EXHIBIT Z
(a) & (b)

AFFIDAVIT & ANNEXURES

OF

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

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AFFIDAVIT

I the undersigned,

JOHAN WESSEL BOOYSEN

do hereby state under oath that:

1.

I am an adult male South African citizen residing in Pretoria, Gauteng Province.

2.

All facts stated herein are, unless the context indicates otherwise, within my own personal knowledge and are to the best of my belief both true and correct.

3.

I will attempt to keep my submission brief in order to avoid prolixity and to unnecessarily burden the Commission. I will seek to highlight key aspects, events and *dramatis personae*. Should it become necessary I will provide additional facts.

MY POLICE CAREER AND QUALIFICATIONS

4.

I was a career policeman having joined the South African Police in 1976. I was an officer before our democracy in 1995 and was part of the transformation process from a Police Force to a Police Service. I regard my integration into the new Police Service, including my promotion to the ranks of Colonel, Brigadier and Major-General subsequent to the democratic dispensation in South Africa, as one of my

significant achievements. I served in various capacities, mostly in managerial positions until 2016.

5.

I retired from SAPS in February 2016, five months before my due retirement date whilst holding the rank of Major-General and a position as Provincial Head of Directorate of Priority Crimes Investigation ("**DPCI**"), commonly known as the "**HAWKS**". This for reasons I will expound on later herein.

6.

I hold a National Diploma in Police Administration as well as Bachelor degree in Policing. I also completed a post graduate Presidential Strategic Leadership Programme. I have attended a number of international courses by *inter alia* the Federal Bureau of Investigation (FBI) USA, The China Police University China and the Bundeskriminalampt from Germany. I successfully completed a variety of courses in South Africa ranging from Investigator, Forensic and Management courses. I have received awards from National and Provincial Commissioners. I also received recognition from the Head of Interpol. I have received a number of medals including the Police Service medal (gold) for faithful service.

7.

I have testified in various High Courts, Regional Courts and Magistrate Courts throughout South Africa on cases ranging from murder, aggravated robberies and other high profile cases. I have also testified at various Judicial Commission of Enquiries. I have been commended by presiding officers and have never been the subject of adverse criticism by any of the presiding officers. I regard myself as an expert in investigations and policing matters.

8.

Following the dissolution of the Directorate of Special Operations also known as the Scorpions, the HAWKS was established.

9.

It was during March 2010 that I was appointed as the Provincial Head of the HAWKS in Kwa-Zulu Natal. I held the rank of Major-General. I was also the Deputy Provincial Commissioner in KZN at the time.

10.

Prior to this appointment, I was the KZN Provincial Commander of the Organised Crime Units. As Head of the HAWKS, a number of Organized Crime Units and Commercial Crime unit commanders in the Province reported to me. These units all had sub-sections.

11.

One such subsection was the Cato Manor Serious-and-Violent Crime Unit. In addition to overseeing these units I was also seized with the management of Human Resources, Supply Chain Management (SCM) and Financial Management of the HAWKS in KZN.

12.

I believe, for reasons set out below, that segments or individuals within the South African Police Services ("**SAPS**"), the HAWKS, and the National Prosecuting Authority ("**NPA**") were captured by persons with political authority, or by persons with political links, to illegitimately control certain criminal investigations and prosecutions for self-serving reasons.

13.

Since the start of my career in 1976, I had an unblemished record in my police career and was considered a dedicated police officer. This changed when I first became involved in an investigation relating to alleged fraud and corruption perpetrated by a local businessman, Mr Thoshan Panday.

THE THOSHAN PANDAY CORRUPTION INVESTIGATION

14.

On 28 April 2010 Brigadier Kemp, the Provincial Head: Financial Services reported to me a possible multi-million-rand corruption relating to the hiring of accommodation for policeman tasked with the 2010 World Cup Soccer duties. I then requested him to compile a short report about it outlining his findings. On receipt of the report on 29 April 2010 I determined that on the face of it there existed enough information to institute an investigation. It appeared that Colonel Navin Madhoe ("**Madhoe**") from SAPS Provincial Supply Chain Management Unit ("**SCM**") had colluded with a local businessman, Thoshan Panday ("**Panday**"), to inflate and/or split quotations.

15.

On 3 May 2010 I caused an enquiry to be registered at the Durban Commercial Branch under the command of Brigadier André Lategan ("**Lategan**") for further investigation as he was the Provincial Commander: Commercial Crime Unit. This unit was tasked to investigate financial related fraud matters.

16.

During early May 2010 I was travelling home from the office when I received a cell phone call from the Provincial Commissioner ("**PC**"), Lieutenant-General Mmamonye

Ngobeni ("**Ngobeni**"). She wanted to know what investigation I was busy with. I asked her which one she was referring to, as by virtue of my appointment I was seized with a number of investigations. She responded that it related to the SCM one. Before I could respond she said to me that there was enough going on in the Province and that the police could not be embarrassed any further because there was already an ongoing investigation at Mountain Rise in Pietermaritzburg pertaining to corruption. I wanted to explain to her that it was better to bring it into the open but she continued to interrupt me by telling me to stop the investigation. She never asked me for any details concerning the magnitude of the investigation or the role players involved. She then ended the call.

17.

On the following day I called Lategan to my office. I told him that I had been instructed by Ngobeni to stop the investigation and that he should return the enquiry file to me. He was not happy and wanted to know why. I informed him that the instruction came directly from the PC and we therefore had to comply. I informed him that I was also not happy and that we needed to see how we would take the matter forward .

18.

On Saturday 8 May 2010, I was at home when Ngobeni phoned me on my cell and it was obvious from her tone of voice that she was very agitated. She shouted at me asking me "*what is wrong with you people?*" I told her that I did not know what she was talking about to which she responded "*I told you to stop the investigation, but your people are still continuing with the investigation*", or words to that effect. I told her that I had retrieved the file from Lategan so there could be no investigation, but that I would confirm with Lategan in any event. I phoned Lategan who confirmed t hat

the investigation had been stopped. I then phoned Ngobeni back and informed her that Lategan had confirmed that the investigation had indeed stopped. Ngobeni terminated the call.

19.

During mid-June 2010 I was summoned to Ngobeni's office. When I attended her office, the following people were present:

- Ngobeni;
- Major-General Bongani Ntanjana ("**Ntanjana**"): Provincial Head, Support Services, comprising SCM, Financial Services ("**FS**") and Human Resource Management ("**HRM**"). He is now deceased;
- Major-General Fannie Masemola ("**Masemola**"): Provincial Head: Operational Response, dealing with amongst other things, the deployment of police officers in the Province;
- Brigadier Lawrence Kemp ("**Kemp**"): Provincial Head: Finance;
- Colonel Navin Madhoe: SCM who was one of the subjects of the investigation who allegedly colluded with Panday.

20.

Ngobeni was very vociferous and she accused us of being more concerned about finances than the lives of the public. Kemp attempted to explain to her what the concerns were but she would have none of what he was trying to tell her. The more Kemp tried to explain, the more she remonstrated with him. She then looked at me and asked me what I had to say, whereupon I told her that I would much rather discuss this matter with her in private. Although I never informed her of my reason to discuss this matter in private, the reason was that Madhoe, who was one of the suspects, was present at the meeting.

21.

She then excused Madhoe and Kemp from the meeting. I told her that I did not think that she realised what our gripe was and what the gravity and implications of the situation was as the initial investigation revealed a large number of contracts going through Panday's books and that there were indications of the SCM procedures being flouted.

22.

In response to this she reiterated that I must stop my investigation and bizarrely instructed Ntanjana to conduct the investigation instead. To my mind Ntanjana did not have the resources, the capacity or the ability to undertake such an investigation. I suspected it to be a smoke screen to exclude me from the investigation whilst creating an impression that the matter would continue to receive attention. The meeting ended and I left.

23.

My suspicions were confirmed when I approached Ngobeni about 2 weeks later and handed her a report from Colonel Vasan Soobramoney ("**Soobramoney**"), one of the investigators. When giving the report to Ngobeni, I made it clear to her that we had a legal obligation to investigate what emerged from Soobramoney's report. She summoned Ntanjana to her office to enquire from him what progress he had made in the investigation. Ntanjana told her that he was waiting for some or other document. It did not make sense to me and it was clear to me that Ntanjana had done absolutely nothing about the investigation. Both Ntanjana and Ngobeni asked me for a copy of Soobramoney's report which I handed to them.

24.

During late June 2010 I was summoned to Ngobeni's office. She confirmed to me that the investigation had ceased. She then asked me to join her in her boardroom adjoining her office. On entering the boardroom I noticed a person whom I recognised as Advocate Mkhize. Also present were the following people whom Ngobeni introduced to me as:

- Panday (He was the main suspect in the investigation. I had never met him before); and
- Mrs Tasha Giyapersad ("**Giyapersad**"), an attorney.

25.

During this meeting I was peppered with questions about the investigation by Panday and Giyapersad. They also accused the investigators of investigating Panday without a mandate. Panday also threatened to sue 'us', being the police. Giyapersad also alleged that the one investigator, Soobramoney, attempted to extort R1 million from Panday, which Panday confirmed. To my surprise Ngobeni did not intervene but rather, in front of the rest of the persons present, instructed me to institute an investigation into the conduct of Soobramoney.

26.

Within a week I caused a case docket to be opened for investigation regarding the allegations against Soobramoney, despite my reservations. I commenced and finalised the investigation, presented the case to the Senior Public Prosecutor ("**SPP**") for a decision and the SPP declined to prosecute Soobramoney or any other investigators.

27.

About a week later, I was again summoned to Ngobeni's office where she again confronted me about the investigation. On entering her boardroom this time, I found Advocate Chowdree SC ("**Chowdree**") and Advocate Stix Madlala ("**Madlala**") who I know, seated there. As before, both Panday and Giyapersad were again present.

28.

This time around Advocate Chowdree, instructed by his client Panday, complained about the underhanded way in which Soobramoney was conducting the investigation. Soobramoney was accused of accessing Panday's bank accounts without a section 205 subpoena, as required by law. I explained to them that it would have been foolish of Soobramoney to have done so as this would render his evidence inadmissible.

29.

At the meeting I had a heated discussion with Giyapersad as I had been informed by Soobramoney that she had approached a number of the witnesses in the investigation against Panday, from whom affidavits had already been obtained. She had obtained further affidavits from them wherein they contradicted information contained in their affidavits already given to our investigators. One statement I can specifically remember was in fact compiled by her and sent to the witness, Mr Edward Ngwenya the owner of Crocodile Creek Guesthouse, to sign who in fact did. Giyapersad disputed my contention that she was not entitled to do so, however Chowdree indicated to her that I was indeed right and we left the matter there.

30.

At some stage Soobramoney complained to the National Head of the HAWKS, Lieutenant-General Anwa Dramat ("**Dramat**"), that the investigation was being stopped. Dramat was my superior. During late May 2011 I met with Dramat in Pretoria at the Burgerspark Hotel, where he asked me about the reasons for stopping the investigation. I briefed him accordingly. I also explained to him that at that stage I had to report to both him and the PC (a decision later successfully challenged in the High Court and the Constitutional Court where it was held that my reporting line would be directly to the National Head: HAWKS, and not to the PC).

31.

After having briefed Dramat, I suggested that the investigators report directly to his office and not to me to obviate the PC interfering with the investigation. He agreed and "appointed" Brigadier Nkosi from the Office of Serious Economic Offences in Pretoria as the person to whom the investigators should report. I would continue to assist in the investigation, albeit surreptitiously.

32.

On 28 June 2010 the then National Police Commissioner, General Bheki Cele ("**Cele**") telephoned me to enquire about the attempts that were being made to interfere with the investigation. I did not elaborate that it was the PC who was interfering as I was still busy with the investigation. Cele instructed me to continue with the investigation and that the reporting lines should be to me and not to the National office as I was the Head for the HAWKS in KZN. We then continued with the investigation.

33.

As the investigation proceeded Panday unsuccessfully attempted to set aside subpoenas issued in terms of section 205 of the Criminal Procedure Act, in the High Court, which the investigators had obtained to access his bank accounts in relation to the investigation against him.

34.

On 24 August 2011, before the court action could be concluded, I was approached by Warrant officer Deena Govender ("**Govender**") who informed me that Madhoe wanted to meet with me. We agreed that Govender could set up the meeting.

35.

On 25 August 2011 Govender again contacted me and suggested that Madhoe wanted to meet with me at Jaipur Palace Restaurant, but I recommended the Elangeni Hotel as this was within close proximity to my office.

36.

When I met with Madhoe, Govender was initially present but left shortly after Madhoe asked to speak to me alone. Madhoe then elicited my assistance in the investigation against him. Madhoe opened his laptop and showed me a series of photographs of crime scenes depicting dead bodies. It was evident from these photographs that they were from police dockets. I asked him what it was about as they appeared to be normal crime scene photographs and he informed me that he could get more. I did not know what to make of it but my interpretation was that he was subtly trying to intimidate me.

37.

Thereafter Madhoe asked me if it was possible for me to assist him with the investigation against him. I played along and asked him how I could be of

assistance. He mentioned that there was a report that I had which originated from the investigators and he wanted me to manipulate Soobramoney's investigation report. Had I done so it would have had the potential to compromise the entire corruption investigation in that it would indicate that the investigators had accessed the bank accounts of Panday, prior to the section 205 subpoena having been obtained.

38.

On the same day Captain Hennie Pelser ("**Pelser**") from my office who was the coordinator of all section 252(a) operations and I immediately arranged authorisation to engage Madhoe from Advocate Gert Nel from the Pietermaritzburg office of the Prosecuting Authority, in terms of section 252(a) of the Criminal Procedure Act.

39.

During my further engagements with Madhoe, he indicated that Panday had 2 "bar" (*sic*) available that would be paid to me for my so called co-operation. After a number of pre-meetings with Madhoe I arranged for a sting operation where I would hand Madhoe the report in exchange for the money.

40.

On 08 August 2011, during the authorised sting operation, I caused Madhoe to be arrested after he had placed R1,372,000.00 in the boot of my car at the KZN police headquarters. Panday was later arrested and joined as an accused with Madhoe for attempting to bribe me, as will become evident later in this affidavit.

41.

During the investigation we obtained search warrants for SAPS Provincial Head Office's SCM Unit, Financial Services and the National Intervention Unit. We also obtained search warrants for Panday, Madhoe and a Captain Narainpersad's

premises. During the subsequent searches a number of incriminating documents were seized. One such document was the confidential Soobramoney progress report into the investigation, which I had provided to the Provincial Commissioner, Ngobeni, and Ntanjana. A copy of the progress report is attached as **Annexure "JWB 1."**

42.

In a brazen attempt Panday approached a member of Cato Manor, Warrant-Officer Paul Mostert ("**Mostert**"), and requested him to either steal the exhibits or to set the building where the exhibits were kept alight. Panday told Mostert that he could name his price. Panday somehow knew exactly where the files were kept. This was told to me personally by Mostert.

43.

We attempted to set up a sting operation in terms of section 252(a) of the Criminal Procedure Act, but Panday must have suspected something as he did not engage further with Mostert when Mostert phoned him back.

44.

It later emerged during the investigation communication interceptions authorised in terms of Act 70 of Act 2002, that one of the Colonels at the HAWKS, Colonel Welcome S (WS) Mhlongo ("**Mhlongo**") had links with Panday and I therefore had good reason to suspect that Mhlongo had informed Panday where the files were kept.

45.

Mhlongo was later implicated by Advocate Mxolisi Nxasana for attempting to 'find dirt' on Nxasana at the behest of Advocate Nomgcobo Jiba ("**Jiba**"). This was when Nxasana had succeeded Jiba as the National Director of Public Prosecutions

("**NDPP**"). I acquired a copy of the statement of Mr Terence John Joubert ("**Joubert**"), a Risk Specialist contracted to the office of the NPA, which confirms this. A copy of Joubert's statement is attached **Annexure "JWB 2."**

46.

Further communications intercepted revealed that on the same day that Madhoe had been arrested, Panday had phoned Deebo Mzobe ("**Mzobe**") during the evening and complained to Mzobe that I set them up. I believe that Mzobe is the relative of former President Jacob Zuma ("**Zuma**"). During the intercepted discussion between Panday and Mzobe they commented that "*Booysen had to be taken care of because Booysen was standing in the way of everything and that Booysen's wings must be clipped*". The discussion related to the investigation against Panday who was a business partner of Mzobe, See attached **Annexure "JWB 3."** This is an example of one of the conversations that were recorded. The other recordings relating to the Panday investigation can be made available to the Commission's investigators, if so required.

47.

Panday also had close business ties with one of Zuma's sons, namely Mr Edward Zuma. During the investigation it came to light that Panday had already received approximately R45 million from SAPS and that a further R15 million was about to be paid to him. I immediately informed SAPS's financial services not to release the money to Panday until the corruption investigation had been concluded. Panday initially threatened me with legal action, however he did not pursue the threats.

48.

Sometime later I was visited by Edward Zuma at my office at Police Provincial Headquarters. Edward Zuma wanted me to release the R15 million which I had frozen. According to him, he was a 'silent' business partner of Panday and was not receiving his dividends as I had frozen the R15 million pay-out. I made it clear to Edward Zuma that if I heeded to his request, it would make me guilty of corruption. Edward Zuma later denied having visited me. The Commissions investigators obtained an affidavit from my secretary at the time, Elaine Latchanah confirming the visit. Statement of Ms Latchanah is attached as **Annexure "JWB 4."**

49.

Soon after Madhoe and Panday appeared in court, the prosecutor in the matter, Advocate Bheki Mnyati ("**Mnyati**"), received a letter from Advocate Laurence Mrwebi ("**Mrwebi**") who was at that stage the Head of the NPA Commercial Crimes Court in Pretoria. The letter essentially interrogated why Madhoe had been charged. He also mentioned that Madhoe's attorney had approached him. In the letter Mrwebi downplayed the strength of the evidence against Madhoe and it seems that he agreed with some of Madhoe's outlandish averments. A copy of the letter is attached as **Annexure "JWB 5."**

50.

In my view, Mrwebi failed to adhere to protocol by entertaining Madhoe directly. He should have informed Madhoe's attorney to make representations to the Director of Public Prosecutions ("**DPP**") in KwaZulu Natal ("**KZN**") and thereafter to the NDPP if he was not satisfied with the response of the DPP.

51.

Mnyati in response penned a detailed legal opinion, setting out the evidence against Madhoe. See attached **Annexure "JWB 6."** In his reply to Mrwebi he concluded that he intended to indict Madhoe in the High Court for corruption. Any benefit Madhoe might have gained by approaching Mrwebi obviously would have benefitted Panday too.

52.

During July 2012 the Acting DPP in KZN Advocate Simpiwe Mlotshwa ("**Mlotshwa**") was replaced with Advocate Moipone Noko ("**Noko**"), as the Acting DPP for KZN. Shortly after her appointment, Noko withdrew the charges against Panday and Madhoe. I suspect that Noko had been appointed on the recommendation of Advocate Jiba, as Jiba was the acting NDPP when advocate Noko replaced Mlotshwa.

53.

Advocate Noko later issued a media statement stating: *"... while there was a prosecutable case, she had concerns "regarding justice", based on representations which Panday had made and which needed further investigation*". The media article is attached as **Annexure "JWB 7."**

54.

Mnyati later informed me that his stance in the matter was the reason for being overlooked for promotion and that he intended resigning from the NPA which he later did. I understand that he is now in private practice.

55.

It later turned out, according to an independent forensic audit report by PricewaterhouseCoopers ("**PWC**"), that the then Provincial Commissioner Ngobeni had a corrupt relationship with Panday and Madhoe. Panday paid a substantial amount of R20 000 to R30 000 for an extravagant birthday party for her husband at an upmarket hotel in Umhlanga Rocks. The PWC audit report and other evidence is contained in the case docket, Durban Central CAS 781/06/2010, which is with the Public Prosecutor, Advocate Wendy O'Brien. The payment was confirmed in the bank statements of Panday. This period coincides with the time period where the PC was continually harassing me to stop the investigations in which Panday was being implicated.

56.

Although I understand that a decision was subsequently taken to re-prosecute Panday, Madhoe and others for corruption and the attempt to bribe me, to date none of the accused have appeared in court. I am informed that a decision to now prosecute Panday and Madhoe for attempting to bribe me had been taken on review by Madhoe. I understand that the review application had been struck off the roll. I am not sure as to the reasons why this was done. It is further my understanding that Advocate Wendy O'Brien from the Specialised Commercial Crimes Court in Durban is preparing to proceed with this case. With regards to the main corruption case, I am informed that a decision was taken to prosecute Madhoe, Panday and others, but the accused have also taken this decision on review. This matter is still pending.

57.

Whereas I am not privy to the founding affidavit for the review application in the main corruption case and can therefore not comment thereon, I have seen the founding

affidavit of Madhoe in the review application for the attempt to bribe me. It is significant that although I am not cited as a respondent, much of the points taken by Madhoe relates to imputations against the Independent Police Investigative Directorate ("**IPID**") Robert McBride, Nxasana and myself. Therefore I submit that the review application, if it had not been struck off the role, could not have been successfully opposed by the then NDPP, Advocate Shaun Abrahams ("**Abrahams**") unless I was approached to submit an affidavit or at the very least, submit a confirmatory affidavit in opposing the review application.

58.

THE AMIGO'S CASE

In another investigation, which I had 'inherited' in 2010 from the Commercial Crime Unit in KZN, after the establishment of the HAWKS, I was informed that whilst still the Acting DPP in KZN, Mlotshwa, had been pressured to withdraw charges against Peggy Nkoyeni ("**Nkonyeni**") and Mike Mabuyakhulu ("**Mabuyakhulu**"), who I recall were members of the KZN Legislature.

59.

I was informed about this by Lieutenant Colonel Piet du Plooy ("**du Plooy**"), the investigating officer in the case at the time. Nkoyeni and Mabuyakhul were co-accused, in what became commonly known as the 'Amigo' Case. It related to the corrupt acquisition of water purifying plants for hospitals in KZN. They were prosecuted for racketeering along with businessman Gaston Savoi ("**Savoi**"). According to Du Plooy, he and the Forensic Auditor in the investigation, Mr Trevor White ("**White**") from PWC, were summoned to Pretoria by Mrwebi and Anthony Mosing ("**Mosing**"). Du Plooy informed me that it was evident that the two advocates

had aligned themselves with the notion that the case against Nkoyeni and Mabuyakhulu did not have sufficient evidence to proceed against them.

60.

