4 Composition of national prosecuting authority

The *prosecuting authority* comprises the -

(a) *National Director* ;

(b) *Deputy National Directors* ;

(c) *Directors* ;

(d) *Deputy Directors* ; and

(e) *prosecutors* .

5 Office of National Director of Public Prosecutions

(1) There is hereby established the National Office of the *prosecuting authority* , to be known as the Office of the National Director of Public Prosecutions.

(2) The *Office of the National Director* shall consist of the-

(a) *National Director* , who shall be the head of the Office and control the Office;

(b) *Deputy National Directors* ;

(c) *Investigating Directors* and *Special Directors* ;

(d) other members of the *prosecuting authority* appointed at or assigned to the Office; and

(d A) .....

[Para. *(d A)* inserted by s. 3 of Act 61 of 2000 and deleted by s. 2 of Act 56 of 2008.]

(e) members of the administrative staff of the Office.

(3) The seat of the *Office of the National Director* shall be determined by the President.

6 Offices of prosecuting authority at seats of High Courts

(1) There is hereby established an Office for the *prosecuting authority* at the seat of each High Court in the *Republic* .

(2) An Office established by this section shall consist of-

(a) the head of the Office, who shall be either a *Director* or a *Deputy Director* , and who shall control the Office;

(b) *Deputy Directors* ;

(c) *prosecutors* ;

(d) persons contemplated in section 38 (1); and

(e) the administrative staff of the Office.

(3) If a *Deputy Director* is appointed as the head of an Office established by subsection (1), he or she shall exercise his or her functions subject to the control and directions of a *Director* designated in writing by the *National Director* .

7 Investigating Directorates

(1) The President may, by proclamation in the *Gazette* , establish one or more Investigating Directorates in the *Office of the National Director* , in respect of such offences or criminal or unlawful activities as set out in the proclamation.

(2) Any proclamation issued in terms of this section-

(a) shall be issued on the recommendation of the *Minister* , the Cabinet member responsible for policing and the *National Director* ;

(b) may at any time be amended or rescinded by the President on the recommendation of the *Minister* , the Cabinet member responsible for policing and the *National Director* ; and

(c) must be submitted to Parliament before publication in the *Gazette* .

(3) The head of an Investigating Directorate, shall be an *Investigating Director* , and shall perform the powers, duties and functions of the *Investigating Directorate* concerned subject to the control and directions of the *National Director* .

(4) *(a)* The *head of an Investigating Directorate* shall be assisted in the exercise of his or her powers and the performance of his or her functions by-

(i) one or more *Deputy Directors* ;

(ii) *prosecutors* ;

(iii) officers of any Department of State seconded to the service of the *Investigating Directorate* in terms of the laws governing the public service;

(iv) persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the *Investigating Directorate* ; and

(v) any other person whose services are obtained by the *head of the Investigating Directorate* ,

and the persons referred to in subparagraphs (i) to (v) shall perform their powers, duties and functions subject to the control and direction of the head of the *Investigating Directorate* concerned.

(b) For the purposes of subparagraphs (iv) and (v) of paragraph *(a)* -

(i) any person or body requested by the *head of an Investigating Directorate* in writing to do so, shall from time to time, after consultation with the *head of an Investigating Directorate* , furnish him or her with a list of the names of persons, in the employ or under the control of that person or body, who are fit and available to assist the head of that *Investigating Directorate* as contemplated in the said subparagraph (iv) or (v), as the case may be; and

(ii) such a person or body shall, at the request of, and after consultation with, the *head of the Investigating Directorate* concerned, designate a person or persons mentioned in the list concerned so to assist the head of the *Investigating Directorate* .

[S. 7 substituted by s. 4 of Act 61 of 2000 and by s. 3 of Act 56 of 2008.]

CHAPTER 3
APPOINTMENT, REMUNERATION AND CONDITIONS OF SERVICE OF MEMBERS OF THE PROSECUTING AUTHORITY (ss 8-19)

8 Prosecuting authority to be representative

The need for the *prosecuting authority* to reflect broadly the racial and gender composition of South Africa must be considered when members of the *prosecuting authority* are appointed.

9 Qualifications for appointment as National Director, Deputy National Director or Director

(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.

[Date of commencement of s. 9: 1 August 1998.]

10 Appointment of National Director

The President must, in accordance with section 179 of the *Constitution* , appoint the National Director.

[Date of commencement of s. 10: 1 August 1998.]

11 Appointment of Deputy National Directors

(1) The President may, after consultation with the *Minister* and the National Director, appoint not more than four persons, as Deputy National Directors of Public Prosecutions.

[Sub-s. (1) substituted by s. 5 of Act 61 of 2000.]

(2) *(a)* Whenever the *National Director* is absent or unable to perform his or her functions, the *National Director* may appoint any *Deputy National Director* as acting *National Director* .

(b) Whenever the office of *National Director* is vacant, or the *National Director* is for any reason unable to make the appointment contemplated in paragraph *(a)* , the President may, after consultation with the *Minister* , appoint any *Deputy National Director* as acting *National Director* .

(3) Whenever a *Deputy National Director* is absent or unable to perform his or her functions, or an office of *Deputy National Director* is vacant, the *National Director* may, in consultation with the *Minister*, designate any other *Deputy National Director* or any *Director* to act as such *Deputy National Director* .

12 Term of office of National Director and Deputy National Directors

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

(2) A *Deputy National Director* shall vacate his or her office at the age of 65.

(3) If the *National Director* or a *Deputy National Director* attains the age of 65 years after the first day of any month, he or she shall be deemed to attain that age on the first day of the next succeeding month.

(4) If the President is of the opinion that it is in the public interest to retain a *National Director* or a *Deputy National Director* in his or her office beyond the age of 65 years, and-

(a) the *National Director* or *Deputy National Director* wishes to continue to serve in such office; and

(b) the mental and physical health of the person concerned enable him or her so to continue,

the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a *National Director*' s term of office shall not exceed 10 years.

(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.

(8) *(a)* The President may allow the *National Director* or a *Deputy National Director* at his or her request, to vacate his or her office-

(i) on account of continued ill-health; or

(ii) for any other reason which the President deems sufficient.

(b) The request in terms of paragraph *(a)* (ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.

(c) If the *National Director* or a *Deputy National Director* -

(i) vacates his or her office in terms of paragraph *(a)* (i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto; or

(ii) vacates his or her office in terms of paragraph *(a)* (ii), he or she shall

be deemed to have been retired in terms of section 16 (4) of the *Public Service Act* , and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired.

(9) If the *National Director* or a *Deputy National Director* , immediately prior to his or her appointment as such, was an officer or employee in the public service, and is appointed under an Act of Parliament with his or her consent to an office to which the provisions of *this Act* or the *Public Service Act* do not apply, he or she shall, as from the date on which he or she is so appointed, cease to be the *National Director* , or a *Deputy National Director* and if at that date he or she has not reached the age at which he or she would in terms of the *Public Service Act* have had the right to retire, he or she shall be deemed to have retired on that date and shall, subject to the said provisions, be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her had he or she been compelled to retire from the public service owing to the abolition of his or her post.

[Date of commencement of s. 12: 1 August 1998.]

13 Appointment of Directors and Acting Directors

(1) The President, after consultation with the *Minister* and the *National Director* -

(a) may, subject to section 6 (2), appoint a Director of Public Prosecutions in respect of an Office of the *prosecuting authority* established by section 6 (1);

(a A *)* .....

[Para. *(a* A *)* inserted by s. 6 *(a)* of Act 61 of 2000 and deleted by s. 4 of Act 56 of 2008.]

(b) shall, in respect of any Investigating Directorate established in terms of section 7 (1A), appoint a Director of Public Prosecutions as the head of such an *Investigating Directorate* ; and

[Para. *(b)* substituted by s. 6 *(b)* of Act 61 of 2000.]