Because I had inherited the investigation in its final stages, I was not conversant with the evidence in the docket and enquired from Du Plooy what Advocate Mlotswa's position on the matter was. Colonel Du Plooy assured me that there was a *prima facie* case against the two and that Advocate Mlotswa was going ahead with the prosecution.

61.

Significantly, during July 2012, Mlotswa was replaced with Noko as the Acting DPP for KZN. Within two weeks after taking up the post, Noko withdrew the charges against Nkoyeni and Mabuyakhulu. The Amigo case was also removed from the assigned prosecutor, namely Advocate Ndlilele Dunywa ("**Dunywa**"), and reassigned to Advocate Bulelwa Vimbani ("**Vimbani**"). Since then no prosecutions have been reinstituted on these charges against Nkoyeni and Mabuyakhulu.

62.

LOOTING OF THE SECRET SERVICES ACCOUNT

Minister Mthethwa himself was responsible for the controversial appointment of Mdluli as Head of Crime Intelligence. The Acting National Police Commissioner at the time, Tim Williams ("**Wiliams**"), commented publically then that Mdluli's appointment was "*completely unusual*" and "*not regular*".

63.

A researcher at the Institute for Security Studies, Dr Johan Burger ("**Burger**"), remarked that Mdluli's appointment was clearly a political appointment which

interfered with police processes. A copy of this article is attached as **Annexure "JWB 8."**

64.

Mdluli was Head of Crime Intelligence and was at the time responsible for allegedly looting the Secret Services Account for his and others' benefit. One significant example is the building of a fence at a cost of R195 581.45 at the private residence of the then Minister of Police, Mthethwa, which had been paid for from the Secret Services Account.

65.

During a live interview with political analyst Karima Brown ("**Brown**") on radio 702 on 17 October 2018, Mthethwa attempted to defend the unlawful expenditure saying that he had been exonerated by the Inspector General of Intelligence ("**IGI**"). He claims that as a Minister he was entitled to the installation of security measures at his residence. This may be so but is a disingenuous deflection of the real issue at hand. The payment thereof should not have been procured from the SAPS Secret Services Account.

66.

From reading the Ministerial Handbook approved by Cabinet on 7 February 2007, the correct procedure is that the SAPS Protection and Security Services should have conducted a 'risk assessment' at the Minister's residence **after** he had requested security improvements at his residence. The risk assessment would have been evaluated and thereafter referred to the Department of Public Works ("**DPW**"). Once approved by the Minister of Public Works the project will be dealt with through DPW with funding coming from the Parliamentary Budget.

67.

In any event, on his own version during the radio interview, the expenditure incurred was higher than permitted by National Treasury which limits the State's contribution to R100 000.00. According to the Handbook, "*should the cost of the security measures be more that R100 000.00 the difference shall be borne by the Public Office Bearer*", in this instance Minister Mthethwa. Besides not conforming to the requirements of the Ministerial handbook the utilisation of the Secret Services Account to fund a wall around his private residence also remains unlawful no matter what benefits he as a Minister was entitled to, as described in the Ministerial Handbook. An extract relevant to the "*POLICY ON SECURITY MEASURES AT THE PRIVATE RESIDENCES OF PUBLIC OFFICE BEARERS*" is attached as **Annexure "JWB 9."**

68.

Details of the wall is confirmed in a report by the Auditor-General ("**AG**"). An extract from the AG report is attached as **Annexure "JWB 10."**

69.

I also assisted in the investigation of Mdluli for the looting of the Secret Services Account. Although the main investigation was being conducted by Roelofse from the HAWKS, there was an auxiliary investigation pertaining to the looting of the Secret Services Account in KZN conducted by Brigadier Simon Madonsela ("**Madonsela**"). Madonsela elicited my assistance and advice because elements from Crime Intelligence ("**CI**") in KwaZulu-Natal were obstructive during the investigation.

70.

I recall having read the dockets and having recorded the names of witnesses. I also made a summary of what the witnesses had stated in their affidavits. A copy of my handwritten notes as well as a transcription thereof is attached as **Annexure "JWB 11."**

71.

After Madonsela had subpoenaed documents from CI in KZN he was recalled to Pretoria and the investigation removed from him by General Lesetja Mothiba ("**Mothiba**"). Mothiba indicated to Madonsela that the instruction emanated from Phiyega.

72.

The investigation into the looting of the Secret Services Account in KZN was then handed to a less experienced junior investigator, Captain Ramesh Heerlal ("**Heerlal**) from Moonoo's office.

73.

Sometime later, McBride of IPID enquired from me if I could get copies of the dockets and I managed to obtain copies of the dockets. On a cursory perusal of copies of the dockets I noticed that any statements that incriminated Mdluli and other police officials were not in the copies of the dockets now provided to me.

74.

I handed the copies to McBride and thereafter submitted an affidavit to him in which I listed the names of witnesses whose statements had been 'sanitized' from the dockets.

75.

CATO MANOR INVESTIGATION

In 2015, in a criminal investigation against Advocate Jiba (in which I was the complainant), Mlotswa filed a witness affidavit wherein he stated that Jiba had phoned him in the beginning of 2012 and requested him to sign an indictment for the Cato Manor officials and me to be prosecuted for racketeering. Mlotshwa declined to do it because there was no accompanying documents to support the indictment for charges of racketeering because there was no evidence linking us individually or collectively to sustain a charge of racketeering.

76.

Mlotswa informed me that Jiba later again discussed the authorising of an indictment against us with him in Pretoria, but he again informed her that he will only do so if and when the indictment is accompanied by documents, linking us individually and collectively to the charges of racketeering. It is significant that during 2012, the same time that Jiba phoned Mhloswa, I was involved in the investigations of Panday and supervising the Nkoyeni and Mabuyakhulu investigations.

77.

INTERFERENCE BY MINISTER MTHETHWA

Mosing of the NPA recorded handwritten minutes of a meeting between the then Minister of Police, Nathi Mthethwa ("**Mthethwa**") and prosecutors at the NPA head office, which coincides with the timeline during which Mlotshwa was pressured by Jiba to authorise the Cato Manor officials and my prosecution ("**the Mosing notes**"). According to the Mosing notes, Mthethwa 'wanted arrests within a week'. I have obtained a copy of the Mosing notes attached as Annexure **"JWB 12."**

78.

In Mosing's handwritten minutes, I am referred to as a 'suspect'. To emphasize my suspicions concerning the involvement of Mthethwa's office, I am in possession of a NPA letter wherein it is evident that one, Mr Skhumbuzo Ndhlovu from the Civilian Secretariat in the Ministers office was assisting the NPA related to the Cato Manor investigation. A copy of this letter is attached as **Annexure "JWB 13."**

79.

The involvement of Minister Mthethwa to have the Cato Manor policeman and myself prosecuted is further confirmed in an email from Adv Chauke ("**Chauke**") of the NPA to Advocate S Mlotswa, the then acting DPP in KZN. This email is one of a sequence of emails between Chauke and Mlotswa. The general gist of the emails are that Chauke wants Mlotswa to cooperate in having the Cato Manor members and me prosecuted but Mlotswa appears reluctant to do so because he requires certain supporting information. In the email dated 12 June 2012 Chauke writes *inter alia* to Mlotshwa, "*if this makes you uncomfortable please indicate so that I may urgently take up the matter with the acting NDPP as well as the minister*". A copy of this email is attached as **Annexure "JWB 14."**

80.

Mosing's notes reveal how Minister Mthethwa wielded pressure on the police and prosecutors to '*make arrests*'. The notes further reveal how prosecutors conspire to exclude KZN prosecutors and to involve prosecutors at National level (essentially themselves). This clearly highlights how Mthethwa and the group of prosecutors pay scant regard to the constitution by disregarding the doctrine of the separation of powers between the Executive and the Judiciary.

81.

The notes by Mosing must not be viewed in isolation. During the live radio interview with Brown, mentioned earlier, Mthethwa conceded that he had had a meeting with prosecutors and was attempting in the same vain to justify having had the meeting.

82.

It is my respectful opinion that Minister Mthethwa had no legitimate reason to meet with prosecutors and to make demands. If he wanted to obtain feedback regarding the investigation he should have followed protocol and requested feedback via the SAPS's National Commissioner or his counterpart Minister Masutha, the Minister of Justice.

83.

THE PROSECUTORS

The malicious prosecutions of *inter alia*, Gordhan, Dramat, McBride, Sibiya, Breytenbach, Johann Van Loggenberg ("**Van Loggenberg**"), Ivan Pillay ("**Pillay**"), the Cato Manor detectives, Oupa Magashula ("**Magashula**"), Mathews Sesoko ("**Sesoko**"), Andries Janse van Rensburg ("**Janse van Rensburg**"), Gerhard Wagenaar ("**Wagenaar**") and myself, all at the hands of the same regime of prosecutors, suggests that the prosecutors mentioned below were essentially designated through political manipulation to disrupt investigations into corrupt politicians and their associates by targeting individuals seized with those investigations.

84.

In some instances, they acted with patent disregard to the constitution and their oath of office, by unlawfully withdrawing criminal charges against certain individuals

including Mabuyakhulu, Nkoyeni, Mdluli, Jiba and Panday. In other instances they disingenuously contrived reasons not to prosecute certain individuals where *prima facie* cases exists and conversely prosecuted others where **NO** *prima facie* evidence existed such as Sibiya, Dramat, Gordhan, Breytenbach, McBride and myself.

85.

These prosecutors comprise of certain prosecutors of the Priority Crimes Litigation Unit ("**PCLU**") created by Presidential Proclamation on the 23rd of March 2003, or prosecutors working closely with them at the NPA. The mandate of the PCLU is to direct and manage investigations into matters such as Genocide, Crimes against Humanity, War Crimes, Crimes against the State, National and International Terrorism, Contraventions of Foreign Military Assistance Act, Nuclear Energy Act and the Intelligence Service Act etc.

86.

There are many serious matters such as, amongst others, Bosasa, State Capture, the Guptas and Steinhoff that effects the economy and stability of the country, that warrant the attention of the PCLU, however they elected to focus on relatively minor cases such as alleged fraud against Pillay and Gordhan and defeating the ends of justice by McBride.

87.

It is now public knowledge that the individuals mentioned above were all involved in various sensitive investigations by the HAWKS and SARS respectively, such as the Nkandla debacle, illicit tobacco trade involving Edward Zuma and Yusuf Kadjee ("**Kadjee**"), the looting of the Secret Service Account involving Mdluli, tax evasion by Robert Huang ("**Huang**") – a former business associate of Khulabushe Zuma (in this

regard I attach a news report from News24 dated 29 March 2019 wherein it was reported that SARS are seeking to recover R236 million in debt from Huang, see **Annexure "JWB 15."**), senior police officers and politicians and corruption by Panday who had links to Edward Zuma.

88.

Some of the Advocates, who I believe form part of a captured group within the NPA are listed below. I will demonstrate the involvement of certain prosecutors in various persecutions of individuals who were essentially in the forefront of investigations of individuals with political links, to offset legitimate prosecutions of those with political links.

89.

I firmly believe that these prosecutors acted at the instance of Advocate Jiba who in turn did the bidding of Mr Jacob Zuma, Mdluli and those associated with them. Some of the prosecutors that I believe have been captured by individuals with a vested interest in having investigations manipulated are those listed below.

90.

ADVOCATE NOMGCOBO JIBA

Jiba has been at the centre of controversy at the NPA for almost a decade. She played a prominent role in the arrest of Nel, who investigated the then SAPS Police Commissioner, Selebi, for corruption. She played a key role in shielding Zuma from prosecution by evading scrutiny of the so called 'spy tapes'. The 'spy tapes' were central to a decision for racketeering charges to be dropped against Zuma.

91.

During a review application by lobby groups to have the charges against Zuma reinstated, Jiba frustrated the applicants and the courts by not releasing the 'spy' tapes. Jiba's conduct was criticised by the Supreme Court of Appeal.

92.

Jiba also played a major role, along with Mrwebi, to withdraw criminal charges against the then National Head of Crime Intelligence, Mdluli. This too courted criticisms from the courts as the withdrawal of charges against Mdluli was held to be irrational. Breytenbach, who insisted on prosecuting Mdluli, was suspended and charged internally by Jiba. Breytenbach was acquitted and resigned from the NPA. This did not deter Abrahams from continuing the persecution of Breytenbach once he assumed office. Raymond Mathenjwa ("**Mathenjwa**"), was assigned to prosecute her criminally on spurious charges. The court acquitted her on all charges.

93.

Advocate Jiba played a key role in prosecuting me for racketeering. I took Jiba's decision to prosecute me on review, where Jiba was found to be mendacious in court papers, by Gorven J from the Durban High Court, where he ruled that her authorisation to prosecute me was irrational. Gorven J held as follow in my review application *"I can conceive of no test for rationality, however relaxed, which could be satisfied by [Jiba's] explanation. The impugned decisions were arbitrary, offend the principle of legality and therefore, the rule of law and are unconstitutional*". A copy of Gorven J's Judgement is attached as **Annexure "JWB 16."**

94.

It is my view that Jiba is at the heart of all the nefarious activities that I have been describing in this submission, by using her influence as an executive member of the NPA to direct the fate of others. During her tenure as Acting NDPP when she was appointed in 2012, the NPA was turned into a battleground where she and a faction under her charge, pitted themselves against those who pursued prosecutions of their political acolytes. When Abrahams' predecessor, Nxasana was appointed as NDPP in October 2013, Jiba and Mrwebi were particularly disruptive and recalcitrant.

95.

In an effort to stabilize the NPA, Nxasana requested retired Constitutional Court judge, Justice Yacoob, to conduct an internal enquiry regarding the problems at the NPA at the time. I understand that Advocates Jiba and Mrwebi refused to cooperate prompting Justice Yacoob to call for a Judicial Commission of enquiry at the NPA. Nothing came of his recommendation.

96.

Various disparaging remarks have been levelled at Advocate Jiba by the courts. This culminated in her being prosecuted for fraud, perjury and obstructing the course of justice. When Nxasana was elbowed out by the then President Jacob Zuma, Abrahams withdrew the criminal charges against her. The High Court in Gauteng North found that the withdrawal of the criminal charges was irrational which means that Jiba will have to stand trial. The same court made adverse findings on the integrity of Advocates Abrahams and Mokgathle, but there was no action taken as a result of the findings.

97.

Jiba was struck from the roll of Advocates by the Gauteng North High Court for her handling of the Mdluli matter. The Supreme Court of Appeal upheld her appeal but Freedom Under the Law ("**FUL**") has applied to the Constitutional Court for leave to appeal the SCA decision. The matter is pending.

98.

In the meantime Jiba has been suspended by the current State President, Cyril Rhamaposa ("**Ramaposa**"). Evidence has been led in the Mokgoro inquiry into her fitness to hold office. In terms of the gazetted Terms of Reference the inquiry must probe whether Jiba properly exercised her discretion in relation to instituting and conducting criminal proceedings on behalf of the state with reference to *inter alia* Booysen v Acting NDPP. I indeed testified at the inquiry on the 4th of February 2019 .

99.

ADVOCATE SELLO MAEMA

It is evident from the exposition below that Advocate Maema has been the 'clean-up'-and 'go-to-person' whenever the political elite and or their associates have to be protected from prosecutions. Maema is the lead prosecutor in the prosecution against the Cato Manor officials and myself.

100.

In the wake of Govern J's findings in Booysen v Acting NDPP a criminal investigation against Jiba ensued. Maema made a false statement under oath in this matter to the police. He stated that an apparent witness in the Cato Manor case had been "killed", whereas Maema knew full well that the person that he had referred to was Bheki @ Londlo Mthiyane ("**Mthiyane**") who had died of natural causes.

101.

I have registered a criminal case against Maema for perjury and fraud at the Silverton Police Station vide CAS 156-6-2016, in regard to a prosecution memorandum to the then NDPP Abrahams, in which he was dishonest and misrepresented evidence to persuade Abrahams to authorise our prosecution. I have detailed the falsehoods succinctly in my two complainant statements, copies of which are attached as **Annexure "JWB 17."** The investigation is being conducted by Lieutenant Colonel Pharasa ("**Pharasa**") from the HAWKS. Pharasa has informed me that the docket has been submitted to the Public Prosecutor for decision. I have also reported Maema's conduct to the General Council for the Bar.

102.

I am also aware that Van Loggenberg is the subject of prosecutions by Maema. Maema did this in collaboration with NDPP prosecutors Pretorius and Sibongile Mzinyathi (Mzinyathi). Van Loggenberg filed a formal complaint to the then NDPP, Abrahams because Maema lied under oath pursuant to an application Van Loggenberg had brought pertaining to his prosecution. Van Loggenberg also informed Abrahams how Pretorius and Mzinyathi had lied in the same application.

103.

Maema was also the prosecutor in the aborted so-called 'Rendition' saga when members from the Independent Police Investigative Directorate ("**IPID**") including the Executive Director, McBride, were prosecuted for obstructing the course of justice. They were prosecuted because they updated a report to the Minister of Police, Nathi Nhleko ("**Nhelko**"), which evidently did not fit in with Nhleko's plans to get rid of Dramat who was the Head of the HAWKS at the time.

104.

Nhleko suspended McBride and Maema took up the criminal prosecution. The Constitutional Court held that McBride's suspension was unlawful and criminal charges were eventually withdrawn against McBride and his co-accused. By then certain investigations McBride had undertaken had suffered a setback. Maema and Nhleko's actions, in my view, constitute a criminal offence of defeating the ends of justice.

105.

The suspensions of McBride, Dramat and myself were held to be unlawful by the courts, whilst the others did not challenge their suspensions. Consequent to these persecutions, various HAWKS and SARS investigations were compromised.

106.

Maema previously publicly took responsibility in the media for interfering with a political sensitive prosecution in the Brett Kebble ("**Kebble**") case, as well as the prosecution of former Crime Intelligence Head, Mphego. He replaced Nel and Andrea Johnson in the Kebble case for no apparent reason. Agliotti was not surprisingly acquitted for the murder of Kebble. Mphego was charged for defeating the ends of justice after he allegedly interfered with a witness (Agliotti) in the Selebi case. I understand that the case against him did not proceed after he made representations to the NDPP .

107.

It cannot be said that it is a coincidence that Maema happens to be involved in the prosecution in all three matters. Furthermore, it is my understanding that he is based at the DPP office in Mmabatho, but is designated to conduct these 'prosecutions' in

other parts of the country. Considering his history, (i.e. in the Selebi and Mphego cases referred to previously) it amplifies my contention that he is in effect a proxy who is deployed where and when it is required, to protect certain connected individuals by prosecuting those who are investigating those with political links. In my experience dealing with High Courts spanning almost 40 years I have never encountered a situation where prosecutors from one provincial jurisdiction undertake prosecutions in another provincial jurisdiction.

108.

ADVOCATE ANTHONY MOSING

Advocate Mosing along with Mrwebi facilitated the withdrawal of racketeering charges against two politicians, Nkoyeni and Mabuyakhulu. They had summoned the investigating officer, Du Plooy, to Pretoria where the wheels were set in motion for the charges against them to be ultimately withdrawn by Noko. Mosing played a major role in my prosecution. In the Mosing notes, Mosing writes that he and other prosecutors, all whom are involved in the persecution of people like McBride and Dramat *et al,* met with the then Police Minister Mthethwa on 08 March 2012, where the plan to arrest myself and exclude KZN prosecutors from the process, was conceived.

109.

The relegation of Mlotswa and the deployment of Noko to KZN, the subsequent withdrawal of cases against Panday, Madhoe, Nkoyeni and Mabuyakhulu and the subsequent deployment of Mathenjwa and Maema to spearhead our prosecution, suggests, at a minimum, a familiar pattern similar to other prosecutions such as those of Breytenbach, McBride, Sibiya, Dramat, Van Loggenberg and Pillay.

110.

ADVOCATE MOIPONE NOKO

When the previous acting DPP in KZN, Mlotswa, refused to yield to Jiba, he was replaced with Noko, who wasted no time in effecting Jiba's wishes.

APPOINTMENT OF NOKO TO DPP IN KZN

Considering the above, particularly with reference to Advocate Mlotshwa's affidavit and crucially the timing of ostensible unrelated events, the only reasonable conclusion I can come to is that Advocate Mlotshwa was replaced with Advocate Noko on the recommendation of Advocate Jiba because;

110.1. Mlotshwa refused to withdraw the racketeering charges against Nkoyneni and Mabuyakhulu (Amigo case);

110.2. He refused to sign an indictment to prosecute Cato Manor officials and me for racketeering because he stated that there was no supporting evidence; and

110.3. Noko had to facilitate the withdrawal of corruption charges against Panday, who was a business associate of Edward Zuma and Mzobe, (family members of the then President Jacob Zuma).

111.

Advocate Noko was appointed by the then President Jacob Zuma as the permanent DPP for KZN a year later. In my view Noko's permanent appointment as DPP in KZN was to entrench her as a gate keeper to protect certain politicians and their allies against prosecution.

112.

Noko along with Maema conspired to re-authorise my prosecution, after it was set aside by the High Court. They both presented falsehoods in a prosecution memorandum, and a PowerPoint presentation to Abrahams to persuade him to prosecute me again. They openly lie and make misrepresentations in these documents. I have opened a criminal case against them. A copy of the Prosecution Memorandum compiled by Maema and the PowerPoint presentation compiled by Noko is attached as **Annexure "JWB 18."**

113.

During a recent interview for the appointment of a new NDPP, Noko misled the panel when questioned about the 'Booysen' case. She informed the panel that when she arrived in KZN she *'found the case on the court roll'*. She did not disclose to the panel that she and Maema did a presentation to Abrahams to re-authorise my prosecution. Neither did she disclose that she had signed the indictment for my prosecution on the 9th of October 2015. It is disturbing how individuals who are entrusted with authority which can ultimately affect the lives of others, can be so blatantly dishonest on national television. It undermines the integrity of the NPA.

114.

Noko was later involved in the prosecution of the KZN Judge President at the time, Justice Patel. The State was ordered to pay damages to the Judge and the court criticized Noko's testimony in the case.

115.

ADVOCATE (DR) TORIE PRETORIUS

Advocate Pretorius had a hand in the aborted prosecution of Minister Gordhan, the present Minister of Public Enterprises.

116.

Subsequent to Abrahams' ill-considered decision to prosecute Gordhan, it was reported that the previous State President, Jacob Zuma had served Pretorius with a notice of intention to suspend him along with Abrahams and Mzinyathi, pending an inquiry into their fitness to hold office. Despite this, neither Abrahams, Mzinyathi nor Pretorius were suspended and to my knowledge no inquiry was held pertaining to their conduct or their fitness to hold office.

117.

Considering the catastrophic effect on the country, consequent to their reckless conduct, it is curious why no probe was initiated into their conduct, apropos the failed attempt to prosecute Gordhan. The reasons ought to be found in the representations made to Zuma by Pretorius, Abrahams and Mzinyathi. It may shed light on whether the prosecution of Gordhan was justified, and it may also reveal whether there was a political agenda to prosecute Gordhan.

118.

It simply cannot be so that Pretorius, Abrahams and Mzinyathi's whose conduct which adversely affected the country, escapes sanction.

119.

As previously discussed, I am advised that fraud does not fall in the remit of the Priority Crimes Litigation Unit (PCLU). Therefore in my view, the participation of

Pretorius from the PCLU in the prosecution of Gordhan is not only an abuse of power, but strongly suggests a political motive by Pretorius, Abrahams and Mzinyathi to unlawfully target Gordhan. I understand from Sibiya that Pretorius also played a key role in the now aborted Rendition prosecution of the Head of the HAWKS, Dramat and Sibiya.

120.

I am informed by Van Loggenberg that he, Pillay and Janse Van Rensburg, previously from SARS, have lodged complaints of dishonesty against Pretorius at the NPA. The complaints emanates from Pretorius's alleged dishonesty in a High Court application by Van Loggenberg, which is set down for some time in 2019.

121.

Pretorius also defended the prosecution of the Cato Manor officials and me in a 'legal opinion.

122.

I believe that Pretorius has allowed himself to be deployed as a 'lightning conductor' in these matters to deflect attention from those in the coalface of the malicious prosecutions.

123.

ADVOCATE RAYMOND MATHENJWA

I find it extraordinary that Advocate Mathenjwa appeared in two different courts in two different provinces in one week as the prosecutor. He appeared for the State on 15 February 2016 against Breytenbach in Pretoria and a few days later on 19 February 2016 in Durban when Abrahams re-authorised my prosecution. I am advised that the designation of Mathenjwa to act in my matter, is irregular. I have

been informed by two persons from the NDPP office that Mathenjwa was promised promotion to DPP for Nelspruit where a new post would be created. According to the two persons from the NPA, Abrahams had already approved his promotion along with others of Jiba's captured group, but before former president Zuma could sign their appointment letters, he resigned as President, which negated their promotions.

124.

ADVOCATE SHAUN ABRAHAMS

Former President Zuma appointed Abrahams after he unlawfully deposed Nxasana as the NDPP. Some of the reasons for Nxasana's departure were amongst others his preparedness to review the withdrawal of criminal charges against Panday and his role in sanctioning Jiba's prosecution. Nxasana told me that he suspected that the rumours going around at the time, that he intended to prosecute former President Zuma, were part of an elaborate scheme by Jiba *et al* to alienate former President Zuma from Nxasana. I am inclined to agree with him.

125.

Soon after taking office, Abrahams withdrew the charges of fraud and perjury against Jiba. These charges emanated from the findings of Govern J in Booysen v Acting NDPP [Jiba] in which I am the complainant. Jiba had already appeared in court and her trial was about to commence in August 2015. The withdrawal of these charges were reviewed and set aside by the High Court in Gauteng North.

126.

In defending the review application by FUL to reinstate the charges against Jiba, Abrahams misled the court by stating it was Mokgathle who withdrew the charges against Jiba. The High Court found that it was indeed Abrahams and not Mokgath le

who withdrew the charges and raised questions as to Abrahams' and Mokgathle's integrity. No enquiry was instituted against either Mokgathle or Abrahams, consequent to the adverse remarks by the court. This shows how individuals within the faction consistently get away with infringements, while those outside the captured group are ostracized and vilified.

127.

It is evident from evidence submitted to this Commission by Advocate Sam Muofhe ("**Muofhe**") in November 2018, that former President Zuma was unhappy with the prosecution of Jiba and that the former President Zuma wanted to appoint Muofhe as NDPP as long as Jiba was left alone.

128.

After listening to Muofhe's testimony at the State Capture Commission, I am now more convinced that former President Zuma had a hand in my prosecution. Although Jiba's prosecution commenced under Nxasana's watch, I was the complainant that culminated in her prosecution, and I was also the key witness against her.

129.

Under Abrahams' watch, the destabilisation of the NPA intensified. There was for instance, the Gordhan affair, his unyielding defence of Jiba, his elevation of Jiba to the second most powerful position at the NPA as head of the National Prosecuting Service ("**NPS**"), his removal of Hofmeyr at the Asset Forfeiture Unit, his removal of the NPA CEO, Advocate Karen van Rensburg ("**van Rensburg**"), his handling of the Gupta saga and his resolve to protect former President Zuma from prosecution.

130.

The High Court ruled in "Booysen v Acting NDPP" that there is no evidence linking me to the commission of an offence as purported by Jiba in 2012. Despite the court's findings, Abrahams re-authorised my prosecution in 2016.

131.

I am convinced that if I had not worked my way back into office after my unlawful suspension, revived the cases that had become dormant, accepted the golden handshake that the former National Police Commissioner Riah Phiyega ("**Phiyega**") had offered me and if I had not pursued the likes of Jiba and Panday, Abrahams would not have been coerced into reauthorizing my prosecution, because I would thus no longer have been a threat.

132.

When re-authorising my prosecution Abrahams falsely claims that the statement that finally 'satisfied' him when he decided to prosecute me is from a Greek citizen, Aris Danikas ("**Danikas**"), which he claims is 'now' signed. This is deceitful as the only 'statement' that Abrahams could have seen, at the time, is the same document that served before Gorven J who held that *"it was not a statement as it was neither signed nor commissioned. Further to that, even if the contents in the document can be attributed to Danikas, it relates to events outside the indictment period except for one incident that does not relate to "Mr Booysen"*.

133.

By November 2018, six years on, neither Abrahams nor Maema, could produce a signed English version of Danikas' statement. According to Maema the statement is in Greek, and by late 2018, had not been translated from Greek into English. Unless

Abrahams and Maema are conversant in Greek, which I submit they are not, it is disquieting how Abrahams attempts to deceive the court in purporting to have considered the statement when taking such a crucial decision. For all intents and purposes, the Greek statement which he claims is from Danikas may very well contain exculpatory evidence, or it is the same information contained in the unsigned version which had already served before Gorven J.

134.

Despite written requests by my attorney, I have yet to receive Danikas' statement in English.

135.

The reinstituted prosecution against me, authorised by Abrahams, is currently the subject of a review in the KZN High Court. I brought the review proceedings during 2016 and the matter is still to be heard because of delays occasioned by the office of the NDPP.

136.

OTHER PROSECUTORS

Other prosecutors too played roles behind the scenes to enable the captured faction to function unfettered. They are Advocate JJ Mlotswa who is a co-prosecutor in many of the cases mentioned above and Advocate Dawood Adams ("**Adams**") who according to a report that I had seen appears to have committed fraud by appropriating funds from the Witness Protection Programme for his personal benefit. The alleged fraud was investigated at the time by Advocate Hofmeyr of the Special Investigating Unit ("**SIU**"). Despite evidence of wrongdoing, nothing came of it.

Adams too was involved in my prosecution in that he accompanied Advocate Maema to Greece in order to obtain a statement from Danikas.

137.

The NDPP personnel, which I have listed above, have in one way or another contributed to invent cases against Dramat, Sibiya, Pillay, Breytenbach, McBride, Van Loggenberg, members of Cato Manor and myself, in order to disrupt legitimate investigations by abusing state machinery and processes. Instead of acting as guardians of the Constitution of the Republic of South Africa, they have undermined and violated it.

138.

PROSECUTORS RESIGNING DUE TO INTERFERENCE

Advocate Mlotswa resigned from the NPA becoming the second casualty of political meddling at the NPA in KZN. Mnyati, the initial prosecutor in the Madhoe and Panday matter, being the first. This is one example of the insidious developments at the NPA and how the capturing of the NPA started to manifest itself. Prosecutors who stood for justice and who prosecuted without 'fear or favour', were systematically worked out and replaced by pliable prosecutors who acted towards political objectives and not in the interest of justice. Other prosecutors that resigned from the NPA because of the machinations at the NPA are *inter alia* Advocates Glynnis Breytenbach ("**Breytenbach**") and Nel.

139.

LAW ENFORCEMENT: HAWKS AND THE SAPS

I now turn to deal with the capture of the HAWKS and to a lesser extent the SAPS under the regime of Major-General Berning Ntlemeza ("**Ntlemeza**") and Phiyega respectively.

140.

MAJOR - GENERAL BERNING NTLEMEZA

Ntlemeza was appointed on 24 December 2014 as the Acting Head of the HAWKS after the unlawful suspension of Dramat on contrived charges.

141.

On 1 January to 2015, within a week of his appointment, it became clear to me that Ntlemeza, who was based in Pretoria, had been deployed to take care of certain investigations. Ntlemeza called me to the office of Ngobeni situated in Durban (KZN) at which I am also based, at 08:00 on New Year's Day. On my arrival he was with Ngobeni in her office. I was instructed by Ngobeni's secretary to wait in another office down the passage. Ntlemeza later joined me in the office where he tried to disguise his visit as an assessment of my office's equity profile. This was surprising because the information had been previously provided to his office in the first place.

142.

Usually the Head of the HAWKS would enlist my help for transport from the airport, but to my surprise I noticed that on 01 January 2015, Ntlemeza was transported by a Colonel Clarence Jones ("**Jones**"), who I know had a shady relationship with Panday. Jones tried to facilitate the payment of the R15 million which I had frozen, to Panday. This can be confirmed by Advocate Knorx Molele ("**Molele**") at the NPA and

retired Brigadier Kemp. Advocate Molele informed me of this at the *'Bite Your Tongue'* restaurant in Durban North and Kemp alerted me to attempts to have the money paid out surreptitiously. Incidentally, Jones was arrested last year for corruption in an unrelated matter.

143.

At one stage I confronted Ntanjana from Support Services after a senior officer from SAPS' financial services in KZN alerted me that there were moves afoot to release the money to Panday. I warned Ntanjana that he would be complicit in corruption if the money was paid out. I also reported the conduct of Jones on no fewer than three occasions, in writing, to Ntlemeza. I queried Brigadier Kubi Moodley ("**Moodley**") from Ntlemeza's office, responsible for these investigations, about progress in the investigation and Moodley's response was that he was stifled by Ntlemeza. I wrote to Ntlemeza that their failure to act constituted a criminal offence. Ntlemeza never bothered to acknowledge receipt of my complaints.

144.

Incidentally I am aware that Ntlemeza also visited Cape Town during the same period, where he indirectly intimidated Colonel Kobus Roelofse ("**Roelofse**"), the chief investigator in the looting of the Secret Services Account by Mdluli. Ntlemeza later removed the investigation from Roelofse.

145.

Ntlemeza's links with Mdluli are publicly well known. He initially 'investigated' the kidnapping and murder allegations against Mdluli which he effectively whitewashed to exonerate Mdluli.

146.

The real extent of the nefarious alliance between Ntlemeza and Mdluli was laid bare in an affidavit of Mr Innocent Khuba ("**Khuba**") from IPID. Khuba was the investigating officer in the so-called 'Rendition' case in which it was alleged that Dramat and Shadrack Sibiya ("**Sibiya**") facilitated the unlawful rendition of Zimbabweans to the Zimbabwe authorities. (Dramat and Sibiya directed the Mdluli corruption and murder investigations at the time). In Khuba's affidavit, he describes how Ntlemeza put pressure on him in 2013 to finalize the investigation against Dramat. He even visited Khuba at his residence and phoned him on his wife's phone. He told Khuba that Mdluli would protect him if need be. A copy of Khuba's affidavit is attached as **Annexure "JWB 19."**

147.

On the day of Dramat's suspension on 24 December 2014, for the so-called Rendition case, Ntlemeza went to Khuba and told him that his, Ntlemeza's, time had come to "head" the HAWKS.

148.

It is evident from Ntlemeza's behaviour that there was a grand stratagem between him and people like Mdluli from as early as 2013 to oust Dramat.

149.

It is not disputed that Dramat at the time supported my investigations, much to the disquiet of certain officers, especially Phiyega. Dramat of course also sanctioned the investigation of Mdluli. I also know that Dramat had shown an interest in the Nkandla docket. He confirmed this to me during September 2016, in Somerset-West, a day after I launched a book in Cape Town.

150.

This investigation had another unsavoury aftermath. In a preliminary report to Nhleko, it became public knowledge, that IPID concluded there was a *prima facie* case against Dramat and Sibiya. After further investigations by McBride, McBride advised Nhleko that the investigations now revealed that they were not implicated in the rendition of Zimbabweans. For reasons, best known to Nhleko, he suspended McBride for 'changing' the report. When I asked Khuba later, why he had forwarded the docket to the NPA before all the investigations were concluded, Khuba told me that Mosing had requested a report on the investigation. (*Mosing, as I indicated earlier in this submission, was instrumental in withdrawing racketeering charges against Mike Mabuyakhulu and Peggy Nkonyeni. He also met with Minister Mthethwa when the plan to arrest me was conceived*). The inference I draw from this is that Ntlemeza, Mdluli or Minister Nhleko wanted Dramat to be dealt with expeditiously so as to pave the way for Ntlemeza's appointment.

151.

The strategy was obvious. To neutralize Dramat, Sibiya and others such as Roelofse and myself and therefore directly impacting the sensitive investigations we were all dealing with, they invented false charges against some of us. Dramat was suspended and replaced with Ntlemeza who is an Mdluli collaborator. Ntlemeza wasted no time to take control over the sensitive investigations by driving out those involved with the investigations or directly interfering with investigative processes.

152.

Ntlemeza destroyed the HAWKS. He immediately took charge of all processes relating to promotions. I challenged him once in a management meeting in

Polokwane about it, but he was evasive and dismissive. All the Provincial Heads were unhappy with him hijacking the promotion processes in the HAWKS.

153.

Ntlemeza co-opted Major-General Ngembe from Support Services in KZN, who had no relevant experience and wasn't attached to the HAWKS, to travel across the country to Chair promotions panels in the HAWKS with him. Where all provincial promotions were previously handled by the respective provinces, Ntlemeza took over the process and excluded the provinces. Ngembe confessed this to me and commented that it was not her 'environment and that she did not know anything about investigations'. This is an example of how senior SAPS personnel, such as Ngembe, allowed themselves to become pawns in the capture of state institutions.

154.

Ntlemeza ensured that only those loyal or close to him were promoted. In some instances, if not the majority, the appointees lacked the skills and experience required to investigate complicated cases. Brigadier Ronelle Vermaak, and Colonel Lynn Devashayam from the HAWKS Human Resources department were ex-communicated. Ntlemeza made their lives at the office unbearable until they both eventually left the HAWKS. This amplifies my submission that Ntlemeza wanted total control on who is appointed and or promoted within the HAWKS. I attach a copy of the Brigadier Ronelle Vermaak's affidavit as **Annexure "JWB 20."**

155.

In fact, he orchestrated the replacement of 8 of the 9 Provincial Heads of the HAWKS, almost all at the same time. In KZN he advertised and permanently appointed Major-General Zikhali into my position as Provincial Head, shortly after I

was suspended. My suspension was found to be unlawful. I attach a copy of the judgement by Van Zyl J, as **Annexure "JWB 21."**

156.

After Dramat settled his own disputes with SAPS in around April 2015 and retired with a special dispensation, the post for National Head of the HAWKS was advertised. During an open meeting in Polokwane with all the Provincial Heads and National Heads in the HAWKS, Ntlemeza stated that he did not apply for the post. I applied for the post and was shortlisted for the interviews.

157.

THE APPOINTMENT OF THE HEAD OF THE HAWKS: MY EXPERIENCE AT THE GUPTA SAXON WORLD COMPOUND

158.

On 16 August 2015, a few days before I was interviewed for the post as Head of the Hawks, I was contacted by Captain Dirk Swart ("**Swart**") from Durban SAPS, on behalf of Duduzane Zuma ("**Duduzane**"), the former President's son who wanted to meet me which I agreed to. I knew Duduzane as a result of a fraud investigation in which he was a co-complainant in a criminal matter. The investigation related to a complaint by Duduzame and 'one' Winston Innes against Ian Endres ("**Endres**") concerning a fraud in an on-line betting scam (gambling). At the time I had appointed Lieutenant Colonel Marthinus Botha ("**Botha**") from the Hawks in KZN to investigate the alleged fraud. I had previously met Duduzane a few times when he had enquired about progress in the investigation. One of these meetings took place at his office in Sandton when I was in Gauteng for a meeting.

159.

I met Dududzane at the Sandton Gautrain station where I took it he wanted to discuss his matter. Duduzane was driving a black Rolls Royce. Duduzane had suggested that I get into the vehicle with him. I told my son who was with me at the time, that I would be driving with Duduzane and that he should follow us. My son followed us in his own vehicle. I took it that we were going to his office in Sandton. We chatted about odds and ends. There was no discussion about his fraud matter. Prior to our arrival Duduzane had made no mention that we were in fact going to the Gupta Compound or anything regarding my interview to the position of National Head of the HAWKS.

160.

The next moment we pulled up at a residence in Sandton which I recognised as the Guptas' Saxonwold compound. I alighted from the vehicle by which time my son had walked up to me and asked me "*whether we were where he thought we were*". I responded and told him that I thought so. Although I was caught by surprise I decided to see how things would unfold. We were escorted by security guards and entered the house where we handed our cell phones over to them before entering the lounge. Tony Gupta ("**Tony**"), was the only Gupta brother present.

161.

There were also house staff present, which I gathered were from India, who served us some light Asian snacks.

162.

Tony spoke to my son, who is an IT specialist and told him if he wanted to go into a business venture he should speak to them.

163.

There were no significant discussions, but what I indeed considered curious, was that Tony knew that I was about to be interviewed a few days later, for the post of National Head of the HAWKS, although I recall that a daily local newspaper in KZN, The Mercury, at the time, reported that I had applied for the post as National Head of the HAWKS. Tony said that if I was appointed we should have supper together in Durban. I did not know what to make of his statement, but suspected that he wanted to create the impression that should I be appointed, he had had a hand in it and that I would consequently be indebted to him. I would like to reiterate that Tony did not say this directly and that it is merely speculation on my part. I laughed and said that we could.

164.

Duduzane, who was present, did not partake in the conversation other than discussing generalities. After having had refreshments my son and I left. I did not hear from the Guptas again. This was my one and only visit to the premises.

165.

Since I did not trust Ntlemeza, my Commander at the time, I did not report this to him.

166.

On 13 June 2017 at 15:30 after the Supreme Court of Appeal removed Ntlemeza from office, I handed an unsigned affidavit, see **Annexure "JWB 22.",** to the Acting Head of the HAWKS Major-General Matakata ("**Matakata**"), who succeeded Ntlemeza, in which I described how I was taken to the Gupta residence. I met her at the Irene Mc Donald's and she was in a hurry because she had to catch a flight to

Cape Town. I told her that I will be available to sign and commission the statement, but I have not heard from anyone in this regard.

167.

THE APPOINTMENT OF NTLEMEZA AS HEAD OF THE HAWKS

The following week three other candidates and I had to present ourselves for interviews at Minister Nhleko's office at Parliament in Cape Town. The secretary was Major-General Matakata from the HAWKS. Ntlemeza, who was not present on the day of the interviews, was ultimately appointed as National Head of the HAWKS. I do not know if he was interviewed and if he was, why he was treated differently to the rest of the candidates.

168.

One of the first things Ntlemeza did after his permanent appointment, was to suspend me unlawfully based on a false allegation of fraud concerning a performance incentive. I took the decision by Ntlemeza to suspend me on review. The High Court in Durban declared my suspension unlawful and I was awarded a punitive cost order.

169.

In the judgement of review, Justice Van Zyl found no evidence that I could be implicated in wrongdoing. He commented as follow, *"A strong suggestion arises that there is an ongoing move, possibly even a campaign to unseat the applicant." Booysen.)* [Emphasis added by me].

170.

I am aware of instances after Zikhali was appointed that Ntlemeza started ostracising HAWKS members that were perceived to be associated with me. One such member

was Lieutenant Colonel Adele Sonnekus ("**Sonnekus**"). Ntlemeza had previously suspended her unlawfully and after she returned to work she was unlawfully removed from her post by Zikhali. Sonnekus was the Support Head who dealt with promotions and appointments in KZN. I regard this move as being part of Ntlemeza's strategy to control placements and promotions. Zikhali resisted attempts by Sonnekus to return to her post. I understand that SAPS have now settled the dispute and Sonnekus has returned to her post and she was awarded damages, by consent, for an unfair labour practice. Zikhali himself is now being investigated for an unrelated criminal matter and has been temporarily removed from his post.

171.

Ntlemeza purged the entire leadership of the HAWKS in the provinces and at National Head Quarters. The new regime in turn made changes to the structures downwards that were calculated to seize complete control of the HAWKS by Ntlemeza by placing pliable people in strategic positions. This resulted in a mass exodus of competent skilled personnel from the HAWKS. The few skilled and competent investigators that remained were at the mercy of those who were positioned to do the gatekeeping.

172.

For example, he replaced Major-General Mosipi ("**Mosipi**") as National Head of Commercial Crime with Major-General Alfred Khana ("**Khana**").

173.

Khana had previously resigned from SAPS "under a cloud" after he was the subject of an investigation by Major-General Hans Meiring of Commercial Crime. (Now retired).

174.

Ntlemeza assigned Khana to commence with investigations against me that were based on manifestly false allegations. I am aware of other cases where Khana interfered to the extent that I believe it warrants a criminal investigation. I handed documents to the Anti-Corruption Unit of the HAWKS in this regard.

175.

He sent Major-General Ledwaba to serve a suspension notice on me, accompanied by members of the National Intervention Unit, in riot gear, to my house and my attorney's office. To my mind he wanted to make an example of what would happen to those who thought of opposing him.

176.

He openly displayed his association with Ngobeni, whom I was investigating for corruption, when he marched into my office, accompanied by Ngobeni, where he intimidated my secretary to open my office when I was suspended.

177.

Ntlemeza was undoubtedly 'handpicked' for the position, despite having been found to have made a false statement under oath and having been described as "*dishonest*" and "*lacking integrity*" by Justice Motojane of the High Court pursuant to setting aside the unlawful suspension of Major-General Sibiya by Ntlemeza.

178.

In my view he certainly did not have the required skills to manage the HAWKS and was only appointed to take care of, or to suppress certain investigations, which he did.

179.