(c) 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* .

(2) If a vacancy occurs in the office of a *Director* the President shall, subject to section 9, as soon as possible, appoint another person to that office.

(3) The *Minister* may from time to time, but subject to the laws governing the public service and after consultation with the *National Director* , from the ranks of the *Deputy Directors* or persons who qualify to be appointed as *Deputy Director* as contemplated in section 15 (2), appoint an acting *Director* to discharge the duties of a *Director* whenever the *Director* concerned is for any reason unable to perform the duties of his or her office, or while the appointment of a person to the office of *Director* is pending.

14 Term of office of Director

(1) Subject to subsection (2), a *Director* shall vacate his or her office on attaining the age of 65 years.

(2) A *Special Director* may be appointed for such fixed term as the President may determine at the time of such appointment, and the President may from time to time extend such term.

(3) The provisions of section 12 (3), (4), (6), (7), (8) and (9), in respect of the vacation of office and discharge of the *National Director* , shall apply, with the necessary changes, with regard to the vacation of office and discharge of a *Director* .

15 Appointment of Deputy Directors

(1) The *Minister* may, subject to the laws governing the public service and section 16 (4) and after consultation with the National Director-

(a) in respect of an Office referred to in section 6 (1), appoint a Deputy Director of Public Prosecutions as the head of such Office;

(b) in respect of each office for which a Director has been appointed, appoint Deputy Directors of Public Prosecutions; and

(c) in respect of the Office of the National Director appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the National Director.

[Sub-s. (1) substituted by s. 7 of Act 61 of 2000.]

(2) A person shall only be appointed as a *Deputy Director* if he or she-

(a) has the right to appear in a High Court as contemplated in sections 2 and 3 (4) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995); and

(b) possesses such experience as, in the opinion of the *Minister* , renders him or her suitable for appointment as a *Deputy Director* .

(3) If a vacancy occurs in the office of a *Deputy Director* , the *Minister* shall, after consultation with the *National Director* , as soon as possible appoint another person to that office.

16 Appointment of prosecutors

(1) *Prosecutors* shall be appointed on the recommendation of the *National Director* or a member of the *prosecuting authority* designated for that purpose by the *National Director* , and subject to the laws governing the public service.

(2) *Prosecutors* may be appointed to-

(a) the *Office of the National Director* ;

(b) Offices established by section 6 (1);

(c) *Investigating Directorates* ; and

(d) lower courts in the *Republic* .

(3) The *Minister* may from time to time, in consultation with the *National Director* and after consultation with the *Directors* , prescribe the appropriate legal qualifications for the appointment of a person as *prosecutor* in a lower court.

(4) In so far as any law governing the public service pertaining to *Deputy Directors* and *prosecutors* may be inconsistent with *this Act* , the provisions of *this Act* shall apply.

17 Conditions of service of National Director, Deputy National Directors and Directors

(1) The remuneration, allowances and other terms and conditions of service and service benefits of the *National Director* , a *Deputy National Director* and a *Director* shall be determined by the President: Provided that-

(a) the salary of the *National Director* shall not be less than the salary of a judge of a High Court, as determined by the President under section 2 (1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989);

(b) the salary of a *Deputy National Director* shall not be less than 85 per cent of the salary of the *National Director* ; and

(c) the salary of a *Director* shall not be less than 80 per cent of the salary of the *National Director* .

(2) If an officer or employee in the public service is appointed as the *National Director* , a *Deputy National Director* or a *Director* , the period of his or her service as *National Director*, *Deputy National Director* or *Director* shall be reckoned as part of and continuous with his or her employment in the public service, for purposes of leave, pension and any other conditions of service, and the provisions of any pension law applicable to him or her as such officer or employee, or in the event of his or her death, to his or her dependants and which are not inconsistent with this section, shall, with the necessary changes, continue so to apply.

(3) The *National Director* is entitled to pension provisioning and pension benefits determined and calculated under all circumstances, as if he or she is employed as a Director-General in the public service.

(4) The President may, whenever in his or her opinion it is necessary and after consultation with the *Minister* and the *National Director* , transfer and appoint any *Director* to any Office contemplated in section 6 (1) or *Investigating Directorate* , or as a *Special Director* .

[Date of commencement of s. 17: 1 August 1998.]

18 Remuneration of Deputy Directors and prosecutors

(1) Subject to the provisions of this section, any *Deputy Director* or *prosecutor* shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the *Minister* after consultation with the *National Director* and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the *Gazette* .

(2) Different categories of salaries and salary scales may be determined in respect of different categories of *Deputy Directors* and *prosecutors* .

(3) A notice in terms of subsection (1) or any provision thereof may commence with effect from a date which may not be more than one year before the date of publication thereof.

(4) The first notice in terms of subsection (1) shall be issued as soon as possible after the commencement of *this Act* , and thereafter such a notice shall be issued if circumstances, including any revision and adjustment of salaries and allowances of the *National Director* and magistrates since the latest revision and adjustment of salaries of *Deputy Directors* or *prosecutors* , so justify.

(5) *(a)* A notice issued in terms of subsection (1) shall be tabled in Parliament within 14 days after publication thereof, 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.

(b) If Parliament by resolution disapproves such a notice or any provision thereof, that notice or that provision, as the case may be, shall lapse to the extent to which it is so disapproved with effect from the date on which it is so disapproved.

(c) The lapsing of such a notice or provision shall not affect-

(i) the validity of anything done under the notice or provision up to the date on which it so lapsed; or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred as at that date under or by virtue of the notice or provision.

(6) The salary payable to a *Deputy Director* or a *prosecutor* shall not be reduced except by an Act of Parliament: Provided that a disapproval contemplated in subsection (5) *(b)* shall, for the purposes of this subsection, not be deemed to result in a reduction of such salary.

19 Conditions of service of Deputy Directors and prosecutors, except remuneration

Subject to the provisions of *this Act* , the other conditions of service of a *Deputy Director* or a *prosecutor* shall be determined in terms of the provisions of the *Public Service Act* .

CHAPTER 3A

[Chapter 3A (ss 19A-19C) inserted by s. 8 of Act 61 of 2000 and repealed by s. 5 of Act 56 of 2008.]

19A to 19C inclusive .....

[Ss. 19A to 19C inclusive inserted by s. 8 of Act 61 of 2000 and repealed by s. 5 of Act 56 of 2008.]

CHAPTER 4
POWERS, DUTIES AND FUNCTIONS OF MEMBERS OF THE PROSECUTING AUTHORITY (ss 20-25)

20 Power to institute and conduct criminal proceedings

(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* .

(2) Any *Deputy National Director* shall exercise the powers referred to in subsection (1) subject to the control and directions of the *National Director* .

(3) Subject to the provisions of the *Constitution* and *this Act* , any *Director* shall, subject to the control and directions of the *National Director* , exercise the powers referred to in subsection (1) in respect of-

(a) the area of jurisdiction for which he or she has been appointed; and

(b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the *National Director* .

(4) Subject to the provisions of *this Act* , any *Deputy Director* shall, subject to the control and directions of the *Director* concerned, exercise the powers referred to in subsection (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* .

(5) Any *prosecutor* shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the *National Director* , or by a person designated by the *National Director* .

(6) A written authorisation referred to in subsection (5) shall set out-

(a) the area of jurisdiction;

(b) the offences; and

(c) the court or courts,

in respect of which such powers may be exercised.

(7) No member of the *prosecuting authority* who has been suspended from his or her office under *this Act* or any other law shall be competent to exercise any of the powers referred to in subsection (1) for the duration of such suspension.

21 Prosecution policy and issuing of policy directives

(1) The *National Director* shall, in accordance with section 179 (5) *(a)* and *(b)* and any other relevant section of the *Constitution* -

(a) with the concurrence of the *Minister* and after consulting the *Directors* , determine prosecution policy; and

(b) issue policy directives,

which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in *this Act* or any other law.

(2) The prosecution policy or amendments to such policy must be included in the report referred to in section 35 (2) *(a)* : Provided that the first prosecution policy issued under *this Act* shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first *National Director* .

(3) The prosecution policy must determine the circumstances under which prosecutions shall be instituted in the High Court as a court of first instance in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act 105 of 1997).

[Sub-s. (3) added by s. 7 of Act 38 of 2007.]

(4) The National Director must issue policy directives pursuant to the policy contemplated in subsection (3), regarding the institution of prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997.

[Sub-s. (4) added by s. 7 of Act 38 of 2007.]

(5) The prosecution policy and the policy directives contemplated in subsections (3) and (4) above, must be issued within three months of the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007.

[Sub-s. (5) added by s. 7 of Act 38 of 2007.]

22 Powers, duties and functions of National Director

(1) The *National Director* , as the head of the *prosecuting authority* , shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the *prosecuting authority* by the *Constitution* , *this Act* or any other law.

(2) In accordance with section 179 of the *Constitution* , the *National Director* -

(a) must determine prosecution policy and issue policy directives as contemplated in section 21;

(b) may intervene in any prosecution process when policy directives are not complied with; and

(c) may review a decision to prosecute or not to prosecute, after consulting the relevant *Director* and after taking representations, within the period specified by the *National Director* , of the accused person, the complainant and any other person or party whom the *National Director* considers to be relevant.

(3) Where the *National Director* or a *Deputy National Director* authorised thereto in writing by the *National Director* deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one *Director* be investigated and tried within the area of jurisdiction of another *Director* , he or she may, subject to the provisions of section 111 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other *Director* .

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to the *National Director* by section 179 or any other provision of the *Constitution* , *this Act* or any other law, the *National Director* , as the head of the *prosecuting authority* -

(a) with a view to exercising his or her powers in terms of subsection (2), may-

(i) conduct any investigation he or she may deem necessary in respect of a prosecution or a prosecution process, or directives, directions or guidelines given or issued by a *Director* in terms of *this Act* , or a case or matter relating to such a prosecution or a prosecution process, or directives, directions or guidelines;

(ii) direct the submission of and receive reports or interim reports from a *Director* in respect of a case, a matter, a prosecution or a prosecution process or directions or guidelines given or issued by a *Director* in terms of *this Act* ; and

(iii) advise the *Minister* on all matters relating to the administration of criminal justice;

(b) shall maintain close liaison with the *Deputy National Directors* , the *Directors*, the *prosecutors* , the legal professions and legal institutions in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in respect of the *prosecuting authority* ;

(c) may consider such recommendations, suggestions and requests concerning the *prosecuting authority* as he or she may receive from any source;

(d) shall assist the *Directors* and *prosecutors* in achieving the effective and fair administration of criminal justice;

(e) shall assist the *Deputy National Directors*, *Directors* and *prosecutors* in

representing their professional interests;

(f) shall bring the United Nations Guidelines on the Role of Prosecutors to the attention of the *Directors* and *prosecutors* and promote their respect for and compliance with the above-mentioned principles within the framework of national legislation;

(g) shall prepare a comprehensive report in respect of the operations of the *prosecuting authority* , which shall include reporting on-

(i) the activities of the *National Director*, *Deputy National Directors* , *Directors* and the *prosecuting authority* as a whole;

(ii) the personnel position of the *prosecuting authority* ;

(iii) the financial implications in respect of the administration and operation of the *prosecuting authority* ;

(iv) any recommendations or suggestions in respect of the *prosecuting authority* ;

(v) information relating to training programmes for *prosecutors* ; and

(vi) any other information which the *National Director* deems necessary;

(h) may have the administrative work connected with the exercise of his or her powers, the performance of his or her functions or the carrying out of his or her duties, carried out by persons referred to in section 37 of *this Act* ; and

(i) may make recommendations to the *Minister* with regard to the *prosecuting authority* or the administration of justice as a whole.

(5) The *National Director* shall, after consultation with the *Deputy National Directors* and the *Directors* , advise the *Minister* on creating a structure, by regulation, in terms of which any person may report to such structure any complaint or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of a member of the *prosecuting authority* , and determining the powers and functions of such structure.

(6) *(a)* The *National Director* shall, in consultation with the *Minister* and after consultation with the *Deputy National Directors* and the *Directors* , frame a code of conduct which shall be complied with by members of the *prosecuting authority* .

(b) The code of conduct may from time to time be amended, and must be published in the ***Gazette*** for general information.

(7) The *National Director* shall develop, in consultation with the *Minister* or a person authorised thereto by the *Minister* , and the *Directors* , training programmes for *prosecutors* .

(8) The *National Director* or a person designated by him or her in writing may-

(a) if no other member of the *prosecuting authority* is available, authorise in writing any suitable person to act as a prosecutor for the purpose of postponing any criminal case or cases;

(b) authorise any competent person in the employ of the public service or any local authority to conduct prosecutions, subject to the control and directions of the *National Director* or a person designated by him or her, in respect of such statutory offences, including municipal laws, as

the *National Director* , in consultation with the *Minister* , may determine.

(9) The *National Director* or any *Deputy National Director* designated by the *National Director* shall have the power to institute and conduct a prosecution in any court in the *Republic* in person.

23 Powers, duties and functions of Deputy National Directors

(1) Any *Deputy National Director* may exercise or perform any of the powers, duties and functions of the *National Director* which he or she has been authorised by the *National Director* to exercise or perform.

(2) .....
[Sub-s. (2) added by s. 9 of Act 61 of 2000 and deleted by s. 6 of Act 56 of 2008.]

24 Powers, duties and functions of Directors and Deputy Directors

(1) Subject to the provisions of section 179 and any other relevant section of the *Constitution* , *this Act* or any other law, a *Director* referred to in section 13 (1) *(a)* has, in respect of the area for which he or she has been appointed, the power to-

(a) institute and conduct criminal proceedings and to carry out functions incidental thereto as contemplated in section 20 (3);

(b) supervise, direct and co-ordinate the work and activities of all *Deputy Directors* and *prosecutors* in the Office of which he or she is the head;

(c) supervise, direct and co-ordinate specific investigations; and

(d) carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of *this Act* .

(2) In addition to the powers, duties and functions conferred or imposed on or assigned to an *Investigating Director* , such an *Investigating Director* or any person authorized thereto by him or her in writing may, for the purposes of criminal prosecution-

(a) institute an action in any court in the *Republic* ; and

(b) prosecute an appeal in any court in the *Republic* emanating from criminal proceedings instituted by the *Investigating Director* or the person authorized thereto by him or her:

Provided that an *Investigating Director* or the person authorized thereto by him or her shall exercise the powers referred to in this subsection only after consultation with the *Director* of the area of jurisdiction concerned.

(3) A *Special Director* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the *National Director* : Provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20 (1), they shall be exercised, carried out and performed in consultation with the *Director* of the area of jurisdiction concerned.

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to him or her by section 179 of the Constitution, *this Act* or any other law, a *Directo* r referred to in section 13 (1)-

(a) shall, at the request of the *National Director* , submit reports to the *National Director* or assist the *National Director* in connection with a matter referred to in section 22 (4) *(a)* (ii);

(b) shall submit annual reports to the *National Director* pertaining to matters referred to in section 22 (4) *(g)* ;

(c) may, in the case of a *Director* referred to in section 13 (1) *(a)* , give written directions or furnish guidelines to-

(i) the Provincial Commissioner of the police service referred to in section 207 (3) of the *Constitution* within his or her area of jurisdiction; or

(ii) any other person who within his or her area of jurisdiction-

(aa) conducts investigations in relation to offences; or

(bb) other than a private prosecutor, institutes or carries on prosecutions for offences; and

(d) shall, subject to the directions of the *National Director* , be responsible for the day to day management of the *Deputy Directors* and *prosecutors* under his or her control.