I am convinced that he was placed in the position to protect former President Jacob Zuma, Mdluli, Ngobeni and acolytes such as Panday who had Zuma links.

180.

I believe that he was also commissioned to disembowel the HAWKS so as to strip them from any ability to investigate the Guptas, Mdluli's and Zuma's of the day, now or in the future.

181.

Mr Mcebisi Jonas ("**Jonas**") has already testified in the State Capture Inquiry that Major-General Mnonopi, from Ntlemeza's office, had attempted to cover up an investigation regarding the Guptas. Mnonopi was suspended by the current Head of HAWKS, pending an inquiry.

182.

The newly appointed head of the HAWKS, Lieutenant-General Godfrey Lebeya ("**Lebeya**") inherited a wholly dysfunctional HAWKS which I attribute directly to political interference and the appointment of Ntlemeza.

183.

Lebeya has to undo the damage occasioned by Ntlemeza's appointment, who I believe was an expendable tool to ensure that certain prosecutions don't proceed and to cripple the HAWKS so that certain politicians won't have to fear or face effective investigations into their unlawful activities.

184.

RIAH PHIYEGA

Phiyega was appointed as SAPS National Commissioner after the departure of then General Bheki Cele. It is my view that she initially came across as an intellectual who intended to make a success of her career in the Police, but certain events convinced me that she too was placed there to take care of certain investigations.

185.

I was told by Cele that while he was the National Commissioner of SAPS, Mdluli had implored him to stop the corruption investigation against him (Mdluli) and that he, Cele, had refused.

186.

Soon afterwards the much publicised 'Ground Coverage' ("**GC**") document surfaced from Crime Intelligence ("**CI**") in KZN.

187.

The report, *inter alia,* purported that Cele was part of a group who conspired to oust the former President, Jacob Zuma. It was further alleged in the document that Cele owned taxis in KwaDukuza in KZN and that Cele had promoted me to the rank of Major-General as a *quid pro quo* to neutralize his opposition in the taxi industry .

188.

It is important to contextualize the significance of this narrative which resurfaced later when I was arrested and prosecuted. The crux of the report relating to me would later form the basis of the allegations of the so called Cato Manor 'Hit Squad'. It later unfolded that the allegations contained in the document were conjured up as part of

an elaborate scheme by Mdluli to get rid of Cele and myself. This same GC report was declassified by Mdluli and sent to the former President, Jacob Zuma.

189.

I approached Major-General Deena Moodley ("**Moodley**"), who at the time was the Head of CI in KZN. I wanted to know from him how this report, comprising serious allegations, which emanated from KZN, was sent to Mdluli, without him (Moodley) signing it off. He informed me that Colonel NH Singh ("**Singh**") from KZN CI, was co-opted by Mdluli to craft this report and that Singh reported directly to Mdluli. According to Moodley, Singh was transferred temporarily to Pretoria for the purpose of compiling this report.

190.

Prior to these occurrences, on the 3rd of November 2011, Mdluli wrote to the former President Zuma and accused Lieutenant-Generals Dramat, Lebeya and Sandile Petros ("**Petros**") of conspiring to get rid of him. Mdluli also stated that in the event that he (Mdluli) returned to work, he would assist the former President to succeed the following year, a reference to the ANC's 2012 elective Congress in Mangaung. At that time, Mdluli was on suspension pending investigations.

191.

My observations of the sequence of events depicted below are conspicuous.

191.1. Mthethwa irregularly appoints Mdluli as CI Head.

191.2. Mdluli allegedly loots the Secret Services Account.

191.3. Minister Mthethwa is a benefactor. A wall is built around his private residence, courtesy of the Secret Services Account.

191.4. Major-General Mark Hankel (Hankel) blows the whistle on the looting of the Secret Services Account.

191.5. An investigation into the looting of the Secret Services Account commences.

191.6. The KZN leg of the investigation is conducted by Brigadier Simon Madonsela ("**Madonsela**").

191.7. Madonsela elicits my assistance in the investigation after Crime Intelligence refuse to release documents, required to finalize the investigation.

191.8. Mdluli earlier requested Cele to stop the investigation initiated by Dramat and Sibiya.

191.9. Cele refuses.

191.10. The GC document surfaces.

191.11. Cele is suspended as National Commissioner for an unrelated matter.

191.12. The Sunday Times article (Cato Manor), which contain the same allegations which are in the GC document, is published.

191.13. Attempts are made to suspend me. I obtain an interdict prohibiting SAPS from doing so. SAPS nevertheless suspend me, but the Court reverses the decision and remand contempt proceedings against SAPS *sine die*.

191.14. Minister Mthethwa meets prosecutors essentially demanding our

arrests.

191.15. Cato Manor detectives are arrested for racketeering. Two months later I am arrested for 'managing a so-called criminal enterprise', namely Cato Manor.

191.16. Mdluli is ultimately suspended pending the corruption and murder investigations. When he attempts to return to office, Freedom Under the Law ("**FUL**") files an application in the High Court to prevent him from doing so.

192.

In an extraordinary development, Phiyega filed an affidavit, opposing FUL's application. In his judgement Judge Murphy criticised Phiyega for wanting Mdluli to return to work despite him having serious allegations hanging over his head. A copy of the Judgement as is attached as **Annexure "JWB 24."**

193.

If one juxtaposes Phiyega's position in the Mdluli matter with my matter it is evident that she too protected Mdluli and actively plotted to get rid of me.

194.

The High Court in Durban held that there was no evidence against me and charges against me were withdrawn. Phiyega then belatedly instituted disciplinary proceedings against me. Phiyega even went to the extent of flying to Durban in a police aircraft to testify that she did not know about the investigation against Ngobeni even though she had been cited as a respondent in my review application to set charges aside. The extent of Ngobeni's involvement in the investigation was described in my Founding affidavit.

195.

After a protracted hearing, chaired by Advocate Cassim SC, I was acquitted. Cassim had *inter alia* the following to say in his findings in his evaluation of the evidence, *"I will consciously scrutinize material facts uninfluenced by political considerations and motive. I do this because the entire proceedings appear to have been permeated by political agenda*". See attached copy of the disciplinary findings as **Annexure "JWB 25."**

196.

During the disciplinary hearing, it also emerged that Mdluli had 'interfered' with the Panday investigation. Soobramony, who was one of the main investigators in the investigation against Panday testified how Mdluli and Major-General Solly Lazarus (who is now dismissed from SAPS) had coaxed him by alleging that there were threats against his life. They offered to transfer him to Benoni. According to Soobramoney, he was virtually excised from the Panday investigation once he located to Benoni.

197.

In spite of Cassim exonerating me and the findings of the High Court that there is no evidence linking me to any offence, Phiyega was resolute to get rid of me. I declined to accept a 'golden handshake' which she offered me, after which she served me with a notice of her intention to dismiss me from the Service. I approached the court and obtained an interdict against her preventing her from dismissing me.

198.

I believe that she supported and colluded with Mdluli, who faced serious criminal charges, to return to work but went out of her way to remove me from office. I am convinced that she protected Mdluli and was determined to neutralise me and the other investigations I was busy with.

199.

I was informed by retired Major-General Ntombela ("**Ntombela**") that Phiyega had instructed him to conduct an investigation against Hankel who blew the whistle on Mdluli's looting of the Secret Services Account. When he concluded that Hankel had done nothing wrong, she was livid and remonstrated with him. Hankel was ultimately removed from CI and placed in the uniform branch.

200.

Ntombela's contract as Provincial Commissioner was not renewed whereas Ngobeni's contract was, in spite of the pending investigation against her. These are examples of how innocent individuals, who call out politically linked corrupt individuals, are ostracized.

201.

Phiyega later confirmed her dubious relationship with Jiba when she got involved in an ugly public spat with Advocate Mxolisi Nxasana ("**Nxasana**), the NDPP at the time, because the NPA decided to prosecute Jiba for lying under oath in my review application to set the racketeering charges against me aside. Phiyega was so incensed that she summarily terminated the SAPS' contract with the investigating officer Colonel Christoffel Botha, who is since deceased. Colonel Christoffel Botha had earlier reported to me that Jiba had visited Phiyega at her office, who referred

her to Lieutenant-General Vishnu Moonoo ("**Moonoo**"). Moonoo, was obviously taking instructions from Phiyega so Moonoo replaced Botha as the investigating officer and transferred the case to Major-General Norman Taioe ("**Taioe**") who conducted the rape investigation wherein the former President Jacob Zuma was the accused. The former President Zuma was acquitted.

202.

I also know that there was tension between Moonoo and Dramat when Moonoo apparently refused to cooperate with Dramat in the Nkandla investigation. Dramat confirmed to me in September 2016, that he had requested the Nkandla docket from Moonoo, the National Head of Detectives. At the time, this docket involved the abuse of state funds at Nkandla, the private residence of former President Jacob Zuma.

203.

Phiyega went on to dismiss Lebeya from SAPS. Lebeya had previously headed Organized Crime and had also ordered an investigation into Mdluli. I was privy to Lebeya's correspondence as it formed part of Madonsela's investigation into the looting of the Secret Services Account in KZN by CI.

204.

Colonel Brian Padayachee ("**Padayachee**") from Crime Intelligence who had managed the intelligence in the Panday investigation, in terms of Act 70 of 2002 (communication interception) submitted two affidavits dated 28 January 2019 and 4 February 2019 with regards to his investigation. Copies of these affidavits are attached as **Annexure "JWB 26."**.

205.

Padayachee was also targeted by Phiyega and was suspended on spurious grounds. He has also informed me that Phiyega had uplifted the Act 70 communication recordings in the Panday/Madhoe investigation. This may constitute a criminal offence if the necessary prescripts were not followed.

206.

Phiyega also obstructed the investigation into the looting of the Secret Services Account by Mdluli and Crime Intelligence in KZN. She gave an instruction that the investigation into the KZN leg, which was conducted by Madonsela, must be removed from Madonsela after he, Madonsela, subpoenaed documents from Crime Intelligence in terms of section 205 of the Criminal Procedure Act, Act 51 of 1977.

207.

Phiyega was also the subject of a criminal investigation when she alerted Lieutenant-General Arno Lamoer ("**Lamoer**"), the Western Cape Police's Provincial Commissioner, of a criminal investigation against him. The DPP in the Western Cape at the time declined to prosecute her. It was my observations there was clearly tension between her and Dramat under whose auspices the investigation was conducted. Lamoer is currently serving a prison sentence after entering into a plea bargain with the State on the criminal investigation mentioned.

208.

MAJOR-GENERAL JAN MABULA

Major-General Jan Mabula ("**Mabula**") is a known Mdluli ally. Mabula and Jiba previously teamed up to arrest Advocate Nel when Nel prosecuted the former Police Commissioner Jackie Selebi ("**Selebi**"), for corruption. Mabula was later involved in

an investigation, where several million rand of exhibit money which was recovered, after a heist at OR Thambo airport, was stolen from the Benoni police station.

209.

During this investigation a suspect, Solomon Nengwane ("**Nengwane**"), died during interrogation at the Macou Police station, at the hands of detectives under Mabula's command. There is evidence, which was handed to IPID that Mabula was the mastermind in covering up the murder. According to the information provided by a person who was present when Nengwane died, one of the persons present with the unlawful interrogation was Mdluli's son. I have not been able to independently verify this.

210.

I have however been able to establish that Nengwana died of asphyxiation whilst in the custody of policeman working under the direct command of Mabula, who was a Colonel at the time. It also emerged that a number of witnesses in this investigation died under mysterious circumstances, prompting the State Prosecutor, Peter Smith ("**Smith**") to remark, "*it seemed that the police were knocking off witnesses to cover their own tracks in the case.*"

211.

Mabula later led a team of detectives to investigate the now debunked Sunday Times story about the Cato Manor 'Death Squad'. It was clear that I was the intended target of Mabula's investigation.

212.

According to a witness, Captain Sibusiso Zungu ("**Zungu**"), Mabula was present when his detectives attempted to coerce him (Zungu) to change his statement so as

to falsely implicate me for a murder after one Bongani Mkize, a taxi operator from Kwa-Maphumulu, was shot in a shootout with police. See attached statement of Zungu as **Annexure "JWB 27."**

213.

COLONEL RAJEN AIYER

The immediate Unit Commander of Cato Manor was Colonel Rajen Aiyer ("**Aiyer**"). Aiyer reported to me from 2006 to 2010 and thereafter he reported to Brigadier Madonsela, who in turn reported to me.

214.

Mabula's team won over a notorious Police Colonel to implicate me in Racketeering. Aiyer, who was the Commander at Cato Manor, was used by them to contrive a case of Racketeering against the Cato Manor Unit. Once this was accomplished I was opportunely framed as the manager of the Criminal Enterprise, being the Cato Manor unit, by Mabula's team.

215.

Mabula and prosecutors Maema, Noko, Mathenjwa and Jiba conspired to have me prosecuted under The Prevention of Organized Crime Act (POCA) Act 121 1998 sec 2 (4) 1 (f), managing a criminal enterprise, despite the fact that Aiyer was the direct Commander of Cato Manor .

216.

During a failed attempt by Phiyega to get rid of me, Aiyer was caught out lying on every aspect of his statement in my disciplinary hearing. The Disciplinary Chairperson, Advocate Cassim SC described him as a "*dismal witness in material aspects*". Aiyer was recently dismissed from SAPS for fabricating evidence in an

unrelated matter. The criminal case is currently with the DPP for a decision. Aiyer was also arrested and is currently standing trial in an unrelated case, also for falsely implicating innocent people in offenses.

217.

Notwithstanding this, Mabula and the prosecutors Noko, Maema, Jiba, Abrahams *et al* seek to rely on Aiyer to implicate me in wrongdoings. This illustrates how desperate they are to neutralize and get rid of me. They know full well that his evidence will not pass muster. That does not deter them however because by then they would have achieved their goal to neutralize me or so they imagine.

218.

BRIGADIER NYAMEKA XABA

Brigadier Xaba hails from KZN where he worked under my command. As far as I know Xaba is the Commander of the Crimes against the State ("**CATS**") Unit, at the HAWKS Head Office in Pretoria. During Ntlemeza's tenure at the HAWKS, Xaba was used by Ntlemeza to investigate the complaint from the sacked SARS Commissioner Tom Moyane ("**Moyane**") regarding the SARS saga.

219.

Under Xaba's command, Mr Vlok Symmington ("**Symmington**") from SARS was unlawfully held captive in his office where he was assaulted. Not surprisingly the NPA under Abrahams' declined to prosecute Xaba notwithstanding the evidence that was there for all to see when it was televised on National television.

220.

Xaba was also the investigator against McBride, Sesoko and Khuba.

221.

Xaba met with Jiba on the 18th of November 2018 to commission her affidavit in litigation with the Cato Manor detectives.

222.

I find it unusual that a Brigadier in charge of the HAWKS Crimes against the State would involve himself with a complaint from SARS and commissioning the statement of Jiba in civil litigation against me. It is my submission that Brigadier Xaba is part of the Ntlemeza and Jiba alliance.

223.

BRIGADIER PHARASA NCUBE

Brigadier Pharasa Ncube ("**Ncube**") was sent by Mabula and later Ntlemeza to arrest me.

224.

After Ncube arrested me he was promoted from the rank of Colonel to Brigadier.

225.

ROLE OF INTELLIGENCE SERVICES AND SUNDAY TIMES

Three sagas, namely: the Cato Manor 'Death Squad' (Booysen), the 'Rendition' (Dramat, Sibiya, and McBride) and the SARS 'Rogue Unit' (Van Loggenberg and Pillay) are all strikingly similar, as all of us were conducting sensitive investigations at the time of our prosecution.

226.

In all three sagas information was leaked to the same two journalists, Stephan Hofstatter and Mzilikazi Wa Afrika, from the Sunday Times newspaper by the intelligence services who were invariably behind these 'leaks'.

227.

After the Sunday Times had dropped a 'bombshell' with the so called 'Cato Manor Death Squad' story ("**Cato Manor publication**"), they later confirmed to the press ombudsman that one of their sources in the Cato Manor story was none other than Colonel NH Singh from Mdluli's Crime Intelligence and author of the GC document, mentioned above.

228.

In October 2018 the editor of the Sunday Times, Mr Bongani Siqoko, apologised for getting the Cato Manor publication wrong and for wrongly implicating me. Ironically these reports, that we now know originated from CI, formed the basis of the Sunday Times' 'expose'. I was informed by one of the senior managers at the Sunday Times that they had decided to part ways with the two journalists, Stephan Hofstatter and Mzilikazi Wa Afrika. A copy of this public apology is attached as **Annexure "JWB 28."**

229.

Consequent to the Cato Manor publication, Minister Mthethwa expediently met with Prosecutors in the subsequent Cato Manor investigation. I mention this because Mdluli, who was controversially appointed by Minister Mthethwa in March 2012, had 'procured' the "Ground Coverage" report, that formed the basis of the allegations in the Cato Manor publication, from Colonel NH Singh.

CLOSING REMARKS

230.1. It is uncontrovertibly so, that it is always the same protagonists within Law Enforcement and the National Prosecuting Authority, who are seized with protecting certain politically connected individuals from facing justice and then to investigate and persecute those who investigate those politicians and their associates. These Law Enforcement officials, namely Phiyega, Ntlemeza, Xaba, Ncube and Ngobeni, were all part of a captured faction together with prosecutors Jiba, Mrwebi, Abrahams, Maema, Noko, Mosing, Pretorius, Mokgathle, Adams, Mathenjwa and JJ Mlotshwa.

230.2. In my view, they were all complicit in actively or tacitly promoting state capture. This culminated in institutions like the NPA, HAWKS and SAPS being subverted to ensure the shielding of certain individuals from criminal sanction. Their actions have eroded the capacity within these organizations to deal with large scale corruption and organized crime in the country. It will take many years of intensive efforts to restore the damage they have inflicted on these institutions.

230.3. It defies logic and reason how the HAWKS, SAPS and the NPA have spent more than five years wasting valuable scarce resources to persecute innocent loyal and hardworking Public Servants in order to protect corrupt politicians and other State officials from prosecution.

230.4. It is my respectful submission to this Commission that the unlawful acts which I describe herein by those that I discuss in this submission are in violation of the Prevention of Organized Crime Act, Act 121of 1989 chapter 2 (1) (e) and (f) in that they either participated or managed the affairs of a criminal enterprise [Racketeering] or for obstructing the course of justice.

230.5. It is a dark irony that many of the individuals they sought to protect such as former President Zuma, Mabuyakhulu and Nkoyeni faced racketeering charges, while the captured factions at the NPA now seek to prosecute the investigators for racketeering.

230.6. The HAWKS and the NPA are now under new leadership. It is my submission though, as long as the individuals I have mentioned in my evidence, including their associates, remain within the NPA, SAPS and the HAWKS, these institutions will remain captured and consequently stay ineffective to address serious crime. This in turn will undermine our democracy and stifle foreign investments which are essential to recover and grow our ailing economy.

230.7. Even then, it remains an unfortunate reality that many careers were ruined by the actions of those mentioned in this submission. The compounding effect of their malicious acts can never be measured. Dedicated public servants had to spend years and millions of rand to clear their names and to battle the captured factions. It is upsetting that the public who are ultimately the victims of the evisceration of the NPA and Law Enforcement, have to pay for the litigation cost of these factions.

230.8. I have taken them to court no fewer than seven times, winning each time with cost orders awarded to me. My disciplinary hearing stretching over 6 months, alone cost the taxpayer R1.7 million rand, as was reported in Parliament. I estimate that litigation with SAPS and the NPA versus McBride, Sibiya, Dramat, Lebeya to be in the region of R20 million, all paid for by the taxpayer.

230.9. The monetary and human cost aspects aside, the wasted resources could have made an enormous contribution to fight crime which escalated to an all-time high during the period that we were all persecuted .

230.10. *"It will take South Africa's criminal-justice sector years to recover from the disruptive impact of the Zuma era, during which good men were booted from their jobs for doing the right thing. The chilling impact this had on prosecutors and police officers is immeasurable. Those who were willing to bend the rules and apply two sets of rules, one for Zuma and his cronies and another for the rest of us, thrived".* Adriaan Basson & Pieter du Toit. In their book "*Enemy of the People'* page 95.

230.11. I was interviewed by researchers for "*State Capacity Research Project* titled "*Betrayal of the Promise: How South Africa is being stolen*" published in May 2017. I have read the report. The chapter dealing with "*Securing a Loyal Intelligence and Security Apparatus*", [pages 19 and 20] accurately chronicles some of the events I have described above. Pages 50 to 52 under the heading "*Investigations and prosecutions*" are also relevant. I attach an extract from this report as **Annexure "JWB 29."**

230.12. I have titled a book which I co-wrote with journalist Jessica Pitchford "*Blood on their Hands*" I sincerely believe that those who allowed themselves, for whatever reason, to become part of the captured factions at the NPA and in Law enforcement have done our country a grave disservice. They have blood on their hands.

231.

I know and understand the contents of this declaration.

I have no objection to take the prescribed Oath.

I consider the oath to be binding on my conscience.

JOHAN WESSELBOOY SEN

I certify that the deponent who acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended. This affidavit is signed and sworn to before me at Centurion on this the 2nd Day of April 2019 at 14:32

COMMISSIONER OF OATHS

EX OFFICIO:

SOUTH AFRICAN POLICE SERVICE
MANAGEMENT INTERVENTION
HEAD OFFICE PRETORIA
2019 -04- 02
HEAD: MIAC
SUID-AFRIKAANSE POLISIEDIENS

FULL NAMES:

JEAN JACQUES MARTINS

PHYSICAL ADDRESS:

CNR JEAN AVENUE &
OLIFANTSVLEI CENTURION

DESIGNATION:

COLONEL

ANNEXURE "JWB1"

VS 4

REPORT ON FURTHER INVESTIGATIONS

COMMERCIAL CRIME ENQUIRY 07/05/2010

The following new developments have occurred in the last two weeks:

1. Statements have been obtained from Mrs Gets B/B from Pinetown where trainers were accommodated for the training of NIU members at Chatsworth College. Head Office instructions were that the all the trainees and the trainers where to have resided at the Chatsworth College. However private accommodation was arranged for the local trainers to reside at Mrs Gets accommodation for the duration of the course. According to the claim submitted by Goldcoast Trading CC that 6 members were accommodated in respect of the "Pinetown Deployment" from 21st February 2010 to 14th March 2010 at a rate of R999.00 per person per night totalling **R119 880.00**. However the actual cost of the accommodation at Mrs Gets B/B where the trainers stayed was only **R30 492.00** including a discount of 1% that was given to Goldcoast Trading CC. Furthermore the trainers that stayed at the B/B did not all arrive on the 21st nor did they all depart on the 14th.

2. A further statement has been obtained from the General Manager of La Mercy Beach Hotel. Goldcoast Trading CC had acquired accommodation for 54 members from SAP members from 9th January 2010 to 13th January 2010. The rate charged at the hotel for the said accommodation was **R325.00** per person per night sharing. 27 rooms were allocated and all the SAP members shared the rooms. The total cost of the accommodation was **R70 200.00** which was prepaid by Goldcoast Trading CC. However Goldcoast Trading CC charged the SAP **R925.00** per person per night sharing and a claim of **R 199 800.00** was paid out by the SAP.

3. Goldcoast Trading CC also submitted a claim to the SAP for **R28000.00** in respect of "Hilton Durban deployment". It cannot be confirmed who made use of the accommodation. Only two names were furnished by the General Manager of the Hilton Hotel. The actual cost of the accommodation was **R10 400.00**

4. A lot of questions have been left unanswered owing to fear by many. Rumour has it the senior members and officers are too scared to say anything with regard to the investigation but genuine sources have made startling revelations which needs immediate

VS 4

investigation and action against the target concerned. **Some of the immediate action would be to have the targets removed from office and deployed elsewhere until the investigation is complete and secondly the immediate suspension of Goldcoast Trading CC as a service provider to the SAP.**

5. Information has been brought to the investigation team that the main target at PHQ seems to have an open reign with regard to all acquisitions involving a financial transaction. It appears that he takes it upon himself to acquire the services of private businesses to supply on demand certain services, goods, equipment, accommodation, etc for the SAP. It cannot be conformed at this stage, but many of the service providers are linked to the targets as either family or very close friends.

6. The target has also managed to halt acquisitions that could have been done at stations. He has taken responsibility purely to ensure that his contacts are used to acquire whatever is required by PHQ or stations.

7. There is also a serious allegation of the dubious control of cellular telephones for the Province.

8. Information has also come to light in respect of the deployment of NIU members to Nongoma. According to the target no accommodation was available for the specified period hence Goldcoast Trading CC was used. Strange to say Goldcoast Trading CC was able to obtain accommodation for 63 NIU members at Nongoma that which the target and his accomplices could not secure.

9. Information has also come to the fore in that the target has been employed for many years in the acquisition of goods and it appears until recently the acquisition for all and sundry has been allocated to the target giving him supreme power to acquire almost anything and everything that is required by the SAP at PHQ and stations alike.

10. The target also sourced the transport and equipment that was needed for the Police Day that was held in Bloemfontein early this year.

VS 4

11. As result of the investigations two senior officers were called in by Maj-Gen Ntanjana and questioned about their involvement in the investigations. They denied assisting in the investigation and one has to ask **"why is Senior Management trying its utmost to stop this investigation of fraud and corruption"**. The targets have to be exposed and held accountable for any criminal behaviour.

12. In order to finalise the investigation the investigation team requires full co-operation of Senior Management as well access to certain information at PHQ.

13. It has also been established that the target at PHQ has the authority to sign off acquisitions to a maximum of R200 000. A pattern has been detected in that the target had made sure that all the claims fell within this range. If the claim exceeded R200 000 then Head Office would have to approve the expenditure or the acquisition would have to be sent out for tender.

14. It has been noted that some of the accommodation in respect of detached duties exceeded the amount of R200 000 if the entire service was submitted as one claim. The target at PHQ manipulated the system by ensuring that the claims were split as not to exceed the R200 000 limit. In actual fact Goldcoast Trading CC submitted a weekly claim for long detached duties. The schedule of payments is available to prove this theory.

15. Nedbank contacted me to inform me that the director of Goldcoast Trading CC has informed them that enquiries have been made into in his account. He specifically mentioned the purchase of his new Ferrari were he had paid a R510 000 deposit. This information was only given to two senior officers from PHQ and included in the report submitted to Maj-Gen Booysens. According to Maj-Gen Booysens he had submitted the report to the PC and he has not heard anything from her with regard to returning the original investigation file that was taken from the investigation team.

16. At this stage all the information needed to continue with the investigation is only available at SCM and ORS at PHQ. We cannot get any information from PQ owing to interference and obstacles from senior management.

17. In respect of the two Sony Bravia TV's supposedly purchased for PHQ. There appears to be no record in the assets of the State. The

VS 4

TV"s was paid for from the PC S day to day maintenance account. These TV's would not found on any police system. Had we not obtained copies of the invoices submitted by Goldcoast Trading CC no one would have known about the acquisition of the TV'

18. In order for any success to be achieved the investigation team must be allowed to investigate this matter unhindered and also to report directly to Lt-Gen. Dramat or any senior officer appointed by him.

19. Finally Minister Mthethwa's media statement with regard to the motto of the DPCI (Hawks) ***"Fight against corruption: To Seek. To Find. To succeed."*** A copy of the media statement is attached for easy reference.

Report compiled by Colonel V Soobramoney

4 June 2010

ANNEXURE "JWB2"

W66

AFFIDAVIT

I, the undersigned,

TERENCE JOHN JOUBERT,
States under oath in English:

1.

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

2.

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

3.

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

AFFIDAVIT

4.

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

5.

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

6.

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

7.

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

AFFIDAVIT

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

8.

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

9.

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

DATED AT DURBAN THIS DAY OF NOVEMBER 2013

TERENCE JOHN JOUBERT

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

ANNEXURE "JWB3"

30

TRANSCRIBER'S CERTIFICATE

This is, to the best abilities of the transcriber, a true and correct transcript of the recording, where audible, recorded by means of a mechanical recorder in the matter:

LAWFUL INTERCEPTION ID	:	27727108856
CALL ID	:	INDIA 56921ID26320
DATE	:	2011-09-08
TIME	:	20:47:58
CALLING PARTY	:	076 747 5889
NO OF PAGES	:	4

T J HARVEY

[redacted]

INDIA 5692 IID26320 1 DIRECTION 235/2010 ZD

LAWFUL INTERCEPTION ID: 27727108856

DATE & TIME: 2011-09-08 - 20:47:58

CALLING PARTY: 076 747 5889

TRANSCRIBED BY: Tracy Jane Harvey of SureType Typing & Transcription Services, Durban.

MALE 1 How's it?

MALE 2 ...[indistinct] ...[inaudible]

MALE 1 But can you talk?

MALE 2 ...[indistinct]

MALE 1 Okay. You know, I told you our pressure was denied?

MALE 2 Hmm.

MALE 1 The PC[?] sent a parcel with one of the boys who's a colonel.

MALE 2 Hmm.

MALE 1 Of some cash.

MALE 2 Sorry?

MALE 1 R2 million cash.

MALE 2 Yes?

MALE 1 Because Booysen wanted that.

MALE 2 Sorry?

MALE 1 Can you talk?

MALE 2 Yes, yes, yes, I can hear you now.

MALE 1 This is our situation, right; our guy went to Booysen with the cash of R2 million cash.

MALE 2 Yes.

MALE 1 That's what Booysen wanted. And then Booysen made it into a trap.

MALE 2 [whistles]

MALE 1 They arrested the guy.

MALE 2 Don't tell me.

MALE 1 Honest, my brother, that's why I didn't answer your calls today, I was running around to help the brother out. I got the general in Pretoria phoning me, because she went – some stats are out for crime stats or whatever ...[indistinct] she was busy ...[indistinct] go help the brother out. But the bottom line is how can Booysen do that?

MALE 2 How, how, how. Come on, man, how ...[inaudible]

MALE 1 You see, if you're playing ball, you're playing ball, you know what I'm saying? He went against, he reckoned, "No..." – I mean, I don't know what went into him. He arranged the trap and he sorted it out and the guy – he took the bag of money, there's no doubt about that, R2 million in R100 notes in cash.

MALE 2 How, man, I don't believe this.

MALE 1 That's what happened. It will be in the paper tomorrow morning, so it's a big thing.

MALE 2 That means that your name is not there?

MALE 1 My lady is not here, she's in Joburg, but this was our boy.

MALE 2 No, I'm saying that you name is not there?

MALE 1 No, my name's not there. No, it's not there. But obviously they know my name is there, because we arranged that, you know that I'm saying? ...[speaking simultaneously] they suspect we did this. But this thing

is getting out of hand with Booysen. Booysen thinks he's a mafia now, you know?

MALE 2 ...[indistinct]

MALE 1 I said Booysen thinks he's a mafia now.

MALE 2 Hmm.

MALE 1 You know, for him to behave in this manner, he thinks he's like above everyone else now. Maybe we need to clip him a bit.

MALE 2 How, how, how, I don't believe this, man.

MALE 1 Ja, he did that, that fucking white bastard, and I told my sister, "Don't trust this white bastard.", but she said, "No, send it through, because he's going to play ball, he'll do this, he'll do that.", and whatever.

MALE 2 ...[speaking simultaneously]

MALE 1 ...and that's what he does. He wants ...[indistinct], he wants ...[indistinct]

MALE 2 But your aunty, she's not involved?

MALE 1 No, she and I are not involved. You see, we used someone else to go there and sort it out, you know what I'm saying?

MALE 2 Okay.

MALE 1 Ja. But we'll meet and we'll have a briefing and we'll decide how we're going to take care of this guy, because he's obviously going to stand in the way for everything.

MALE 2 Ja. No, it's fine, it's fine. But ...[intervention] – okay, no, it's fine, it's fine.

MALE 1 ...[speaking simultaneously] ...[indistinct] I said I must get bail for this boy ...[indistinct] I can't tell him, I said, "No, I don't know what you're

talking about.", because I don't know whether it's a trap or not a trap, you know?

MALE 2 Yes.

MALE 1 But then I phoned him back from the callbox, he says no, just help him wherever you can, because he's a good man, he said the guy that got arrested is a colonel, he said he's a good man, just help him wherever you can help him.

MALE 2 ...[inaudible]

MALE 1 So, I said, "Listen, I will help him. We'll sort the bail out, we'll get the advocate, whatever.", he reckoned, "This is a good man, don't let him fall.", I reckoned, "No, we'll help him, don't stress.

MALE 2 How, how, how, man, this is – no, but it's fine. ...[inaudible] Can you organise something for my children, you know I left ...[indistinct] you promised that ...[intervention]

MALE 1 Where are they now, where are they now?

MALE 2 In a flat – no, in Durban North.

MALE 1 Send me their address, I'll send my boy to give them ...[indistinct] or whatever now.

MALE 2 It's No 3 Westminster.

MALE 1 ...[indistinct], my brother, I don't have a pen. Please send ...[intervention]

MALE 2 Okay, I'll send ...[speaking simultaneously]

MALE 1 Okay, brother. But we'll sort out tomorrow, don't stress.

[call ends]

ANNEXURE "JWB4"

Elaine Regina Latchanah - States under oath in English :-

1.

I, Elaine Regina Latchanah, with PERSAL number 70017956, an Indian female, employed as a Captain in the SAPS : DPCI : Organised Crime Durban : Support Head : Kwazulu Natal, 136 Victoria Embankment : 4th floor, Room 15, Telephone Number 031 – 333 8009 and Cell phone 071 481 2460.

2.

I was placed as the Support Head : DPCI Organised Crime Durban, Kwazulu Natal on 2017/02/06.

3.

I was appointed as a Secretary to Major General Booysen in 2010. As a Secretary part of my duties were to make and receive calls including confirmation of appointments. According to my recollection a person, who identified himself as Mr Edward Zuma, requested an appointment with Major General Booysen. Mr Zuma called several times to secure an appointment. A date which I do not recall was agreed upon after consulting with Major General Booysen. Mr Edward Zuma did not inform me as to what the meeting was about. Mr Edward Zuma did arrive on the day agreed upon and met with Major General Booysen in General Booysen's office. I do not recall how long the meeting was and after the meeting Mr Zuma left.

4.

I know and understand the contents of this statement.

I have no objection of taking the prescribed oath.

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

PLACE : DURBAN DATE : 23 NOVEMBER 2018 TIME : 09:30

DEPONENTS SIGNATURE : .....CAPT
LATCHANAHER

I hereby certify that this statement was taken down by me and that the deponent has acknowledged that he/she knows and understands the contents of this statement. This statement was duly sworn to before me and deponent's signature was placed thereon in my presence AT DURBAN ON THIS 23RD DAY OF NOVEMBER 2018 AT 09:30.

1.

.....

COMMISSIONER OF OATHS

MARIUS WAGENAAR

FULL NAMES

S.A.P.S : ORGANISED CRIME DURBAN

136 VICTORIA EMBANKMENT

DURBAN

ANNEXURE "JWB5"

Specialised Commercial Crime Unit

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

HEAD OFFICE

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INTERNAL MEMORANDUM

TO: **ADV W MULLER**
ACTING REGIONAL HEAD: SCCU DURBAN.

CC: **ADV. MLOTSHWA**
ACTING DIRECTOR OF PUBLIC PROSECUTIONS;
KWAZULU- NATAL

FROM: **ADV LS MRWEBI**
SPECIAL DIRECTOR: SCCU

DATE: **09 JANUARY 2012**

SUBJECT: **COLONEL NAVIN MADHOE, DURBAN CENTRALCAS 466/09/2011 AND CAS 781/06/2010: COMMERCIAL CRIME COURT DURBAN CASE NO 41/1388/2011: DISCIPLINARY HEARING CASE NO TR 03/11/2011.**

1. On 6 December 201 this office received representations from the lawyer representing Colonel Madhoe in the abovementioned matters. A copy of the said representations is attached hereto for your information.

2. In order for this office to meaningfully respond to the said representations, the prosecutor dealing with the matter must please ensure that the following is submitted to this office:

   a. A summary of both dockets Durban CAS 466/09/2011 and Durban CAS 781/06/2011

   b. In respect of both dockets the prosecutor must set out a clear factual basis and indication of the link of Col Madhoe to the crimes allegedly committed in respect of matters investigated under the said dockets

   c. In respect of both dockets the prosecutor must give an indication of the legal basis of the link of Col Madhoe to the said crime. The evidential aspects must be clearly set where it is indicated how the prosecutor will set out to present these in proof of the crimes allegedly committed.

   d. An indication of any anticipated difficulties in any of the matters must be given with an indication of how these would be dealt with.

   e. An indication of any circumstances/evidence favourable to the accused must be set out.

   f. A motivated recommendation on the merits of the representation

   g. A copy of the section 252A authorisation and the affidavit in support thereof as well as the reports that General Booysen alleges he provided to adv. Nel.

   h. Electronic copies of both dockets Durban CAS 466/09/2011 and Durban CAS 781/06/2011must be submitted to this office.

3. With reference to Durban CAS466/09/2011 and Durban CAS 781/06/2011 and in order to save time in the matter; I raise the following preliminary issues based on the affidavits presently annexed to the representations:

   i. As it is alleged that Madhoe made the said payment in order to have the undated report pre-dated; how did or how could Madhoe have known about the existence of the said report?

ii. Clearly the contents of the report refer to evidence or information in the source documents; how can it or having it predated affect anything? Or can the report be used to prove anything?

iii. Supposing the section 205 subpoenas were based on the report and not on the evidence (something which is inconceivable of course) and were to be set aside based on the said pre-dated report what would have prevented the police from getting other subpoenas?

iv. In reality does it make sense that a court can set aside a subpoena based on the report as the report is not evidence nor can it have any impact on any procedural steps involved in obtaining a section 205 subpoena?

v. How could Madhoe ask General Booysen about the investigations of the R60million fraud when he was not the investigator?

vi. What is the nature of benefit or advantage that the state seeks to prove in the case against Madhoe taking into account that:

- He was/is not challenging the validity of any section 205 subpoenas.
- He naturally would not have been acting to advance the case of Mr. Panday, as on the version of the state he believes Panday is the person who put him in trouble.
- Madhoe knows and has evidence that the contract in respect of the R60 million tender was personally authorised by the National Commissioner on under his signature on 7/06/2010.
- Madhoe through correspondence dated 17/02/2010 and 14 June 2010 alerted the police management on the problems related to sourcing of accommodation.

vii. It appears that General Booysen is the single witness in the case against Madhoe; how does the prosecutor propose to overcome any difficulties associated with his evidence to satisfy the cautionary rule, taking into account the following :

- From his statement it appears that General Booysen did not see it fit to ensure that the events relating to any discussions on the request of Madhoe were recorded at any stage from 25/08/2011 to 8/09/2011. It appears that, save for an sms and an FNB scrap paper, reliance will mainly be on the viva voce evidence of Gen. Booysen.
- The instruction he gave as per minute dated 16 September 2011 that nobody else shall visit Madhoe whilst in custody except certain persons listed in the said minute.

4. The requested information must be submitted to this office on or before Friday 13th January 2012.

Regards

ADVOCATE L.S.MRWEBI
SPECIAL DIRECTOR: COMMERCIAL CRIME UNIT
PRETORIA
DATE: 04 DECEMBER 2011

ANNEXURE "JWB6"

MEMORANDUM

TO: Adv LS Mrwebi
Special Director: SCCU

CC: Adv CS Mlotshwa
ADPP: KZN

CC: Adv S Ramouthar
DDPP: Durban

FROM: BF Manyathi
SSA: DDPP- Durban

DATE: 22/01/12

RE: Representations - Col N Madhoe
Durban Central Cas 466/09/11 (Corruption)

1. I have been on leave from 22/12/11 until 16/01/12, hence the delay in responding to your memo dated 6/01/12.

2. I am only dealing with the corruption matter (Cas 466/09/11). Ms Wendy Greef (Clark) is dealing with the fraud matter (Durban Central Cas 781/06/10). I have given her copies of your memo and attachments. She will respond with regard to the fraud matter.

3. I will endeavour to respond as best as I can, however I believe that it would be more appropriate for Wendy and I to brief you in person. If you share my belief, I would await your further directive in that regard.

Background

4. Col Madhoe ("Madhoe") was working at the procurement section. He and business man Thoshan Panday ("Panday") are suspects in the fraud matter involving R60 million. I understand that section 205 subpoenas were duly obtained and Panday's business and personal bank statements were obtained. As a result thereof, a preliminary report was compiled by the investigators alleging wrong doing on the part of Madhoe and Panday. The fraud matter is investigated by the Hawks and they fall under the command of Major General Booysen ("Booysen").

5. At the bail hearing for the corruption matter, it was common cause that Panday had instituted civil action in order to have the section 205 subpoenas set aside. I believe the civil matter was heard in December 2011 and judgment has been reserved.

Summary of evidence in the corruption matter

6. Due to bits and pieces of evidence constituting a mosaic, it would be difficult to summarise it comprehensively for purposes of responding to your memo. A copy of the "A" clip is attached herewith for completeness. In the course of my response, I will refer to specific witnesses whose statements are part of the evidence.

7. In short, Madhoe approached Booysen and asked him about the fraud investigation. There were several meetings and communication between them which culminated in Madhoe handing Booysen R1,362 million cash and Booysen handing him a pre-dated report. Madhoe was arrested on the spot and the said report was found in his car. The cash was found in Booysen's car.

8. In my view, Madhoe's conduct falls squarely within the ambit of sections 3(b) and 4(1)(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. The said provisions are attached hereunder.

Madhoe's representations

9. Madhoe is clouding issues and is making extremely serious allegations, including treason. He avers that he is a potential witness in matters of national interest. I cannot comment on his averments as there is nothing in my matter relating to his allegations. I also fail to comprehend how the corruption matter is being used to possibly "silence" him as a potential witness.

10. One should look at the essence of his one "defence" as raised in his bail application affidavit. He stated that he was approached by Booysen and asked to obtain certain discs containing incriminating evidence against a

unit falling under his command. He further stated that he handed discs and a hard drive containing such material to Booysen. The state's case differs materially from Madhoe's version as to how it came about that he gave Booysen the said material. It is however common cause that he did give it to Booysen. It is significant to note that the material was handed into the SAP13 exhibit register. If Booysen was so determined to destroy the damning evidence, it defies logic why he allowed it to be handed into the exhibit register.

11. The material is actually crime scene photos depicting dead persons. In my experience, several parties have access to such photos and they include LCRC members, detectives in general and prosecutors.

12. It is nonsensical for Booysen to fabricate the corruption charge if Madhoe had helped him by giving him the supposed damning evidence. In any event, Sandesh Dhaniram ("Dhaniram"), a former policeman, has made a statement (A21) to the effect that he gave the said material to Madhoe. Dhaniram states that he got it from Col Aiyer, who was in bad terms with Booysen. It would seem that Madhoe naively believed that the material was indeed damning against Booysen and/or his unit and that he could use it to blackmail him so that he would help him with the fraud matter.

13. Madhoe's other theory is that the corruption charge is an attempt to persuade him to implicate the Provincial Police Commissioner of KZN ("PC") and Panday. I fail to understand how.

14. One should also look at another "defence" averred by Madhoe to Major General Moodley ("Moodley"), who has made a statement (A14). He stated that he had information that "would turn the (corruption) case on its head". He told Moodley that he had approached Booysen previously and told him of damning evidence possessed by his "contacts" that implicated Booysen and a unit falling under his command. Booysen then asked him to get the evidence so that he would destroy it. Madhoe further stated to Moodley that his "contacts" wanted R2 million for the material.

Booysen handed him R1,362 million and undertook to pay the balance on receipt of the material. Madhoe then took the money to his "contacts", but they refused to accept the lesser amount. When he was arrested, he was actually returning the said money to Booysen. I must say that this is the most absurd averment I have ever come across.

15. That was not the end of the matter. Madhoe told Moodley that he had evidence to substantiate his allegations against Booysen and was willing to hand it to Moodley. Moodley then arranged Col Chetty and Col Padayachee (A27) to book Madhoe out in order to retrieve the evidence. Madhoe took them to his residence, did a prayer and asked to be taken back to the cells where he was detained. It was clearly a false alarm.

16. Based on the state's case, Madhoe seems to be "bluffing" with these "defences", allegations and theories. From the time of the bail hearing, he has been saying that he will divulge at the right forum the real state of affairs underlying his arrest. I suggest that his attorney should obtain a "without prejudice" statement from him pertaining to the allegations in respect of which he claims to be a potential witness and submit it to your office for consideration.

Alleged conflict of interest

17. There is substance in the concern that the matter is being investigated by members of the Hawks who fall under Booysen's command. I am however surprised that the issue is being raised again. It was first raised at the bail hearing and was discussed between myself and his defence team. They suggested the Public Protector or SIU or ICD. We deliberated the issue and they then reconsidered and decided to withdraw it. I should however not be construed as saying that the matter should not be transferred to an "independent" investigative unit.