(5) Without limiting the generality of subsection (4) *(c)* and subject to the directions of the *National Director* , directions or guidelines under that subsection may be given or furnished in relation to particular cases and may determine that certain offences or classes of offences must be referred to the *Director* concerned for decisions on the institution or conducting of prosecutions in respect of such offences or classes of offences.

(6) The *Director* shall give to the *National Director* a copy of each direction given or guideline furnished under subsection (4) *(c)* .

(7) Where a *Director* -

(a) is considering the institution or conducting of a prosecution for an offence; and

(b) is of the opinion that a matter connected with or arising out of the offence requires further investigation,

the *Director* may request the Provincial Commissioner of the police service referred to in subsection (4) *(c)* (i) for assistance in the investigation of that matter and where the *Director* so requests, the Provincial Commissioner concerned shall, so far as practicable, comply with the request.

(8) The powers conferred upon a *Director* under section 20 (1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings.

(9) *(a)* Subject to section 20 (4) and the control and directions of a *Director* , a *Deputy Director* at the Office of a *Director* referred to in section 13 (1), has all the powers, duties and functions of a *Director* .

(b) A power, duty or function which is exercised, carried out or performed by a *Deputy Director* is construed, for the purposes of *this Act* , to have been exercised, carried out or performed by the *Director* concerned.

25 Powers, duties and functions of prosecutors

(1) A *prosecuto* r shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her-

(a) under *this Act* and any other law of the *Republic* ; and

(b) by the head of the Office or *Investigating Directorate* where he or she is employed or a person designated by such head; or

(c) if he or she is employed as a *prosecutor* in a lower court, by the *Director* in whose area of jurisdiction such court is situated or a person designated by such *Director* .

(2) Notwithstanding the provisions of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), or any other law, any *prosecutor* who-

(a) has obtained such legal qualifications as the *Minister* after consultation with the *National Director* may prescribe; and

(b) has at least three years' experience as a *prosecutor* of a magistrates' court of a regional division,

shall, subject to section 20 (6), have the right to appear in any court in the *Republic* .

CHAPTER 5
POWERS, DUTIES AND FUNCTIONS RELATING TO INVESTIGATING DIRECTORATES (ss 26-29)

26 Application

(1) This Chapter only relates to *Investigating Directorates* .

(2) Nothing in this Chapter or section 7, derogates from any power or duty which relates to the prevention, combating or investigation of any offences and which is bestowed upon the South African Police Service in terms of any law.

[Sub-s. (2) substituted by s. 7 of Act 56 of 2008.]

[S. 26 substituted by s. 10 of Act 61 of 2000.]

27 Reporting of matters to Investigating Director

If any person has reasonable grounds to suspect that a *specified offence* has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may report the matter in question to the *head of an Investigating Directorate* by means of an affidavit or affirmed declaration specifying-

(a) the nature of the suspicion;

(b) the grounds on which the suspicion is based; and

(c) all other relevant information known to the declarant.

[S. 27 substituted by s. 11 of Act 61 of 2000.]

28 Inquiries by Investigating Director

(1) *(a)* If the *Investigating Director* has reason to suspect that a *specified offence* has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an *investigation* on the matter in question, whether or not it has been reported to him or her in terms of section 27.

(b) If the *National Director* refers a matter in relation to the alleged commission or attempted commission of a *specified offence* to the *Investigating Director* , the *Investigating Director* shall conduct an investigation, or a preparatory investigation as referred to in subsection (13), on that matter.

(c) If the *Investigating Director* , at any time during the conducting of an investigation on a matter referred to in paragraph *(a)* or *(b)* , considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the *investigation* so as to include any offence, whether or not it is a *specified offence* , which he or she suspects to be connected with the subject of the *investigation* .

(d) If the *Investigating Director* , at any time during the conducting of an *investigation* , is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the *Investigating Directorate* concerned, he or she must without delay inform the National Commissioner of the South African Police Service of the particulars of such matter.

[Sub-s. (1) substituted by s. 12 *(a)* of Act 61 of 2000.]

(2) *(a)* The *Investigating Director* may, if he or she decides to conduct an *investigation* , at any time prior to or during the conducting of the *investigation* designate any person referred to in section 7 (4) *(a)* or, in the case of an investigation requested by the Head of the Directorate for Priority Crime Investigation in terms of section 17D (3) of the South African Police Service Act, 1995 (Act 68 of 1995), any member of the *prosecuting authority* or a member of that Directorate, to conduct the *investigation* , or any part thereof, on his or her behalf and to report to him or her.

[Para. *(a)* substituted by s. 8 of Act 56 of 2008.]

(b) A person so designated shall for the purpose of the *investigation* concerned have the same powers as those which the *Investigating Director* has in terms of this section and section 29 of this Act, and the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act 66 of 1975), in respect of commissions of inquiry shall apply with the necessary changes in respect of such a person.

[Sub-s. (2) substituted by s. 12 *(a)* of Act 61 of 2000.]

(3) All proceedings contemplated in subsections (6), (8) and (9) shall take place *in camera* .

[Sub-s. (3) substituted by s. 12 *(a)* of Act 61 of 2000.]

(4) The procedure to be followed in conducting an *investigation* shall be determined by the *Investigating Director* at his or her discretion, having regard to the circumstances of each case.

[Sub-s. (4) substituted by s. 12 *(a)* of Act 61 of 2000.]

(5) The proceedings contemplated in subsections (6), (8) and (9) shall be recorded in such manner as the *Investigating Director* may deem fit.

[Sub-s. (5) substituted by s. 12 *(a)* of Act 61 of 2000.]

(6) For the purposes of an *investigation* -

(a) the *Investigating Director* may summon any person who is believed to be able to furnish any information on the subject of the *investigation* or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the *Investigating Director* at a time and place specified in the summons, to be questioned or to produce that book, document or other object;

(b) the *Investigating Director* or a person designated by him or her may question that person, under oath or affirmation administered by the *Investigating Director* , and examine or retain for further examination or for safe custody such a book, document or other object: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the *Investigating Director* , at his or her request be allowed, at his or her own expense and under the supervision of the *Investigating Director* , to make copies thereof or to take extracts therefrom at any reasonable time.

[Sub-s. (6) substituted by s. 12 *(a)* of Act 61 of 2000.]

(7) A summons referred to in subsection (6) shall-

(a) be in the prescribed form;

(b) contain particulars of the matter in connection with which the person concerned is required to appear before the *Investigating Director* ;

(c) be signed by the *Investigating Director* or a person authorized by him or her; and

(d) be served in the prescribed manner.

(8) *(a)* The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers contemplated in paragraph *(a)* shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (10) *(b)* or *(c)* , or in section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

(9) A person appearing before the *Investigating Director* by virtue of subsection (6)-

(a) may be assisted at his or her examination by an advocate or an attorney;

(b) shall be entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate's court.

(10) Any person who has been summoned to appear before the *Investigating Director* and who-

(a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the *Investigating Director* from further attendance;

(b) at his or her appearance before the *Investigating Director* -

(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;

(ii) refuses to be sworn or to make an affirmation after he or she has been asked by the *Investigating Director* to do so;

(c) having been sworn or having made an affirmation-

(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;

(ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true,

shall be guilty of an offence.

(11) and (12) .....

[Sub-ss. (11) and (12) deleted by s. 12 *(b)* of Act 61 of 2000.]

(13) If the *Investigating Director* considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1) *(a)* , the *Investigating Director* may hold a preparatory investigation.

(14) The provisions of subsections (2) to (10), inclusive, and of sections 27 and 29 shall, with the necessary changes, apply to a preparatory investigation referred to in subsection (13).

[Sub-s. (14) substituted by s. 12 *(c)* of Act 61 of 2000.]

29 Entering upon premises by Investigating Director

(1) The *Investigating Director* or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an *investigation* at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that *investigation* is or is suspected to be, and may-

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(b) examine any object found on or in the premises which has a bearing or might have a bearing on the *investigation* in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;

(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the *investigation* in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;

(d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the *investigation* in question, or if he or she wishes to retain it for further examination or for safe custody: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the *Investigating Director* , at his or her request be allowed, at his or her own expense and under the supervision of the *Investigating Director* , to make copies thereof or to take extracts therefrom at any reasonable time.

[Sub-s. (1) substituted by s. 13 *(a)* of Act 61 of 2000.]

(2) Any entry upon or search of any premises in terms of this section shall be conducted with strict regard to decency and order, including-

(a) a person's right to, respect for and the protection of his or her dignity;

(b) the right of a person to freedom and security; and

(c) the right of a person to his or her personal privacy.

(3) No evidence regarding any questions and answers contemplated in subsection (1) shall be admissible in any subsequent criminal proceedings against a person from whom information in terms of that subsection is acquired if the answers incriminate him or her, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (12).

(4) Subject to subsection (10), the premises referred to in subsection (1) may only be

entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.

(5) A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating-

(a) the nature of the *investigation* in terms of section 28;

(b) that there exists a reasonable suspicion that an offence, which might be a *specified offence* , has been or is being committed, or that an attempt was or had been made to commit such an offence; and

(c) the need, in regard to the *investigation* , for a search and seizure in terms of this section,

that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

[Sub-s. (5) substituted by s. 13 *(b)* of Act 61 of 2000.]

(6) A warrant issued in terms of this section may be issued on any day and shall be of force until-

(a) it has been executed;

(b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or

(c) the expiry of three months from the day of its issue,

whichever may occur first.

(7) *(a)* Any person who acts on authority of a warrant issued in terms of this section may use such force as may be reasonably necessary to overcome any resistance against the entry and search of the premises, including the breaking of any door or window of such premises: Provided that such person shall first audibly demand admission to the premises and state the purpose for which he or she seeks to enter such premises.

(b) The proviso to paragraph *(a)* shall not apply where the person concerned is on reasonable grounds of the opinion that any object, book or document which is the subject of the search may be destroyed, tampered with or disposed of if the provisions of the said proviso are first complied with.

(8) A warrant issued in terms of this section shall be executed by day unless the person who issues the warrant authorises the execution thereof by night at times which shall be reasonable in the circumstances.

(9) Any person executing a warrant in terms of this section shall immediately before commencing with the execution-

(a) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises;

(b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

(10) *(a)* The *Investigating Director* or any person referred to in section 7 (4) *(a)* may

without a warrant enter upon any premises and perform the acts referred to in subsection (1)-

(i) if the person who is competent to do so consents to such entry, search, seizure and removal; or

(ii) if he or she upon reasonable grounds believes that-

(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and

(bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

(b) Any entry and search in terms of paragraph *(a)* shall be executed by day, unless the execution thereof by night is justifiable and necessary, and the person exercising the powers referred to in the said paragraph shall identify himself or herself at the request of the owner or the person in control of the premises.

(11) If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the *investigation* and that such information is necessary for the *investigation* , request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

[Sub-s. (11) substituted by s. 13 *(c)* of Act 61 of 2000.]

(12) Any person who-

(a) obstructs or hinders the *Investigating Director* or any other person in the performance of his or her functions in terms of this section;

(b) when he or she is asked in terms of subsection (1) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading,

shall be guilty of an offence.

30 and 31 .....

[Ss. 30 and 31 substituted by s. 14 of Act 61 of 2000 and repealed by s. 9 of Act 56 of 2008.]

CHAPTER 6
GENERAL PROVISIONS (ss 32-42)

32 Impartiality of, and oath or affirmation by members of prosecuting authority

(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.

(2) *(a)* A *National Director* and any person referred to in section 4 must, before commencing to exercise, carry out or perform his or her powers, duties or functions in terms of *this Act* , take an oath or make an affirmation, which shall be subscribed by him or her, in the form set out below, namely-

'I .....
(full name)
do hereby swear/solemnly affirm that I will in my capacity as *National Director/Deputy National Director* of Public Prosecutions/ *Director/Deputy Director* of Public Prosecutions/ *prosecutor* , 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. (In the case of an oath: So help me God.)'.

(b) Such an oath or affirmation shall-

(i) in the case of the *National Director* , or a *Deputy National Director, Director* or *Deputy Director* , be taken or made before the most senior available judge of the High Court within which area of jurisdiction the Office of the *National Director* , *Director* or *Deputy Director* , as the case may be, is situated; or

(ii) in the case of a *prosecutor* , be taken or made before the *Director* in whose Office the *prosecutor* concerned has been appointed or before the most senior judge or magistrate at the court where the *prosecutor* is stationed,

who shall at the bottom thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

33 Minister's final responsibility over prosecuting authority

(1) 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* .

(2) 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)* ;

(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* .

34 Reports by Directors

(1) A *Director* must annually, not later than the first day of March, submit to the *National Director* a report on all his or her activities during the previous year.

(2) The *National Director* may at any time request a *Director* to submit a report with regard to a specific activity relating to his or her powers, duties or functions.

(3) A *Director* may, at any time, submit a report to the *National Director* with regard to any matter relating to the *prosecuting authority* , if he or she deems it necessary.

35 Accountability to Parliament

(1) The *prosecuting authority* shall be accountable to Parliament in respect of its powers, functions and duties under *this Act* , including decisions regarding the institution of prosecutions.

(2) *(a)* The *National Director* must submit annually, not later than the first day of June, to the *Minister* a report referred to in section 22 (4) *(g)* , which report must be tabled in Parliament by the *Minister* within 14 days, 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.

(b) The *National Director* may, at any time, submit a report to the *Minister* or Parliament with regard to any matter relating to the *prosecuting authority* , if he or she deems it necessary.

36 Expenditure of prosecuting authority

(1) The expenses incurred in connection with-

(a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the *prosecuting authority* ; and

(b) the remuneration and other conditions of service of members of the *prosecuting authority* ,

shall be defrayed out of monies appropriated by Parliament for that purpose.

(2) The Department of Justice must, in consultation with the *National Director* , prepare the necessary estimate of revenue and expenditure of the *prosecuting authority* .

(3) The Director-General: Justice shall, subject to the Public Finance Management Act, 1999 (Act 1 of 1999)-

(a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the *prosecuting authority* ; and

(b) cause the necessary accounting and other related records to be kept.

[Sub-s. (3) substituted by s. 15 of Act 61 of 2000 and by s. 10 *(a)* of Act 56 of 2008.]

(3A) .....

[Sub-s. (3A) inserted by s. 15 of Act 61 of 2000 and deleted by s. 10 *(b)* of Act 56 of 2008.]

(4) The records referred to in subsection (3) *(b)* shall be audited by the Auditor-General.

[Sub-s. (4) substituted by s. 15 of Act 61 of 2000 and by s. 10 *(c)* of Act 56 of 2008.]

(5) The Director-General: Justice may, on the recommendation of the *National Director*

and with the concurrence of the Minister of Finance, order that the expenses or any part of the expenses incurred by any person in the course of or in connection with an *investigation* contemplated in section 28 (1) be paid from State funds to that person.

[Sub-s. (5) added by s. 15 of Act 61 of 2000 and substituted by s. 10 *(d)* of Act 56 of 2008.]

37 Administrative staff

The administrative staff of-

(a) the *Office of the National Director* ;

(b) the Offices of the *Directors* , including *Investigating Directorates* ; and

(c) the Offices of *prosecutors* as determined by the *National Director* , in consultation with the *Director* concerned,

shall be persons appointed or employed under the *Public Service Act* .