Issues raised in para 3 of your memo

AD 3i

18. In his bail application affidavit, Madhoe stated that a copy of the report was forwarded to his office while he was at procurement. On his own admission, he had access to it.

AD 3ii-iv

19. My understanding is that the report was compiled on the basis of the information obtained, inter alia, from the bank statements. One should keep in mind that Booysen is simply stating what Madhoe stated to him. In para 7 of his affidavit, he states: "...if I could help him. I asked in what way. He said that if I pre-dated a report that the investigating officer had submitted to me, it would assist them in getting the section 205 subpoenas to be set aside". In para 12, he states: "I asked him how the pre-dating would help, to which he responded that it would get the subpoenas overturned". As indicated above, Panday had already instituted civil action which was due to be heard in December 2011 in the High Court.

20. There is substance in your reasoning in para 3ii-iv and I agree with it. However, one should not speculate as to the logic or otherwise of pre-dating the report in order to have subpoenas set aside. As already pointed out, Booysen is simply stating what Madhoe stated to him. One aspect is nevertheless apparent, that is, a pre-dated report would logically mean that the relevant bank accounts were accessed illegally. Perhaps one needs to look at the papers filed in the civil action in trying to figure out the sense in this regard. In any event, I will illustrate hereunder that this issue has no bearing on the legal requirements (elements) on a charge of corruption.

AD 3v

21. Madhoe had a copy of the report and he knew that Booysen was the head of the Hawks who were investigating the fraud.

AD 3vi

22. My understanding of the relevant provisions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 is that the prosecution is not required to prove that the accused would have benefited or gained advantage from the commission of the offence. In the context of the evidence, the logic or otherwise of pre-dating a report in order to have subpoenas set aside will not be a hindrance in proving the requisite elements of the offence. Sections 3(b) and 4(1)(b) are relevant in this regard:

3 General offence of corruption

Any person who, directly or indirectly-

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.

4 Offences in respect of corrupt activities relating to public officers

(1) Any-

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;
(iii) designed to achieve an unjustified result; or
(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to public officers.

Madhoe and Panday are suspects in the fraud matter. The fraud and corruption matters are inter-related. It would be unrealistic to think that Madhoe was advancing only his own interests in his dealings with Booysen. The evidence reasonably indicates that the R1,362 million must have come from Panday. It would also be unrealistic to think that if Panday succeeds with his civil action, Madhoe will not derive any advantage.

23. I assume that the averment that "Panday is the one who put Madhoe in trouble" is based on para 12 of Booysen's statement. It states "...he would let the bastard pay for what he had put him through". Once again, one should not speculate as to what Madhoe meant. However, as pointed out above, Madhoe had every reason to advance Panday's course. I have not been aware that the R60 million tender was personally authorised by the National Commissioner and that Madhoe sent correspondence dated 17/02/10 and 14/06/10 respectively to police management. Wendy should deal with those aspects.

AD 3 vii

24. It is quite correct that Booysen is essentially a single witness against Madhoe. However it is trite that a court may convict on the evidence of a single witness. I need not deal with the test, suffice to say that there is substantial other evidence giving credence to Booysen's version. For instance, the pre-dated report that Booysen handed to Madhoe was recovered on the spot by members of the sting operation in Madhoe's car.

25. During the course of the bail hearing, Madhoe was being detained at Durban Central police cells. At some stage, he alleged that he was being visited in the cells by certain police members who wanted to exert pressure on him to implicate the PC and Panday.

Based on that, I informed court that police management had decided that he should no longer be detained in the police cells. I accordingly suggested that he should be detained in prison. His defence team did not take kindly to that and it was apparent that Madhoe had shot himself in the foot. In the light of that, I do not believe that the minute dated 16/09/11 that restricted his visitors will adversely affect the credibility and essence of Booysen's evidence.

Conclusion

26. In my view, the case against Madhoe is overwhelming and I recommend that he must be indicted in the High Court.

Regards

B.F. Manyathi
SSA – DDPP Durban

ANNEXURE "JWB7"

IOL

Graft charges against Panday withdrawn

NEWS / 3 APRIL 2013, 11:16AM / TANIA BROUGHTON

THOSHAN Panday coming out from Magistrate court Picture; DOCTOR NGCOBO

Durban -

Businessman Thoshan Panday walked scot-free from the Durban Magistrate's Court on Tuesday after charges of corruption and conspiracy to commit fraud were provisionally withdrawn.

Although still under investigation for an alleged R60 million police accommodation tender scam, Panday no longer faces any criminal charges in spite of being arrested twice in connection with allegations of bribery and corruption.

Earlier this year, the provincial prosecutions boss, advocate Moipone Noko, instructed that charges against him and supply chain unit policeman Navin Madhoe, involving an alleged attempt to bribe KZN Hawks head Johan Booysen with R2m, be provisionally withdrawn.

She said that while there was a prosecutable case, she had concerns "regarding justice", bas ed on representations which Panday had made and which needed further investigation.

RELATED ARTICLES

Bugged Panday calls set to shock

Hawks probe Panday bribe case cop

Panday i century'

NPA spokeswoman Natasha Ramkisson told The Mercury on Tuesday that Noko still had not made a final decision in this matter.

On Tuesday, Panday and another supply chain policeman, Captain Aswin Narainpershad, appeared before Durban Regional Court magistrate Nanette Otto at what was to be the start of their trial in which they are charged with allegedly offering R1m to Captain Kevin Stephen to help them generate false invoices worth R15m for submission to the SAPS.

But State advocate Dorian Paver said the State could not proceed "because of problems regarding the preparation of evidence".

He said the charges would be provisionally withdrawn and the magistrate recorded that they would be reinstated only if and when the investigations were concluded.

In response to a question from The Mercury, Ramkisson said Panday had not made any representations about these charges and the reason for the provisional withdrawal was "as stated in court by Paver".

Auditors are still probing the alleged R60m tender scam, and a decision will be made about possible prosecutions once the report is finalised.

The Mercury

Related Tags

Crime and Courts

ANNEXURE "JWB8"

NEWS (HTTPS://MG.CO.ZA/SECTION/NEWS)

Crime intelligence boss Mdluli a 'political appointment'

Staff Reporter (https://mg.co.za/author/no-profile) 03 Apr 2011 14:48

Police crime intelligence boss Lieutenant-General Richard Mdluli was a "political appointment", *City Press* newspaper reported on Sunday.

In an interview with the newspaper, former acting national police commissioner Tim Williams described Mdluli's appointment process as "completely unusual" and "not regular".

Mdluli and Colonel Nkosana Sebastian Ximba were arrested last week in connection with a murder committed 12 years ago.

Appointment process 'hijacked'

Williams, who retired from the police in 2009, reportedly claimed Mdluli was promoted from deputy head of Gauteng earlier in 2009 after a panel of four ministers, led by Police Minister Nathi Mthethwa, hijacked the appointment process.

The others were State Security Minister Siyabonga Cwele, the then home affairs deputy minister Malusi Gigaba—now minister of public enterprises—and former safety and security deputy minister Susan Shabangu, who is now minister of mineral resources.

"The normal [appointment] process would involve the commissioner, deputy national commissioner and the deputy minister," Williams told *City Press*.

Also commenting in the newspaper, Institute for Security Studies researcher Johan Burger said that if this was indeed the case, the appointment was "a clear case of political interference and a political appointment in which the normal procedures of the police were completely ignored".

Burger is a former police officer with 36 years experience.

Also quoted in *City Press*, Mthethwa's spokesperson Zweli Mnisi confirmed that a panel of four ministers made the recommendation, but said "this was not an unusual process".

Appointment 'based on his capabilities'

He said the Police Act did not prohibit a panel of ministers from being directly involved in the appointment process.

Mnisi denied that Mdluli's appointment was politically motivated and said he was "solely appointed based on his capabilities to head crime intelligence and met all the terms of the appointment".

At the time, the panel was not aware of murder allegations against Mdluli.

Oupa Ramogibe, who was killed in Vosloorus, Boksburg, in 1999, was apparently involved a love triangle with Mdluli and a woman.

At the time, Mdluli was the station commander at the Vosloorus police station, where Ximba also worked.

Last year, Mdluli apparently promoted Ximba seven ranks—from constable to colonel—in one day, according to the *Sunday Times*.

The newspaper reported that this promotion was now the subject of an internal investigation by the Hawks, who arrested the men for the murder of Ramogibe.

The two face charges of murder, kidnapping and defeating the ends of justice with Warrant Officer Samuel Dlomo and a fourth man, who is also a colonel. - Sapa

Richard Mdluli (https://mg.co.za/tag/richard-mdluli) South Africa (https://mg.co.za/tag/south-africa)

CLIENT MEDIA RELEASES

Press Offices

UNIVERSITY OF KWAZULU-NATAL (HTTP://PRESSOFFICE.MG.CO.ZA/UNIVERSITYOFKWAZULU-NATAL/PRESSRELEASE.PHP?STORYID=288820)
Big data research project gets R9m boost (http://pressoffice.mg.co.za/UniversityofKwaZulu-Natal/PressRelease.php?StoryID=288820)

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SNUPIT (HTTP://PRESSOFFICE.MG.CO.ZA/SNUPIT/PRESSRELEASE.PHP?STORYID=288752)
Snupit shares success of Business Show SA (http://pressoffice.mg.co.za/Snupit/PressRelease.php?StoryID=288752)

NORTH-WEST UNIVERSITY (HTTP://PRESSOFFICE.MG.CO.ZA/NORTHWESTUNIVERSITY/PRESSRELEASE.PHP?STORYID=288751)
NWU applauds best-of-the best lecturers (http://pressoffice.mg.co.za/northwestuniversity/PressRelease.php?StoryID=288751)

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NORTH-WEST UNIVERSITY (HTTP://PRESSOFFICE.MG.CO.ZA/NORTHWESTUNIVERSITY/PRESSRELEASE.PHP?STORYID=288661)
Celebrating the legacy of a poetry giant (http://pressoffice.mg.co.za/northwestuniversity/PressRelease.php?StoryID=288661)

BARLOWORLD LOGISTICS (HTTP://PRESSOFFICE.MG.CO.ZA/BARLOWORLDLOGISTICS/PRESSRELEASE.PHP?STORYID=288594)
Barloworld announces new group structure (http://pressoffice.mg.co.za/BarloworldLogistics/PressRelease.php?StoryID=288594)

ANNEXURE "JWB9"

MINISTERIAL HANDBOOK

A Handbook for Members of the Executive and Presiding officers

Approved by Cabinet 7 February 2007

Produced by Ministry of Public Service and Administation (C) 2007

CONTENTS

PREFACE

This Handbook is a guideline for benefits and privileges, to which Members and their families are entitled, in the execution of their duties. These benefits and allowances refer to both the time during term of office and in some cases to the time thereafter. The Handbook incorporates the Executive Code of Ethics, which regulates probity in public life.

The guidelines with regard to administrative and support services, and the benefits, privileges associated with occupying these offices, provide assistance in ensuring good governance in line with the Code. The Handbook seeks to sensitise members on the security measures that have to be observed in co-operation with the National Intelligence Agency and Safety and Security Services.

The interpretation of anything relating to these guidelines rests with Cabinet. Any person interpreting this Handbook should consult Cabinet Secretariat when in doubt. In the event of the latter having doubts about the interpretation of the provision(s) in question, the matter should be referred to Cabinet.

All staff members providing support services to the portfolios mentioned above are expected to acquaint themselves thoroughly with the provisions contained in these guidelines. Specialised training can be provided for members of staff through the South African Management Development Institute (SAMDI).

Anything not mentioned in these guidelines does not form part of the benefits, allowances and support services envisaged for Political Office Bearers.

DEFINITIONS

In these guidelines, unless the context otherwise indicates:

"adult" means a person who has reached the age of legal majority of 18 years.

"department" means any department listed in the Schedules 1, 2 and 3 of the Public Service Act, 1994 and includes national and provincial legislatures.

"domestic worker" means an employee who performs domestic work in the home of his or her employer and includes

(a) a gardener;

(b) a person employed by a household as driver of a motor vehicle; and

(c) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker.

"dependant" means a child, adopted child and/or foster child whom the Member is legally obliged to support financially and is in fact supporting.

"Driver / Aide" means a staff member of the office serving a Member, employed to perform driver and messenger functions as envisaged in Chapter 8.

"family" in relation to any person, means his or her parent, child or spouse, and includes a person living with that person as if they were married to each other, i.e. a spouse/ life partner and/or the following dependants:

Any child recognised as a dependant for the purpose of the Parmed Medical Aid Scheme; and

Any relative (child, parent, brother or sister, whether such a relationship results from birth, marriage or adoption) who resides permanently with the member and is of necessity dependent, and whose income, from whatever source, does not exceed the amount of the applicable maximum basic social pension prescribed in regulations made under the Social Pension Act, 1973.

"Member/s" means a Minister, Deputy Minister, Premier, Member of the Executive Council (MEC) and a Presiding Officer/Deputy Presiding Officer in Parliament or in a Provincial Legislature, except in cases where specific categories of the above members are mentioned as national or provincial members.

"National member/s" means a Minister, Deputy Minister, Presiding Officer and Deputy Presiding Officer.

"Official Residence" means a state owned residence or a private residence designated by a member as to be used, amongst others, for official purposes at the seat/s of office.

"Parliament" refers to both national and provincial legislatures.

"permanent companion" means a person who is cohabiting with the member and is publicly acknowledged by the member as a permanent companion, provided the member has informed his/her Department in writing of such a companion.

"Private Residence" means a privately owned house.

"Provincial member/s" means a Premier, Member of the Executive Council (MEC), Presiding Officer or Deputy Presiding Officer.

"SAPS VIP Driver / Protector" means a member of the SAPS VIP Protection Unit, allocated / appointed to provide security and driving services to the member.

"Spouse" means person legally married to the member including a spouse in a polygamous marriage or a permanent companion/life partner.

"State-owned Residence" means housing, furniture and effects owned by the State.

"Support services and benefits to the Spouse" means support services and benefits to the spouse of a member and who as part of the household of the member supports him/her in the execution of his/her official functions.

ANNEXTURE E

POLICY ON SECURITY MEASURES AT THE PRIVATE RESIDENCES OF PUBLIC OFFICE BEARERS

Cabinet approved on 11 June 2003 the following provisions of the above policy:

1. The Minister of Public Works may approve a State contribution of a non-recoverable maximum amount of R100 000, or the total cost of security measures not exceeding R100 000.

2. Should the cost of the security measures be more than R100 000, the difference shall be borne by the Public Office Bearer.

3. The State's contribution of R100 000 should be reviewed every five years to match with the changing costs for security systems.

4. The following procedure should be followed to obtain approval from the Minister of Public Works for the State's contribution of R100 00 to be made towards security measures at the private residences of Public Office Bearers:

4.1 The South African Police (Protection and Security Service) should at the request of a Public Office Bearer, conduct a security evaluation of such Public Office Bearer's private residence.

4.2 SAPS (Protection and Security Service) would discuss the Public Office Bearer's personal circumstances with him/her, with a view to inform the recommendations to be made.

4.3 SAPS (Protection and Security Service) should submit the security evaluation report to the Department of Public Works, Directorate: Prestige Accommodation (Head Office) for consideration by the Interdepartmental Security Coordinating Committee (ISCC) and for cost estimates to be prepared.

4.4 The Directorate: Prestige Accommodation will provide SAPS (Protection and Security Service) with the cost estimate to be attached to the Public Office Bearers copy of the security evaluation report and to be forwarded to the relevant Public Office Bearer.

4.5 Upon receipt of the report and cost estimate, the Public Office Bearer may submit a formal request to the Minister of Public Works for this Department to make a contribution towards the security measures.

4.6 The Office Bearer may effect security measures at a lower level than recommended by SAPS (Protection and Security Service), provided that he/she first obtains the approval of the Minister of Safety and Security.

4.7 Once the Minister of Public Works has approved the contribution by the Department towards the security measures, the Public Office Bearer should obtain quotations for the work to be executed and forward the preferred quote to the relevant Regional Office of the Department for technical scrutiny, bearing in mind the fact that the State may only contribute a maximum amount of R100 000 towards the security measures.

4.8 Should the quotation be found reasonable and in accordance with the approved security measures, the Public Office Bearer may enter into agreements with contractors for the work to be executed.

4.9 Upon completion of the work, the Public Office Bearer must furnish the relevant Regional Office with receipts of the work executed. The Officer Bearer must certify that the work has been executed to his/her satisfaction. On receipt thereof, the relevant Regional Office, in collaboration with the SAPS ((Protection and Security Service), will inspect the completed work. If the Regional Office and SAPS are satisfied that the work has been completed in accordance with the tender/quotations and the recommendation of South African Police Service, payment would be made directly to the Office Bearer, who would in turn be responsible for the payment of contractors.

5. Standard security measures, as recommended by SAPS (Protection and Security Service) for the private residence of Public Office Bearers, may include the following:

Bulletproof guard hut.
Perimeter fencing, 2 100 mm high (or any appropriate height recommended by the SAPS).
Vehicle and pedestrian gates, 2 100 mm high (or any appropriate height recommended by the SAPS for the perimeter fence).
Security gates for external doors.
Burglar proofing to windows.
Window glazing to prevent spalling in case of an explosion.
Illumination (Security lights).
Intercom system.
Alarm system.
Fire extinguishers.

6. The Department does not accept responsibility for the maintenance and running costs of the above security measures (excluding guard hut, should it be of the pre-fabricated removable type provided and constructed by the Department of Public Works as a temporary facility, according to the specific request of the SAPS).

7. The relevant Regional Office is responsible for the provision of removable bulletproof guard huts, if specifically required by SAPS, at the private residences of Public Office Bearers.

8. The relevant Regional Office is also responsible for the payment of water and electricity consumption from the guard huts. The Regional Office should reimburse Public Office Bearers, on a monthly basis or as mutually agreed with the Public Office Bearers, for water and electricity consumption from the guard huts.

9. The Department may make advance payments to Public Office Bearers for the implementation of security measures at their private residences, should a Public Office Bearer requiring an advance payment make a presentation to the Minister of Public Works to this effect.

10. A period of five (5) years should lapse before a Public Office Bearer may again request funds for the implementation of security measures, and only after the original private residence where security measures were affected, had been disposed of.

11. Security measures may be implemented at Public Office Bearers' private residences occupied on a regular basis in areas other than Cape Town or Pretoria.

12. In terms of the Handbook for Members of the Executive and Presiding Officers, (Chapter 2, paragraph 3) approved by Cabinet on 5 February 2003, Premiers and Members of the Executive (MEC's) may apply for financial contributions towards security measures at their private residences. Such applications should, however, be submitted to the relevant MEC of the Provincial Department of Public Works and all other responsibilities and expenditure would be undertaken by the Provincial Department of Public Works.

ANNEXURE "JWB10"

Annexure "JWB10"
(pages JWB-122 to JWB-132)
of Exhibit Z(a) & Z(b) was not timeously declassified at the time of Maj-Gen Johan Wessel Booysen's evidence and accordingly not referred to in his evidence.

ANNEXURE "JWB11"

1

G.P.-S. 01/02 P. 21 (81/143198)

6·4·12. DHR 952 K Reg.

WAVZZZ8R4AA108151 VIN

CCW D89392 Eng

Audi AU 416 - Q5

Ekurhuleni

ID 6003040799080
NCHWE MA

2010 ·08 ·13 Date Issued.

Navindra
Manikilall
Rec MR Manikilall 5/51
29·12·11
Head Advocate
Mwrabe.

(1)

G.P.-S. 01/02 P. 21 (81/143198)

Devendran Applsamy Naidoo.
0638168-5 // @ Soobramoney DA.

Oct 2011 received call from
anonymous b/m to collect
golf Audi Q5 @
Sunnyside. Key given to him
by b/m who disappeared

Details in his given 3rd
stolen during break in @
safe house Primrose CAS 192-10-11.

#

(2)

Hlabirwa Milton Lamole Lt Col.
0825793956

Mosimola instructed him to
collect all SA vehicles
from Generals + Brigadier on
9/12/11 to be done
before 17/12/11 Mosimola
also supplied him with
a list of vehicles

Received keys of Audi Q5
from Col DU [illegible] SLM [illegible]

parked @ Erasmus at building

(3)

Yolisa Matakata

was Director LI W/Cape
since ~~2-10~~ 2010 . 02 . 28 Prov Head
LI

December 2009 call from
SS Tahoor [illegible] from Zuma's
office. He arrested the [illegible]
She called Jacobs who
said he could assist with
appointment of members of
LI He was vague
She was not part of
any panel

Feb ~~2-0~~ 2010 received call
from S/S Mngqonkhola prov
commander SSA Account W/Cape
saying Jacobs was in
his office with
[illegible] who he had to
take up he post @ W/Cape

Mngqonkhola informed her
that he [illegible] the

G.P.-S. 01/02

P. 21 (81/143198)

lady. We had collected Mathaba @ airport & dropped him @ ladies lounge @ Waterfront.

She was told that lady to appointed in WC as ??? Never partook in process!

(4)

Rodney Ntsimane Toka Maj Gen CI @ JSS building 89HA

Told by Lazarus to submit names of people to appointed & promoted including family members.

Denied this to be irregular.

(5)

Maj Gen FN Dumo

Strange advert in newspaper re posts at Attention drawn by Brig Mabena

My Jan Mokgabudi
also arrested person 250

My Jan Mabena
also arrested person of 250

My Jan Jindile Christopher Mfazi
Questions Mthethi v Zuma
appointment.
Says Mthethi displays double
standard Mthethi was not taking
disciplinary steps in Zwelitsha
(A) 89/9/10 Brig Ndlovu
except - the action!
Service not filed not
Mthethi

G.P.-S. 01/02 P. 21 (81/143198)

Prov Comm SSA Sebingile Petros Mngomezulu

Appointed by Ngcons
Appointed Lt Col Lions
Also W/O Phillips to be
Person - do
documentation

After six month Ngcons
said Lions to be deployed
to Agent

He was invited to Mthethwa
wedding with Lions!

Saw that Lions is now
a Colonel.

No proper procedures were
followed

Sthembile Bungani E
3 NY 132? Enyobotho 0823784940
Transported Mthethwa girlfriend

G.P.-S. 01/02

P. 21 (81/143198)

Mmakou [illegible] Sept 2009

22/9/09 had to fetch

MP Mdluli's cousin son

from Mdluli @

21 Uitspan Street Sinoville have

fighting & he taken to

Person [illegible] Centre attend

matric dance - got

registered [illegible] in

[illegible] World 2010 working

@ SSA & girl friend

of Mdluli the name

was Theresa

She was also given

BMW 320 closed to

drive.