38 Engagement of persons to perform services in specific cases

(1) The *National Director* may in consultation with the *Minister* , and a *Deputy National Director* or a *Director* may, in consultation with the *Minister* and the *National Director* , on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.

(2) The terms and conditions of service of a person engaged by the *National Director* , a *Deputy National Director* or a *Director* under subsection (1) shall be as determined from time to time by the *Minister* in concurrence with the Minister of Finance.

(3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State-

(a) the *National Director* ; or

(b) a *Deputy National Director* or a Director, in consultation with the National Director,

may, on behalf of the State, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the *Minister* as contemplated in that subsection.

[Sub-s. (3) added by s. 16 of Act 61 of 2000.]

(4) For purposes of this section, 'services' include the conducting of a prosecution under the control and direction of the *National Director* , a *Deputy National Director* or a *Director* , as the case may be.

[Sub-s. (4) added by s. 16 of Act 61 of 2000.]

[Date of commencement of s. 38: 23 April 1999.]

39 Disclosure of interest and non-performance of other paid work

(1) The *National Director* , a *Deputy National Director* and a *Director* shall give written notice to the *Minister* of all direct or indirect pecuniary interests that they have or acquire in any business whether in the *Republic* or elsewhere or in any body corporate carrying on any such business.

(2) The *National Director* , a *Deputy National Director* and a *Director* shall not, without the consent of the President, perform any paid work outside his or her duties of office.

40 Regulations

(1) The *Minister* may make regulations prescribing-

(a) matters required or permitted by *this Act* to be prescribed;

(b) the steps to be taken to ensure compliance with the code of conduct referred to in section 22 (6); or

(c) matters necessary or convenient to be prescribed for carrying out or giving effect to *this Act* .

[Sub-s. (1) amended by s. 11 *(a)* of Act 56 of 2008.]

(2) .....

[Sub-s. (2) amended by s. 17 of Act 42 of 2001 and deleted by s. 11 *(b)* of Act 56 of 2008.]

(3) Any regulation made in terms of this section-

(a) which may result in the expenditure of State monies shall be made in consultation with the Minister of Finance;

(b) may provide that a contravention thereof shall be an offence; and

(c) must be submitted to Parliament before publication in the *Gazette* .

[S. 40 substituted by s. 17 of Act 61 of 2000.]

40A Unauthorised access to or modification of computer material

(1) Without derogating from the generality of subsection (2)-

(a) **'access to a computer'** includes access by whatever means to any program or data contained in the random access memory of a computer or stored by any computer on any storage medium, whether such storage medium is physically attached to the computer or not, where such storage medium belongs to or is under the control of the *prosecuting authority* ;

(b) **'contents of any computer'** includes the physical components of any computer as well as any program or data contained in the random access memory of a computer or stored by any computer on any storage medium, whether such storage medium is physically attached to the computer or not, where such storage medium belongs to or is under the control of the *prosecuting authority* ;

(c) **'modification'** includes both a modification of a temporary or permanent nature; and

(d) **'unauthorised access'** includes access by a person who is authorised to use the computer but is not authorised to gain access to a certain program or to certain data held in such computer or is unauthorised, at the time when the access is gained, to gain access to such computer, program or data.

(2) Any person is guilty of an offence if he or she wilfully-

(a) gains, or allows or causes any other person to gain, unauthorised access to any computer which belongs to or is under the control of the *prosecuting authority* or to any program or data held in such a computer, or in a computer to which only certain or all members of the *prosecuting authority* have access in their capacity as members; or

(b) causes a computer which belongs to or is under the control of the *prosecuting authority* or to which only certain or all members of the

prosecuting authority have access in their capacity as members, to perform a function while such person is not authorised to cause such computer to perform such function; or

(c) performs any act which causes an unauthorised modification of the contents of any computer which belongs to or is under the control of the *prosecuting authority* or to which only certain or all members of the *prosecuting authority* have access in their capacity as members with the intention to-

(i) impair the operation of any computer or of any program in any computer or of the operating system of any computer or the reliability of data held in such computer; or

(ii) prevent or hinder access to any program or data held in any computer.

(3) Any act or event for which proof is required for a conviction of an offence in terms of this section and which was committed or took place outside the Republic is deemed to have been committed or to have taken place in the Republic if-

(a) the accused was in the Republic at the time when he or she performed the act or any part thereof; or

(b) the computer, by means of which the act was done, or which was affected in a manner contemplated in subsection (2) by the act, was in the Republic at the time when the accused performed the act or any part thereof; or

(c) the accused was a South African citizen or domiciled in the Republic at the time of the commission of the offence.

[S. 40A inserted by s. 18 of Act 61 of 2000.]

41 Offences and penalties

(1) Any person who contravenes the provisions of section 32 (1) *(b)* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

(2) Any person convicted of an offence referred to in section 28 (10) or 29 (12) shall be liable to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.

(3) Any person who is convicted of an offence in terms of a regulation made under section 40, shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(4) Any person who is convicted of an offence referred to in section 40A(2), shall be liable to a fine or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

(5) Any person who, in connection with any activity carried on by him or her, in a fraudulent manner takes, assumes, uses or publishes any name, description, title or symbol indicating or conveying or purporting to indicate or convey or which is calculated or is likely to lead other persons to believe or to infer that such activity is carried on under or by virtue of the provisions of *this Act* or under the patronage of the *prosecuting authority* , or is in any manner associated or connected with the *prosecuting authority* , shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

(6) Notwithstanding any other law, no person shall without the permission of the

National Director or a person authorised in writing by the *National Director* disclose to any other person-

(a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;

(b) the contents of any book or document or any other item in the possession of the *prosecuting authority* ; or

(c) the record of any evidence given at an investigation as contemplated in section 28 (1),

except-

(i) for the purpose of performing his or her functions in terms of *this Act* or any other law; or

(ii) when required to do so by order of a court of law.

(7) Any person who contravenes subsection (6) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.

[S. 41 substituted by s. 19 of Act 61 of 2000.]

42 Limitation of liability

No person shall be liable in respect of anything done in good faith under *this Act* .

CHAPTER 7
TRANSITIONAL ARRANGEMENTS (ss 43-46)

43 Transitional arrangements

(1) *(a)* Anyone holding office as an attorney-general in terms of the Attorney-General Act, 1992 (Act 92 of 1992), shall, subject to paragraph *(b)* , be deemed to have been appointed as a *Director* in terms of *this Act* , and shall continue to function in terms of the laws applicable to his or her Office.

(b) The President shall, as soon as reasonably possible after the commencement of this section, appoint each attorney-general referred to in paragraph *(a)* as a *Director* at the Office that, and for such term as the President, after consultation with the attorney-general concerned, may determine, but such term shall not extend beyond the date on which the attorney-general concerned will attain the age of 65 years.

(c) The provisions of section 12 (4) shall apply with the necessary changes in respect of a *Director* referred to in paragraph *(b)* : Provided that the reference in section 12 (4) to the age of 65 years shall be construed as a reference to the date on which the *Director* 's term of office as contemplated in paragraph *(b)* expires.

(d) If the term of office of a *Director* appointed under paragraph *(b)* expires before he or she has attained the age of 65 years, he or she shall be entitled to pension benefits determined and calculated under all circumstances as if he or she was employed as a Director-General in the public service, who served as a Director-General for five years.

(2) Anyone holding office as an attorney-general in terms of a law other than the Attorney-General Act, 1992, or holding an appointment as acting attorney-general, shall be deemed to have been appointed as an acting *Director* under *this Act* at the office where he or she holds such office or appointment, and shall continue to function in that capacity until otherwise determined under *this Act* or any other law.

(3) *(a)* Any person who immediately before the commencement of this section was

employed by the State as a deputy attorney-general shall continue in such employment and shall be deemed to have been appointed as a *Deputy Director* in terms of section 15 (1).

(b) Any person who immediately before the commencement of this section was employed by the State as a state advocate or prosecutor and who has been delegated in terms of any law to institute criminal proceedings and to conduct any prosecution in criminal proceedings on behalf of the State-

(i) shall continue in such employment as a *prosecutor* ; and

(ii) shall be deemed to have been authorised to exercise the powers referred to in section 20 (1): Provided that no *prosecutor* shall, by virtue of this section, have more powers than he or she would have had under the delegation concerned.

(4) Criminal proceedings which have been instituted before the commencement of *this Act* , must be disposed of as if the decision to institute and prosecute in such criminal proceedings had been taken by a member of the *prosecuting authority* appointed in terms of *this Act* .

(5) Any attorney-general, deputy attorney-general, state advocate or prosecutor who continues in office in terms of this section must, within three months after the commencement of *this Act* , take the oath or make the affirmation referred to in section 32 (2).

(6) As from the date of the commencement of this section, all offices of attorneys-general at the High Courts contemplated in item 16 (4) *(a)* of Schedule 6 to the *Constitution* , shall become offices of the *prosecuting authority* as referred to in section 6 (1) of *this Act* .

(7) .....

[Sub-s. (7) deleted by s. 12 of Act 56 of 2008.]

(8) Subject to the *Constitution* and *this Act* , all measures which immediately before the commencement of this section were in operation and applied to attorneys-general, deputy attorneys-general, state advocates and prosecutors, including measures regarding remuneration, pension and pension benefits, leave gratuity and any other term and condition of service, shall continue in operation and to apply to the said attorneys-general, deputy attorneys-general, state advocates and prosecutors until amended or repealed by *this Act* : Provided that no such measure shall, except in accordance with an applicable law or agreement, be changed in a manner which affects such attorneys-general, deputy attorneys-general, state advocates and prosecutors to their detriment.

(9) Notwithstanding the commencement of *this Act* , all measures regulating the institution and conducting of prosecutions in any court shall remain in force until repealed or amended under *this Act* or by any competent authority.

43A Transitional arrangements relating to Directorate of Special Operations

(1) In this section-

(a) any word or expression in respect of which a specific meaning has been assigned by the South African Police Service Act, 1995 (Act 68 of 1995), has the same meaning; and

(b) **'fixed date'** means a date [*] to be determined by the President by proclamation.

(2) Prior to a date determined by the *National Director* , any person employed by the *Directorate of Special Operations* must inform the *National Director* whether they consent to be transferred to the South African Police Service.

(3) As from the fixed date-

(a) any person, who immediately before the fixed date held the office of *special investigator* and who has consented to the transfer, is transferred to the South African Police Service and becomes a member of the South African Police Service; and

(b) such administrative and support personnel employed by the *Directorate of Special Operations* as may be agreed upon between the *National Director* and the National Commissioner, may be transferred to the South African Police Service.

(4) *(a)* An employee contemplated in subsection (3) may be transferred to the South African Police Service only with his or her consent.

(b) The remuneration and other terms and conditions of employment of employees transferred in terms of subsection (3) may not be less favourable than those that applied immediately before their transfer.

(c) The transfer contemplated in subsection (3) does not interrupt the employees' continuity of employment and the employees remain entitled to all rights and benefits, including pension benefits and privileges to which they were entitled to immediately before transfer.

(5) *(a)* An employee referred to in subsection (3) who does not consent to be transferred to the South African Police Service must, prior to the date referred to in subsection (2), notify the *National Director* thereof in writing.

(b) In respect of such an employee, the *National Director* may-

(i) after consultation with the *Minister* and the Cabinet members responsible for the public service and for finance, offer to transfer the employee to a reasonable alternative post or position in any government department or state institution in accordance with subsection (4) *(b)* and *(c)* and section 14 of the Public Service Act, 1994 (Proclamation 103 of 1994), shall, unless the context indicates otherwise, apply to such a transfer; or

(ii) after consultation with the *Minister* , offer to transfer the employee to a reasonable alternative post or position in the *prosecuting authority* , other than any post of *special investigator* , in accordance with subsection (4) *(b)* and *(c)* .

(c) If the employee does not accept the offer made in paragraph *(b)* within 30 days of it being made, the employee's employment automatically terminates on the fixed date.

(d) An employee whose employment is terminated in terms of paragraph *(c)* is entitled to a severance package determined by the *Minister* in consultation with the Cabinet members for the public service and for finance.

(e) The severance package provided for in paragraph *(d)* may not be less favourable than the severance package provided for in the Determination on the Introduction of an Employee-Initiated Severance Package for the Public Service determined in terms section 3 of the Public Service Act, 1994.

(f) Any dispute arising from the interpretation or application of this section in so far as employees are concerned must be referred to the Labour Court for determination.

(6) Any decisions made, directions issued and any proceedings instituted by the employer immediately before the fixed date in respect of an employee referred to in subsection (3), remains [sic] applicable to him or her and must be implemented or finalised as if the National Prosecuting Authority Amendment Act, 2008, has not been passed.

(7) Any member of the *prosecuting authority* who was employed in the *Directorate of Special Operations* immediately before the fixed date, shall continue to be employed in the *Office of the National Director* , and shall exercise, carry out and perform his or her powers, duties and functions as conferred, imposed or assigned to him or her by the *National Director* and subject to the control and directions of the *National Director* or a person authorised thereto by the *National Director* .

(8) The National Prosecuting Authority Amendment Act, 2008, does not affect the validity of any *investigation* performed by the *Directorate of Special Operations* before the fixed date, including any functions incidental to such *investigations* or the institution of any criminal proceedings.

(9) *(a) Investigations* by the *Directorate of Special Operations* that are pending immediately before the fixed date must, on that date, be transferred to and continued by the Directorate for Priority Crime Investigation in accordance with a mechanism to ensure that the *investigations* are not prejudiced by the transfer.

(b) The *Minister* , in consultation with the Cabinet member for police and after consultation with the *National Director* and the National Commissioner, must determine the mechanism referred to in paragraph *(a)* .

(10) As from the fixed date any liability incurred by the *Directorate of Special Operations* as a result of any *investigation* by that Directorate, shall pass to the *prosecuting authority* , unless the *Minister* in consultation with the Cabinet member for police, in a specific instance determines otherwise.

(11) *(a)* Any *investigation* that has been instituted under section 28 by the *Directorate for Special Operations* , and all steps taken as a result of such an *investigation* , shall be deemed to have been instituted or taken in consequence of the application of section 17D (3) of the South African Police Service Act, 1995.

(b) The Head of the Directorate for Priority Crime Investigation may, at any time after the fixed date, withdraw such a request.

(c) The *National Director* must designate a *Director* in respect of each *investigation* referred to in paragraph *(a)* , who must assist the Directorate of Priority Crime Investigation in carrying out such an *investigation* .

[S. 43A added by s. 20 of Act 61 of 2000 and substituted by s. 13 of Act 56 of 2008.]

44 Amendment or repeal of laws

The laws mentioned in the Schedule are hereby amended or repealed to the extent indicated in the third column thereof.

45 Interpretation of certain references in laws

Any reference in any law to-

(a) an attorney-general shall, unless the context indicates otherwise, be construed as a reference to the *National Director* ; and

(b) an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a *Director* or *Deputy Director* appointed in terms of *this Act* , for the

area of jurisdiction of that Court.

[S. 45 substituted by s. 13 of Act 122 of 1998.]

46 Short title and commencement

This Act shall be called the National Prosecuting Authority Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the *Gazette* .