D

G.P.-S. 01/02 P. 21 (81/143198)

known about a number
of promotions where no-
process was followed
James Croker Andrea Burger
Molefi Moiran

6

Jabulani Henry Mbatha
Unit 11 Westwood 381
Mengen Harden Woodmen
Capt LI Toti Meeting
Bisi Unde Mthethi complained
about nepotism.
Waljee Malli Adimulam
Alice Shetty now married
to Col Pedreyathee +
Jerusha all family

Brig Ndlovo + girlfriend
Lt Col Ntshali (Sat on panel)

Mr Jan Moodley younger brother
Joined Lower Level 2005 now Captain
Lt Col Singh Son Vicky
Single cost to Lt. Colonel

Nuki Sounds MB Moodley
as administrator in project
KANO - Dave Andi A4 + BMW 5
has done panel no 1
Fifteen grandsons employed
by Moodley
B Yato P Tshilela PJ Jeane
SCI Nhlonzi MS Ngubane
D Naidoo MM Msimango
B Nxabinisi NM. Mbenenhi N. Gila

10

Recommendation by [illegible]

① Set aside promotions

Col M Ximba
S Zeeuws
J Vanker
J Lyons
L. V Mdhlali
F Khan
S Mohammed
R "
J F DS 125010
J F D Gwenson
J LA Breytenbach

SAC Pat Mdhlalose
SO Sgt P J Maganda
M. Mabizela
W/O S Bhengu
Sgt NP Mhlumbho
W/O YM Pixx
Sgt LM Govindsamy
W/O H Moodley
W/O L Mashigo
Sgt S. Ngobeni
Sgt RKH Madlwa
ALL HG Nash
Sgt M Khan
" MN Sibiyela
Lt Col MP Thomas

All with [illegible] to be revoked

12

G.P.-S. 01/02

P. 21 (81/143198)

Cpt. Vivek Singh
Lt Col [illegible] [illegible]

Also mentioned that
IGI Radebe was informed.

ANNEXURE "JWB12"

8/3/12 Meeting with ICD
= Kgamanyane 053 780 1154
Glen Angus 053 5655 360
Mr Khuba 084 702 2741

1st Meeting - meeting with Min / NPA
SAPS - acting Nat Comm -
undergo two [illegible]
pending [illegible]
allegations - that [illegible] weekend
[illegible] [illegible] NPA [illegible]
Challenge to [illegible] [illegible] to NPA
to KZN DPP [illegible] with [illegible]
Gen [illegible] met with [illegible] next week
[illegible] that [illegible] by
[illegible] [illegible] only
[illegible] 156 (14) [illegible]
Then
51 cases -
12 cases [illegible] that are [illegible]
Now 6 cases [illegible] that [illegible]
[illegible] outstanding [illegible]
Others [illegible] which [illegible]
6 cases [illegible]
Brought [illegible] [illegible] case
here and [illegible]
Forward [illegible]
12 in [illegible]
Suspects - [illegible]
with General
Evidence of photos
Need to get.

Way forward: Whether w pros will [illegible] ICD officers DBN next weekend.
Briefed NDPP.

ANNEXURE "JWB13"

Director of Public Prosecutions
South Gauteng

NATIONAL PROSECUTING AUTHORITY
South Africa

Reference: JPK2012/0112
Enquiries: G S Maema

Mr G Angus
Independent Police Investigative Directorate
KZN Cato Manor Project
DURBAN

Date: 25 September 2012

AND

General Mabuta
Directorate for Priority Crimes Investigation
KZN Investigation Project
North West

DPP South Gauteng Regional Office

+27 11 220 4122
+27 11 220 4232

Court Building
Kerk Street
Pritchard &
Brandis
hannesburg
2000

Bag X8
nnesburg
2000

pa.gov.za

REQUEST FOR SECURING A CONSULTATION WITH A WITNESS: COLONEL AIYER 1- 4 OCTOBER 2012 AND SKHUMBUZO NDHLOVU 5 OCTOBER 2012.

The prosecution team had a consultation with Colonel Aiyer on Thursday to Friday 6-7 September 2012 in the DPP office, Johannesburg. The witness still has a lot to consult about, he had dealt with the background of the Cato Manor Unit, how it was composed, how they operated etc. When we ran out of time on Friday 7 September 2012, he had just started dealing with what he knew about the various scenes at which the Cato Manor office was involved in.

We are of the view that we will require consultation with Colonel Aiyer for the dates 1-4 October 2010 to conclude his consultation. The plan is that we also consult Skhumbuzo Ndlovu, the gentleman from the civilian secretariat in the Minister's office, who was introduced to us by Colonel Aiyer on Friday 5 October 2012. It appeared from what Skhumbuzo Ndhlovu was telling us that he has a lot of background information or possible clues to unlock some crucial information that we will require going ahead with the case.

Kindly make the necessary arrangements so that the witness, Colonel Aiyer is transported to and accommodated in Johannesburg for consultation purposes on 1 – 4 October 2012 and Skhumbuzo Ndhlovu on 5 October 2012. It will also be crucial that the investigating officers are also in so far as it is possible available at the consultation session.

Kind Regards,

ANNEXURE "JWB14"

496

Director of Public Prosecutions
South Gauteng High Court
Johannesburg
Tel: (011) 220-4122
Fax: (011) 220-4232

From: Andrew KMA. Chauke
Sent: 12 June 2012 05:14 PM
To: Cyril S. Mlotshwa
Cc: Thoko J Majokweni; Palesa NP. Matsi; Sello MAEMA (GS); Raymond R. Mathenjwa
Subject: RE: INDICTMENT - CATO MANOR

Dear adv Mlotshwa,

Who is the prosecutor that you are referring to? I have forwarded to you the indictment which has all the detailed summary, by which you ought to be in a position to open your office file. I also forwarded to you details of the inquests with police cas numbers etc to which you referred to adv Thoko Majokweni for reasons that I do not follow and understand. The indictment with respect gives you the whole view of the matter.

You are kindly and fervently requested to please discuss any issues if any with me. I really do not see any need for me to give you any report other than what I have forwarded to you already. Please if I misunderstand you, make me understand. I do not want to play you or undermine your jurisdictional authority in any way whatsoever. There are serious issues of security in this matter, which if necessary you will be briefed about which are not relevant to you and I cannot expose such to you at this stage.

I have also learnt with utter dismay that you have now issued an instruction to the senior prosecutors that all dockets that are with us must be brought to you. What is not happening here my brother? Please if you have any issue again talk to me or arrange that we see the ANDPP urgently.

Another issue of concern to me is the delay in you issuing the instruction of the reopening of the inquests in view of the fact that you have been requested to sign the indictment which must be preceded by your decision to reopen the inquests. If this makes you uncomfortable please indicate so that I may urgently take the matter up with the Acting NDPP as well as the minister.

I do not want to step on your toes, I was informed that you agreed and arranged with the ANDPP for somebody from outside to do the prosecution of this matters. If you have now a change of heart please indicate so that we may resolve it as soon as possible

Regards

Andrew Chauke
Director of Public Prosecutions
South Gauteng High Court
Johannesburg
Tel: (011) 220-4122
Fax: (011) 220-4232

From: Cyril S. Mlotshwa
Sent: 12 June 2012 03:21 PM
To: Andrew KMA. Chauke
Subject: FW: INDICTMENT - CATO MANOR

Dear Adv Chauke

1. Our telephonic conversation today refers.

ANNEXURE "JWB15"

Will politicians play by the rules?

Guarding the democratic process is far more important than the outcome of that process, writes **Melanie Verwoerd**.

Search

Cape Town

Saturday **16-21°C**

Morning clouds. Cool.

3 DAY FORECAST

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LAST UPDATED: 2019-03-30, 08:31

EXCLUSIVE: Sheriff raids properties of Robert Huang to pay R236m SARS debt

2019-03-29 13:00

Alex Mitchley and Kyle Cowan

news24

Officials from the sheriff of the High Court in Pretoria are in the process of attaching assets at five properties belonging to controversial Zuma-linked Taiwanese businessman and ANC benefactor Jen-Chih "Robert" Huang and his wife, Shou Fang.

This as the South African Revenue Service (SARS) attempts to recover R236m, a portion of a long-outstanding debt to the taxman, reportedly running into the billions.

Huang was once a business partner of former president Jacob Zuma's nephew, Khulubuse Zuma, and has been embroiled in a fight with SARS over outstanding debts since 2012.

SARS obtained two summary judgments against the Huangs in the High Court in Pretoria on Thursday, resulting in two writs of execution authorising the sheriff to seize movable assets at five properties, four of which are situated inside the upmarket Woodhill Golf Estate in Pretoria.

The judgments are only for personal income tax owed by the Huangs.

A small truck is seen loaded with furniture taken by the Sheriff from inside a home belonging to Robert Huang inside the Woodhill Golf Estate in Pretoria. (Alex Mitchley, News24)

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WATCH: SARS swoops on Bosasa

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On Friday morning, News24 observed officials from the office of the sheriff and SARS outside one of the homes inside the estate.

Furniture and one dishwasher were carried out of the premises and loaded onto a truck. It is understood the house was almost entirely empty and that no electronics were seized.

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A small truck is seen loaded with furniture taken by the sheriff from inside a home belonging to Robert Huang inside the Woodhill Golf Estate in Pretoria. (Alex Mitchley, News24)

One Mercedes-Benz GL350 SUV was observed in the garage of the home, and it is understood this will also be seized.

News24 understands that officials expected more vehicles to be at the home.

Officials from the office of the sheriff and SARS at the scene declined to comment.

SARS first obtained a provisional preservation order against the Huangs and Mpisi Trading on June 12, 2014.

In court papers SARS alleged that "Mr Huang and/or Mpisi have used and continued to use various entities effectively controlled by Mr Huang ... as conduits to evade Mpisi's tax liability and to 'export' large amounts of money which should have been declared, as taxable income".

The papers further reveal:

June 2012 – SARS conducted a search and seizure of the Huang residence and business premises of Mpisi;
April 2013 – SAPS executes a warrant for search and seizure at the same premises;
During 2013 – SARS conducts an analysis of funds flowing in various bank accounts involving both Huang and his wife and Mpisi Trading; and
November 2013 – SARS initiates a tax inquiry.

By early 2018, SARS' assessments showed that Huang, his wife and Mpisi Trading owed taxes amounting to more than R420m.

SARS also discovered four companies referred to as the Razi entities, which owe SARS a further R540m, Fin24 reported in February 2015.

READ: Zuma man could owe SARS R1.8-billion

In the run-up to the May 2014 elections, Jacques Pauw revealed in his bestseller, *The President's Keepers*, that SARS had seized a shipment of ANC T-shirts imported by Huang and Mpisi, branded with a picture of former president Jacob Zuma, worth R118m.

Then deputy commissioner Ivan Pillay stood firm and the ANC was forced to pay R41m import duties before SARS would release the shipment.

ANNEXURE "JWB16"

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**

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:

'(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 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:

> '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.

[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 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 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 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 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 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.

[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.

[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.

[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.

[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 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.

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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'.

[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).

[6] Section 2(1)(f).

[7] 1979 (3) SA 1048 (A).

[8] *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma & another v* National *Director of Public Prosecutions & others* **[2008] ZACC 13**; **2009 (1) SA 1** (CC) para 65.

[9] **2009 (1) SACR 479** (C) para 57.

[10] 2008 (4) SA 441 (C).

[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] ZASCA 1**; **2009 (2) SA 277** (SCA) para 35.

[14] Ibid, para 36.

[15] Per O'Regan J in *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* **[2004] ZACC 20**; **2005 (2) SA 359** (CC) para 85.

[16] **[2000] ZACC 1**; **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] ZACC 15**; **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* **[1998] ZACC 17**; **1999 (1) SA 374** (CC) para 56.

[20] Loc cit.

[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* **[2005] ZACC 3**; **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] ZACC 10**; **2008 (5) SA 171** (CC) para 62.

[27] Per Moseneke DCJ in *Masetlha v President of the Republic of South Africa & another* **[2007] ZACC 20**; **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.

[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).

[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.

[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* **[2006] ZACC 9**; **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.'

[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.'

[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.

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

ANNEXURE "JWB17"

JW Booysen declares under oath in English:

1.

I am a Major General in the SA Police Service. My contact number is cellular no 0826324025.

2.

In amplification of my affidavit dated 10 June 2016 I herewith submit the following false statements, misrepresentations and omissions which Advocate Maema made in his prosecution memorandum to NDPP Advocate Abrahams. This prosecution memorandum was compiled by Maema to present to the NDPP to charge me for Racketeering.

3.

I have been trained extensively in the preparation of case dockets for Racketeering. I am *au fait* with the processes. It involves *inter alia* the presentation of a prosecution memorandum, as well as a PowerPoint Presentation to the NDPP. I know from experience that the responsible prosecutor, as well as the investigating officer will collaborate in preparing the presentations for the NDPP.

4.

The penalties for POCA are a one million rand fine or life imprisonment. Because the legislator has recognized the potential for abuse in Racketeering cases, it has brought in Sec 2 of POCA, as a safety net. It's evident that the legislator intended for these prosecutions to be brought only where and when it is warranted. Sec 2 of POCA exists, to ensure that the decision taken to prosecute for Racketeering is done with the due diligence which is required in taking a decision of this *gravitas*.

5.

In my current review application, the NDPP has filed the record, in terms of Rule 53, indicating what information he had considered in applying his mind to authorize charges of Racketeering in terms of Sec 2 (e) & (f). One of the items filed in the record, which the NDPP considered, when he authorized my prosecution, was a prosecution memorandum compiled by Maema on 17/8/215.

6.

The prosecution memorandum contains a number of misrepresentations and blatant lies, which is designed to mislead the reader, in this instance the NDPP, so as to persuade the NDPP to prosecute me for Racketeering. Advocate Maema also omits a number of important facts that would have been relevant for the NDPP to apply his mind in taking a rational and thus lawful decision.

I hereby list these as follow:

Lies, Misrepresentation & Omissions in prosecution memorandum by Maema

1. In par 4(b) of the memo Maema states that the dockets contained the statements of Aiyer and Ndlondlo. It also suggests that Danikas' statement was also in the docket. This is a blatant lie. None of these statements were discovered as part of the discovery process during October 2012. The court records will prove that on a number of occasions Maema had told the Presiding Officers, subsequent to the discovery of evidence to the accused, that Aiyer's statement still had to be obtained because Aiyer was hospitalized. If my memory serves me correctly, that was during the High Court remand of February 2013.
During another remand later that year, I think it was in May, Maema told the Judge that Danikas' statement was being obtained via Mutual Legal Assistance. Maema's deceit is twofold:

   (a) It is clear from the docket, post the discovery process, that none of the three statements was in the docket. Having regard to the dates on which these statements were obtained, it is clear that the prosecution had had it in their possession before the discovery of evidence in October 2012. The signed statement being dated the 31st of July and 3rd of August 2012. Maema had lied to the Magistrate in the Regional court at the time when he stated on record that all the evidence had been discovered. He had also lied to the judge in the High Court in 2013 when he stated that they were in the process of getting Aiyer's statement. Yet the statements signed by Aiyer are dated before the discovery process, which means Maema was in possession there-of during the discovery process.
   I had reported the conduct of Maema to the erstwhile NDPP, Advocate Nxasana. I was informed that an investigation into Maema conduct would be done. However, since Advocate Abrahams had taken over from Nxasana, I had heard nothing from the NDPP.

   (b) Maema now perpetuates a different lie in the memorandum by stating that these statements were in the docket. They were not.
   Maema had thus misled at least two Presiding Officers in court and now in his memorandum he misleads the NDPP. In any event the High Court held in Booysen vs The Acting NDPP, par 31 & 33 read with par 29 that neither the dockets nor Aiyer or Danikas' statements, or Ndlondlo for that matter, implicates me in any of the offences in question. Maema disingenuously states in par 4 (b) that Danikas' statement is to be signed via Mutual Legal Assistance, in spite of his own letter to Danikas' lawyer Julian Knight, in which he inter alia states that Danikas will not be used as a witness, because the incidents Danikas refers to in his unsigned statement refers to incidents outside the indictment period and rather tellingly – they (the

investigators) could not find cases supporting Danikas' allegations. Maema himself questions the credibility of Danikas, in this letter. Maema's omission in not placing this in front of Abrahams, which he was duty bound to do by the NPA Prosecution Policy, derived from an Act of Parliament, in itself constitutes Fraud.

2. Maema, par 4(c) falsely imputes that I received monetary awards for the killing of Taxi Association members (plural). This is not true. It is clear from the application itself. Maema disingenuously uses a statement by Cochrane to show that I was present at one of the scenes. What he fails to mention, is that Cochrane's statement with regard to me is an exculpatory statement. Par 4 (d) is also misleading in stating that I defended the actions of Cato Manor. Par 4 (e) is another misrepresentation by Maema by stating that Aiyer's statements alludes to my direct involvement in Cato Manor SVC operations. There is no evidence in Aiyer's convoluted statements that I partook in any operations with Cato Manor, let alone being directly involved. Maema deliberately misconstrues my role. I was duty bound, by virtue of my position, to provide Cato Manor and other units with resources, which does not conform or equate of having been involved with them in 'operations'. Par 4 (f) is another blatant lie. The statements of Brown do not refer to the 'management of any operations' whatsoever, let alone by me. In par 24.9.2 Maema embroids this lie by stating that Brown in his statement said that Olivier and I communicated directly with each other to the exclusion of Aiyer.
Brown does not say this in his statement; it is a fabrication by Maema.

Par 4 (g) combined with par 24.4.13 is the most serious lie in Maema's memorandum. Maema states that "this witness heard Mostert and Booysen planning to kill Chonco... they hired a hitman...". Maema accuses me of conspiring to murder L/Colonel Chonco. Par 9 & 10 of now deceased witness, Simpiwe Cypran Mathonsi, unambiguously states that it was Zanele Zondi and Bongiswe Mhlongo who conspired to kill Chonco, not Mostert or myself. It is evident that Maema does not believe his own lie in his memorandum. If he did, he would've added a charge of Conspiracy to Murder (Chonco). Neither he nor Abrahams, who had read the dockets, had included such a charge in the indictment.

3. Maema contends in the memo that Bongani Mkhize and the two Ndimande brothers were suspected by the accused (Cato Manor and me) "without evidence". This is false. In the docket Bhekithemba CAS 113/1/2009 (Zondi Murder docket) A9 clearly demonstrates the converse, in that Mkhize and the Ndimande brothers had conspired to kill Zondi at Steers in Durban North. There was also a Warrant of Arrest for Sifiso Ndimande.

4. Under the heading Modus Operandi, Maema makes the following presentation, as if supported by the evidence in the dockets; 'Inquests came about as a result of the tampering of the crime scenes by the accused, by amongst other things, placing fire-arms next to bodies of the deceased persons...'. This is a misrepresentation of what is contained in the dockets. There is no evidence that fire-arms were 'planted next to bodies' or that 'scenes were tampered with' by the accused. This is pure speculation by Maema. The prosecution memorandum should reflect what the evidence is and not what Maema concludes based on supposition. He also states that we 'planned operations to hunt down their alleged suspects...their intention was not to arrest them...but to shoot and kill all the suspects'. Maema constructs something that does not exist. There is not an iota of evidence in the dockets to substantiate what Maema submits to Abrahams.

5. With reference to Aiyer's statement, par 24.1, there are a number of issues, if not all, that were traversed in my disciplinary hearing. Maema failed to bring this to the attention of the NDPP. The Cassim enquiry findings is conspicuously absent in this memorandum; instead Maema, when discussing the credibility of Aiyer, he states that the only challenge would be Aiyer's perceived jealousy of my achievements. Maema is duty bound to have brought the well-publicized findings of Advocate Cassim SC regarding the credibility of Aiyer to the attention of the NDPP. He also fails to refer, with regards to Aiyer's evidence, to the findings of a High Court judge (Gorven, par 31 & 33 Booysen vs Acting NDPP) that Aiyer does not implicate me in any of the offences in question.

6. With reference to the statement of Bhekinkosi Ndlondlo Mthiyane, Maema indicates that he would lay a foundation to admit Mthiyane's statement as hearsay evidence. What Maema fails to mention is that this statement is hearsay twice removed, ie the deceased will testify what he had heard from someone else. If this evidence is to be led, it would mean that the person who obtained the statement will have to testify what the deceased had told him, what he had heard from someone else. In this case one Zondi and one Mhlongo.
Maema conceals the fact that Zondi and Mhlongo through their attorney Moloi had written a letter to Maema disavowing what Mthiyane alleges. By concealing this vital information from the NDPP, Maema not only commits an act of Fraud, but unlawfully persuades the NDPP to authorize our prosecution, thus Defeating the course of Justice.
Maema is well aware of this letter, since it had been sent to him by Attorney Moloi and had also formed part of my previous litigation in this regard. Why Maema relies on triple hearsay, when at least one of the actual witnesses is still available, is inconceivable, in fact it suggests impropriety.

7. Under the heading Evidence Analysis, Maema states that the following will testify about my role...he then lists a number of witnesses, one being Bongani Mandla Mkhize. Mkhize does not refer to me in his statement at all. This is a further misrepresentation by Maema.

8. Par 2.5.3 Maema imputes that I played a role in an operation, hence me being rewarded. This is misleading. It is clear from the document on which he relies that I had not partaken in the operation, but had merely passed on information to the investigators.

9. Par 24.6.1 Maema states that I was flown by Andrew Cochrane (the pilot) to where Magojela was killed. This is untrue. The pilot was Captain Rafilwe Ledwaba; see Cochrane's statement. In any event, Maema misconstrues what Cochrane, who was the air crew, says in his statement. His statement is an exculpatory statement that Maema, with no evidence whatsoever, interprets that the helicopter was on standby to 'carry Booysen pending the notification by his foot soldiers, that the execution of Magojela has been fulfilled'.

10. With regards to the reference by Maema to the interdict obtained by Bongani Mkhize, he falsely states in par 24.7.7 that I allowed my members to confront Mkhize without contacting his attorney and they subsequently killed him in contravention of a court order. This is a lie. The final court order does not order that Mkhize should be approached via his attorney. This point had been discharged subsequent to the *rule nisi.* Furthermore the court ordered that Mkhize may not be killed unlawfully. Maema conveniently conceals the fact the Minister of Police, in civil proceedings, stated that the members had acted lawfully and reasonably when Mkhize was killed.