Schedule
LAWS AMENDED OR REPEALED BY SECTION 44

Number and year of law	Title	Extent of amendment or repeal
Act 51 of 1977	Criminal Procedure Act, 1977	*(a)* Repeal of sections 2 and 5. *(b)* Amendment of section 111 by the deletion of subsection (1) and the substitution for subsections (2), (3) and (4) of the following subsections: '(1) *(a)* The direction of the National Director of Public Prosecutions contemplated in section 179 (1) *(a)* of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced. *(b)* A copy of the direction shall be served on the accused, and the original thereof shall, save as is provided in subsection (3) be handed in at the court in which the proceedings are to commence. (2) The court in which the proceedings commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court. (3) Where the National Director issues a direction contemplated in subsection (1) after an accused has already appeared in a court, the original of such direction shall be handed in at the relevant proceedings and attached to the record of the proceedings, and the court in question shall- *(a)* cause the accused to be brought before it, and when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the Director in whose area of jurisdiction the said criminal proceedings shall commence, whereupon such time and date and court shall be deemed to be the time and date and court appointed for the trial

		of the accused or to which the proceedings pending against the accused are adjourned; *(b)* forward a copy of the record of the proceedings to the court in which the accused is to appear, and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it.'.
Act 117 of 1991	Investigation of Serious Economic Offences Act, 1991	The whole
Act 92 of 1992	Attorney-General Act, 1992	The whole

NATIONAL PROSECUTING AUTHORITY AMENDMENT ACT 61 OF 2000

[ASSENTED TO 5 DECEMBER 2000] [DATE OF COMMENCEMENT: 12 JANUARY 2001]

(English text signed by the President)

ACT

To amend the National Prosecuting Authority Act, 1998, so as to make provision for the establishment of the Directorate of Special Operations; to make provision for the existing Investigating Directorates to become part of the Directorate of Special Operations; to amend the Interception and Monitoring Prohibition Act, 1992, so as to make provision for applications for directions in terms of that Act by the head of the Directorate of Special Operations; and to provide for matters connected therewith.

1 Substitutes the Preamble to the National Prosecuting Authority Act 32 of 1998 .

2 Amends section 1 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* inserts the definitions of 'Directorate of Special Operations' and 'head of an Investigating Directorate'; paragraph *(b)* substitutes the definitions of 'Investigating Director' and 'Investigating Directorate'; paragraph *(c)* inserts the definition of 'investigation'; and paragraph *(d)* inserts the definitions of 'special investigator' and 'specified offence'.

3 Amends section 5 (2) of the National Prosecuting Authority Act 32 of 1998 by inserting paragraph *(d* A *)* .

4 Substitutes section 7 of the National Prosecuting Authority Act 32 of 1998 .

5 Amends section 11 of the National Prosecuting Authority Act 32 of 1998 by substituting subsection (1).

6 Amends section 13 (1) of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* inserts paragraph *(a* A *)* ; and paragraph *(b)* substitutes paragraph *(b)* .

7 Amends section 15 of the National Prosecuting Authority Act 32 of 1998 by

substituting subsection (1).

8 Inserts Chapter 3A (sections 19A to 19C) in the National Prosecuting Authority Act 32 of 1998 .

9 Amends section 23 of the National Prosecuting Authority Act 32 of 1998 by adding subsection (2), the existing section becoming subsection (1).

10 and 11 Substitute respectively sections 26 and 27 of the National Prosecuting Authority Act 32 of 1998 .

12 Amends section 28 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* substitutes subsections (1) to (6); paragraph *(b)* deletes subsections (11) and (12); and paragraph *(c)* substitutes subsection (14).

13 Amends section 29 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* substitutes subsection (1); paragraph *(b)* substitutes subsection (5); and paragraph *(c)* substitutes subsection (11).

14 Substitutes sections 30 and 31 of the National Prosecuting Authority Act 32 of 1998 .

15 Amends section 36 of the National Prosecuting Authority Act 32 of 1998 by substituting subsections (3), (3A), (4) and (5) for subsections (3) and (4).

16 Amends section 38 of the National Prosecuting Authority Act 32 of 1998 by adding subsections (3) and (4).

17 Substitutes section 40 of the National Prosecuting Authority Act 32 of 1998 .

18 Inserts section 40A in the National Prosecuting Authority Act 32 of 1998 .

19 Substitutes section 41 of the National Prosecuting Authority Act 32 of 1998 .

20 Inserts section 43A in the National Prosecuting Authority Act 32 of 1998 .

21 Inserts the index in the National Prosecuting Authority Act 32 of 1998 .

22 Amends section 1 of the Interception and Monitoring Prohibition Act 127 of 1992 , as follows: paragraph *(a)* inserts the definition of 'Directorate'; and paragraph *(b)* adds paragraph *(c)* to the definition of 'serious offence'.

23 Amends section 3 (2) of the Interception and Monitoring Prohibition Act 127 of 1992 by adding paragraph *(d)* .

24 Amends section 4 of the Interception and Monitoring Prohibition Act 127 of 1992 , as follows: paragraph *(a)* substitutes subsection (1); and paragraph *(b)* adds subsection (2) *(b)* (iv).

25 Amends section 5 of the Interception and Monitoring Prohibition Act 127 of 1992 by substituting subsection (2).

26 Short title and commencement

This is the National Prosecuting Authority Amendment Act, 2000, and comes into operation on a date fixed by the President by proclamation in the *Gazette* .

NATIONAL PROSECUTING AUTHORITY AMENDMENT ACT 56 OF 2008

[ASSENTED TO 27 JANUARY 2008] [DATE OF COMMENCEMENT: 6 JULY 2009]

(Unless otherwise indicated)

(English text signed by the President)

ACT

To amend the National Prosecuting Authority Act, 1998, so as to repeal the provisions relating to the Directorate of Special Operations; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:-

1 Amends section 1 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* deletes the definition of 'Directorate of Special Operations'; paragraph *(b)* substitutes the definition of 'head of an Investigating Directorate'; paragraph *(c)* substitutes the definition of 'Investigating Director'; paragraph *(d)* deletes the definition of 'special investigator'; and paragraph *(e)* substitutes the definition of 'specified offence'.

2 Amends section 5 (2) of the National Prosecuting Authority Act 32 of 1998 by deleting paragraph *(d* A *)* .

3 Substitutes section 7 of the National Prosecuting Authority Act 32 of 1998 .

4 Amends section 13 (1) of the National Prosecuting Authority Act 32 of 1998 by deleting paragraph *(a* A *)* .

5 Repeals Chapter 3A (ss 19A to 19C inclusive) of the National Prosecuting Authority Act 32 of 1998 .

6 Amends section 23 of the National Prosecuting Authority Act 32 of 1998 by deleting subsection (2).

7 Amends section 26 of the National Prosecuting Authority Act 32 of 1998 by substituting subsection (2).

8 Amends section 28 (2) of the National Prosecuting Authority Act 32 of 1998 by substituting paragraph *(a)* .

9 Repeals sections 30 and 31 of the National Prosecuting Authority Act 32 of 1998 .

10 Amends section 36 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* substitutes subsection (3); paragraph *(b)* deletes subsection (3A); paragraph *(c)* substitutes subsection (4); and paragraph *(d)* substitutes subsection (5).

11 Amends section 40 of the National Prosecuting Authority Act 32 of 1998 , as follows: paragraph *(a)* substitutes the words in subsection (1) preceding paragraph *(a)* ; and paragraph *(b)* deletes subsection (2).

12 Amends section 43 of the National Prosecuting Authority Act 32 of 1998 by deleting subsection (7).

13 Substitutes section 43A of the National Prosecuting Authority Act 32 of 1998 .
[Date of commencement of s. 13: 20 February 2009.]

14 Amends the Preamble to the National Prosecuting Authority Act 32 of 1998 by deleting the ninth, tenth and eleventh paragraphs.

15 Short title and commencement

This Act is called the National Prosecuting Authority Amendment Act, 2008, and comes into operation on a date determined by the President by proclamation in the *Gazette* .