11. Under the heading Analysis of Modus Operandi, Maema states that the accused tracked or traced suspects... 'even where there exists not even shreds of evidence linking them to any offence' (sic). This is patently false. This lie of Maema in the memorandum is exposed in the dockets where the deceased were sought for. There is direct evidence against twenty five (25) of the twenty eighty (28) deceased, which was available to Maema and which is still available. This include eye witness statements, statements from co-accused, fingerprint evidence, CCTV footage evidence, cellphone records, cellphone mapping, Section 204 statements and the recovery of exhibits, ie explosives and firearms. Furthermore there were Warrants of Arrest for five (5) of the deceased: Ntuli, Mkhize, S Ndimande, J Msimango & L Mhlongo.

12. Maema dishonestly does not alert the NDPP in his memorandum that approximately ten (10) of the deceased tested positive for primer residue, indicating they had fired a gun or at the very least that this possibility could not be excluded. He also does not mention that one of the deceased had possibly fired from inside the house. This was concluded by his own ballistic expert, Kobus Steyl- Mandini CAS 76/2/2008.

13. It is patently clear and evident that Advocate Maema has deliberately couched the prosecution memorandum to the NDPP in such a way, so as to convince him that myself and other Cato Manor members be prosecuted for Racketeering. In doing so, he has misrepresented the truth, which has caused real prejudice to me and the administration of justice. Maema cannot claim ignorance to the facts mentioned above. All the information referred to above were discovered by the prosecuting authority to the accused in this matter. Furthermore the rest of the information was gleaned from dockets, which he had, on his own version, considered.

14. Advocate Maema, as an officer of the court, is enjoined by the Constitution of Republic of South Africa, as well as the Policy Guidelines of the National Prosecuting Authority (NPA), which is derived from an Act of Parliament, to present the truth and not to omit relevant information that could have dire consequences for accused citizens. It is indeed fraud to misrepresent facts, which could hold real or potential prejudice for others. This also includes omissions, where a person was duty bound to have disclosed such information. The NPA Policy Guidelines deals specifically with the approach prosecutors should adopt regarding witnesses. Advocate Maema was duty bound to have disclosed the truth and all relevant and applicable information, so that the NDPP can take a rational and thus lawful decision. All he has done in this instance was to regurgitate the same information, which had already been settled in the Gorven judgment. For Maema to have applied for my prosecution, knowing that the evidence or rather the lack there-of, as per the Gorven judgment would not pass muster, demonstrates that he defeated the course of justice.

8.

I request that a case of Fraud and /or Defeating the course of Justice be investigated against Advocate Maema for the number of misrepresentations he had made in the prosecution memorandum to the NDPP. I further request that a case of Perjury be investigated against Advocate Maema for lying in his affidavit in support of Advocate Jiba. This statement is filed in the docket in which Advocate Jiba was prosecuted and charges later withdrawn by the NDPP. Maema lied in a statement under oath by stating that a witness, Mthiyane, was killed, whereas he in fact died of natural causes, whilst in their protective custody.

I reserve my right to add to my statement.
This is all I wish to declare.
I know and understand the contents of this declaration.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience.
So help me god.

_____**MAJOR GENERAL**
JW BOOYSEN

I certify that the above statement was taken by me and that the deponent acknowledged that he knows and understands the contents of the declaration.
The deponent's signature was placed there-on and the statement sworn to in my presence on June _____, 2016 at _____ .

COMMISSIONER OF OATHS

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COMMISSION OF INQUIRY
INTO STATE CAPTURE

JW Booysen declares under oath in English:

1.

I am a Major General in the SA Police Service, in KwaZulu-Natal. My contact number is 0826324025.

2.

I am currently a litigant in a review application in the High Court of KwaZulu-Natal. The review application is to have the authorization in terms of Sec 2 of the Prevention of Organized Crime Act, Act 121/1998 (POCA), to prosecute me for Racketeering set aside.

3.

In terms of the said Act, prosecution for Racketeering can only proceed once the National Director of Public Prosecutions (NDPP) has authorized such a prosecution in writing.

4.

I have been trained extensively in the preparation of case dockets for Racketeering. I am *au fait* with the processes. It involves *inter alia* the presentation of a prosecution memorandum, as well as a PowerPoint Presentation to the NDPP. I know from experience that the responsible prosecutor, as well as the investigating officer will collaborate in preparing the presentations for the NDPP.

5.

The penalties for POCA are a one million rand fine or life imprisonment. Because the legislator has recognized the potential for abuse in Racketeering cases, it has brought in Sec 2 of POCA, as a safety net. It's evident that the legislator intended for these prosecutions to be brought only where and when it is warranted. Sec 2 of POCA exists, to ensure that the decision taken to prosecute for Racketeering is done with the due diligence which is required in taking a decision of this gravity.

6.

In my current review application referred to in para 2 supra, the NDPP has filed the record, in terms of Rule 53, indicating what information he had considered in applying his mind to authorize charges of Racketeering in terms of Sec 2 (e) & (f). One of the items filed in the record, which the NDPP considered, when he authorized my prosecution, is a PowerPoint Presentation by Advocate Noko, the DPP in KwaZulu-Natal dated the 9th of July 2015.

7.

The PowerPoint Presentation contains a number of misrepresentations and untruths, which is designed to mislead the reader, in this instance the NDPP, so as to persuade the NDPP to prosecute me for Racketeering. Advocate Noko also omits a number of important facts that would have been relevant for the NDPP to apply his mind in taking a rational and thus lawful decision.

8.

I hereby list these as follow:

A. Misrepresentations

1. Advocate Noko misrepresents as to what the final interdict in Durban Central CAS 185/2/2009 contains. The final interdict states that 'the deceased may not be killed unlawfully. In the civil matter relating to the same incident The Minister of Police, Nathi Mthetwa has pleaded that the members had acted lawfully and reasonably.

Noko also fails to mentions that the investigating officer in the murder of Inkosi Zondi, Lt Zungu, filed an affidavit stating that Bongani Mkhize was a suspect in Zondi's murder. She also does not mention that Mkhize tested positive for primer residue and that ballistic expert, Captain Mangena, had conceded under oath that the possibility of Mkhize having fired, cannot be excluded.

She purports that a firearm was planted on the scene by the accused (Cato Manor) without any direct evidence to substantiate the claim. *Page 519 -520 of record*

2. In Kwa Mashu CAS 629/4/2009 Noko imputes that the ballistic expert, Steyl, concluded as follows 'it dispels the notion that the accused was under attack". This is couched in a way to create the impression that it forms part of Steyl's finding. Steyl did not say so in his report. *Page 520 in record*
3. In Phoenix CAS 377/8/2009 Noko introduces 'evidence' suggesting that the deceased was lying 'defenseless'. The word defenseless is not used by the ballistic expert. She disingenuously excludes the fact that the deceased tested positive for primer residue and that cartridges found on the scene were linked to the deceased's firearm. *Page 522 of record*
4. In Kwa Mashu CAS 698/11/2009 Noko's conduct is so disingenuous and blatantly biased that her conduct suggests serious impropriety. In her endeavor to convince the NDPP to authorize our prosecutions, she relies on the statement of one Hurley (A12). She conspicuously does not mention that the same witness (A12) had made another statement in the same case docket (A30). Not only does she exclude the A30 statement, but incredibly fails to mentions the discrepancies between A12 and A30. *Page 533 of record*
5. In Durban North CAS 67, 69 & 71/7/2011 Noko once again fail to disclose that the deceased tested positive for primer residue and that firearms found with the deceased were linked to cartridges recovered on the scene. She conspicuously excludes the evidence of ballistic expert, W/O Lalbahado, as well as CCTV footage, which is very relevant to this matter. *Page 533 of record*
6. In her discussion of the so-called witnesses, she makes the following misrepresentations- with regards to the statement of Brown (A100); she adds words as if they were stated by Brown. She adds the words 'had to oversee operations because of Aiyer's inexperience'. Brown did not say this. It is a fraudulent attempt to demonstrate to the reader that I partook in operations at Cato Manor.

   With regards to the statement of Mathonsi (A101) Noko conveniently remains silent of the fact that at least one of the actual witnesses is available. This omission is a misrepresentation designed to create the impression that the actual witnesses are unavailable. She also fails to state that Mathonsi's statement is dated 2013, which is prior to the date Advocate Jiba had made her replying affidavit, where this statement is conspicuously absent. She does not mention that Mathonsi's statement is in fact hearsay twice removed and neither does she reveal that the incidents mentioned in his statement in so far as I am concerned, is outside the indictment period. Most, if not all, with regards to Mathonsi is applicable to witness Bekhinkosi Ndlondlo (Mthiyane) A90.
7. Astonishingly Advocate Noko still purports that one Danikas is a witness in this matter. This in spite of the fact that it was concluded that Danikas 'statement' does not subscribe to the requirements of an affidavit. See Booysen v Acting NDPP. Actually Noko should have realized, given the Gorven judgment, that the bulk of evidence that Jiba had previously relied upon, ie Ndlondlo, Danikas, the Monetary Awards, etc. had been thoroughly ventilated in litigation. Lead prosecutor, Advocate Maema, indicated in a letter to attorney Julian Knight, prior to Noko's application, that Danikas will not be a witness.

8. In all the cases Noko imputes that Cato Manor had placed (planted) firearms on the scenes to create the impression that their lives were in danger. There is no evidence in any of the discovered dockets that firearms were planted. It is mere conjecture and supposition.

B. Untruths

1. Advocate Noko says that there was no evidence linking Bongani Mkhize to the killing of Inkosi Zondi; Bhekithemba CAS 113/1/2009, the murder of Inkosi Zondi, A9 clearly shows that Bongani Mkhize, Ska Ndimande and Sifiso Ndimande conspired to murder Inkosi Zondi. It rubbishes her claim that Kito (sic) did not link anyone to Zondi's killing. *Page 499 of record*

2. Advocate Noko intimates that I (Booysen) and accused 9 (Olivier) tampered with evidence in Howick CAS 106/9/2008. She intimates that we placed an AK 47 on the scene. This is an absolute fabrication. There is not an iota of evidence that an AK 47 was placed on the scene by me or Olivier, or anyone else for that matter. *Page 504 of record*
3. Under the heading Monetary Awards Noko states that I 'traced' Ndimande and Tembe. There is no evidence that I traced them. I merely conveyed a message received from an informer, as to their where-abouts. Noko uses the word traced as a verb to overstate my involvement in the location of the suspects. She also uses the word 'waylay' which is incongruent with the evidence in the docket.

C. Omissions

1. Advocate Noko failed to disclose that the deceased in Mandini CAS 76/2/2008 tested positive for primer residue. She also fails to disclose that Steyl, the ballistic expert concluded that a shot had been fire from the inside, where the deceased were. The contextual bias by omitting this important information could not have caused the NDPP to take a rational decision. *Page 506 of record*
2. Noko conveniently does not consider or alert the NDPP as to the character of Colonel Aiyer. He had already been discredited in the Regional court in Durban, where-in the Magistrate had made adverse findings regarding Aiyer's credibility. She also conveniently disregards the well published findings of Advocate Nassir Cassim SC, regarding the credibility of Aiyer.

9.

It is blatantly clear and evident that Advocate Noko has deliberately couched the PowerPoint Presentation to the NDPP in such a way, so as to convince him that myself and other Cato Manor members be prosecuted for Racketeering. In doing so, she has misrepresented the truth, which has caused real prejudice to me and the administration of justice. Noko cannot claim ignorance to the facts mentioned above. All the information referred to above were discovered by the prosecuting authority to the accused in this matter. Furthermore the rest of the information was gleaned from dockets, which she had, on her own version, considered.

10.

Advocate Noko is enjoined by the Constitution of Republic of South Africa, as well as the Policy Guidelines of the National Prosecuting Authority (NPA), which is derived from an Act of Parliament to present the truth and not to omit relevant information that could have dire consequences for accused citizens. It is indeed fraud to misrepresent facts, which could hold real or potential prejudice for others.

This also includes omissions, where a person was duty bound to have disclosed such information. The NPA Policy Guidelines deals particularly with the approach prosecutors should have regarding witnesses. Advocate Noko was thus duty bound to have disclosed the truth and all relevant and applicable information, so that the NDPP can take a rational and thus lawful decision. All she has done in this instance was to regurgitate the same information, which had already been settled in the Gorven judgment. For Noko to have applied for my prosecution, knowing that the evidence or rather the lack there-of, as per the Gorven judgment would pass muster, demonstrates that she defeated the course of justice.

11.

I request that a case of Fraud and /or Defeating the course of Justice be investigated against Advocate Noko. I reserve the right to add to this statement.
This is all I wish to declare.
I know and understand the contents of this declaration.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience.
So help me god.

MAJOR GENERAL
JW BOOYSEN

I certify that the above statement was taken by me and that the deponent acknowledged that he knows and understands the contents of the declaration. The deponent's signature was placed there-on and the statement sworn to in my presence on June 19, 2016 at Pietermaritzburg.

COMMISSIONER OF OATHS

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ANNEXURE "JWB18"

12

PROSECUTION MEMORANDUM

A INTRODUCTION

1 At all relevant times accused number 1, Johan Wessel Booysen was the Provincial Commander of KwaZulu-Natal Organised Crime Unit and he subsequently became a Provincial Commander of the Directorate for Priority Crime Investigations (DPCI). Organised crime units became subcomponent of DPCI at various regions in the province namely viz – Durban, Port Shepstone and Richards Bay.

The Durban Organised Crime Unit had sections such as SVC section based at Cato Manor, drugs section, vehicle unit, etc.

2 The prosecution in this case is based on the activities of SVC section based at Cato Manor. The court judgment was based on wrong concessions made by the counsel for the then ANDPP, that the contents of the dockets were not implicating Booysens at all, see Paragraph 29 Page 19 of the judgment:

2.1 That the ANDPP did not have statements of certain individuals on the 17 August 2012 when the authorisation was made, such as that of Colonel Aiyer dated 31 August 2012 and 13 May 2013, Nkosinathi Shozi dated 15 March 2013 and Simphiwe Mathonzi dated 15 March 2013.

2.2 If the ANDPP did not have the statements before her when issuing the certificates the statements could therefore not have been a rational basis for the issuing of the racketeering certificates and was thus irrational. See paragraph 34 page 20 of the judgment.

B. MANAGEMENT OF THE ENTERPRISE

Accused 1, 6 (now deceased), 9 15 and 16 managed the activities of the SVC section of the Durban Organised Crime based at Cato Manor. Accused 1, who was the Provincial Commander Organised Crime and later the Provincial Head: DPCI and as such was overall responsible for the activities of this SVC section. The Unit Commanders of all Organised Crime units, including the Durban Organised Crime unit, reported to him. During this period, Accused 1 dealt directly with members of the SVC section thereby bypassing the Unit Commander of Durban Organised Crime by directly communicating with the section members and providing them with resources. He also participated in their operations and further held regular (weekly) meetings with the section members.

Accused 9 was the SVC section commander who was obliged to report to the Unit Commander but instead overlooked the Unit Commander and communicated directly with Booysen.

Accused 6, 15 and 16 were group commanders within the SVC section.

The remainder of the accused executed the unlawful activities in furtherance of the aims and objectives of the enterprise.

C. PARTICIPATION IN THE ACTIVITIES OF THE ENTERPRISE BY ACCUSED 2; 3 4; 5; 7; 8; 9; 10; 11; 13; 14; 15; 16; 17; 25; 26 AND 27

3 These accused participated in the unlawful activities of the enterprise which began to manifest themselves from May 2008 to September 2011. They killed members of KwaMaphumulo Taxi Association which was at all relevant times embroiled in a conflict with a rival taxi association, the Stanger Taxi Association in various activities as outlined in the various dates mentioned in the indictment. They also killed ordinary civilians, and people suspected of having committed violent crimes. In total twenty eight (28) people were killed.

4 In the taxi violence related matters, the accused were eliminating members of rival taxi organisations for payment from rival taxi association. The facts of the other

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killings were reported as excellent police work when in fact alleged criminals were being eliminated unlawfully. They were rewarded by state monetary awards and/ or certificates for excellent performance and financial benefits from communities.

D. SUMMARY OF THE CASE

5 The State has grouped the preferred predicate offences by association and/ or method of operation as killings relating to taxi violence, ordinary civilians or suspects and ATM bombing suspects as described below.

6 The taxi violence killings began immediately after Superintendent Zethembe Mzwakhe Chonco and Inkosi Wellington Zondi were killed. Superintendent Chonco was a co-ordinator dealing with Taxi Violence killings between KwaMaphumulo Taxi Association and Stanger Taxi Association. He was killed whilst transporting prisoners to court on 27 August 2008. Certain members of KwaMaphumulo Taxi Association were suspected of his murder and were subsequently killed from 3 September 2008 to 18 October 2008 as mentioned in the schedule below:

	Date	Docket Reference Number	Names of Deceased
1.	03 September 2008	KwaDukuza CAS 39/09/2008	Lindelani Buthelezi
2.	16 September 2008	Howick CAS 106/09/2008	Magojela Timson Ndimande Sibusiso Thokozani Tembe
3.	18 September 2008	Mandini CAS 76/09/2008	Mzameni Johannes Ntuli Nkosinathi Wilson Mthembu
4.	18 October 2008	Umkomaas CAS 235/10/2008	Mduduzi Mkhize

7 Inkosi Wellington Zondi was a former police officer and was an associate of the Cato Manor SVC section. He was suspected of having leaked information to the Cato Manor SVC section about the whereabouts of Magojela Thomson Ndimande who was subsequently killed by the accused on 16 September 2008.

8 Inkosi Wellington Zondi was suspected of having leaked information to the Accused about the whereabouts of **Magojela Timson Ndimande** who was subsequently killed by the accused on 16 September 2008.

9 Inkosi Wellington Zondi was subsequently killed on 22 January 2009 and Bongani Mkhize, the Chairperson of KwaMaphumulo Taxi Association and Magojela Timson Ndimande's brothers were suspected by the Accused without evidence for having orchestrated the killing of Inkosi Zondi. Bongani Mkhize and the Ndimande brothers were subsequently killed as mentioned in the schedule below:

	Date	Docket Reference Number	Names of Deceased
1.	03 February 2009	Durban Central CAS 185/02/2009	Bongani Mkhize
2.	23 May 2009	Pinetown CAS 1000/05/2009	Sibongiseni Badumile Ndimade
3.	20 September 2009	Rustenburg CAS 1098/09/2009	Sifiso Ndimande

10 The Accused also killed a number of civilians and/or suspects. They did not have tangible evidence and warrants of arrests against the suspects. The Accused killed the civilians and/or suspects mentioned in the schedule below, when there was ample opportunities to effect an arrest.

	Date	Docket Reference Number	Names of Deceased
4.	24 May 2008	Berea CAS 288/05/2008	Thabo Sunshine Msimango
5.	23 November 2008	Melmoth CAS 142/11/2008	Bongani Velaphi Biyela Khanyisani Biyela
6.	27 April 2009	KwaMashu CAS 629/04/2009	Gladwell Thokozani Njapha
7.	10 August 2009	Phoenix CAS 377/08/2009	Phillip Lindokuhle Nzuza
8.	26 November 2009	KwaMashu CAS 698/11/2009	Prince Thabethe

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9.	01 April 2010	Esikhawini CAS 03/04/2010	Kwazi Wiseboy Ndlovu
10.	10 May 2010	Bhekithemba CAS 44/05/2010	Musawenkosi Aubrey Ngcobo Xolisani Allen Ngcobo Simphiwe Sydney Shozi
11.	04 July 2011	Durban North CAS 67/07/2011	Jabulani Camson Bhengu
12.	04 July 2011	Durban North CAS 69/07/2011	Dumisani Blessing Mgobhozi
13.	04 July 2011	Durban North CAS 71/07/2011	Boysie Sibusiso Mbonambi
14.	04 September 2011	Esikhawini CAS 50/09/2011	Qinisani Philangenkosi Gwala

11 The Accused further killed individuals who were suspected of being part of a syndicate involved in ATM bombings as mentioned in the schedule below, without warrants of arrest and sufficient evidence:

	Date	Docket Reference Number	Names of Deceased
1.	31 July 2008	KwaMashu CAS 116/08/2008	Mfanafuthi Amstrong Zwane
2.	06 August 2008	Escourt CAS 34/08/2008	Muzi Sanele Majola
3.	12 November 2008	KwaMashu CAS 314/11/2008	Nhlanhla Nkuthu Masondo
4.	18 March 2009	Tongaat CAS 356/03/2009	Dan Chester Phiri
5.	06 March 2010	KwaDukuza CAS 115/03/2010	Nhlanhla Lucky Mhlongo

12 The Accused killed a total of 28 (twenty eight) persons and committed other crimes in the process.

13 The accused would in most of the killings place a firearm next to the deceased person to create an impression that the deceased was armed and/ or attacked them and/ or posed danger to their lives thus tempering with the scenes of crime. The tempering with the crime scenes precipitated the opening of inquest dockets in lieu of the matters

14 The Accused would break and enter the premises of the deceased, steal possessions of the deceased and family members, damage their property and assault family members who were on the premises.

E. MODUS OPERANDI

15 Some of these cases ended up as informal inquests that were held in the Magistrate's courts. These inquests came about as a result of the tampering with the crime scenes by the accused, by among other things, placing firearms next to the bodies of the deceased persons, thus creating an impression that their lives were in danger when effecting arrest and that the killings were justifiable.

16 These acts of tampering with the crime scenes were cover-ups of their unlawful activities.

17 The accused persons planned operations to hunt down their alleged suspects utilising all available police resources including vehicles, firearms, informers and support services such as the National Intervention Unit (NIU). The operations were carried out mostly at night. Their intention was not to arrest and bring them properly before a court of law for their guilt to be established beyond reasonable doubt, but to shoot and kill all the suspects.

18 The crimes that they were allegedly investigating were the murder of Supt. Chonco, Inkosi Zondi and other violent crimes.

19 After killing their victims they would temper with the crime scene to give the impression that they acted justifiably by planting firearms next to their bodies of the victims.

F. IDENTIFICATION OF THE ACCUSED

20 Accused 1: **BOOYSEN, JOHAN WESSEL**
A fifty five (55) year old male person residing at 14 Thompson Road, Amanzimtoti. At all the relevant times he was the Provincial Commander: Organised Crime and the

Regional Head: Directorate for Priority Crime Investigations (DPCI) for the Province of KwaZulu-Natal. He held the rank of a Director and Major General respectively.

Accused 2: **PADAYACHEE, GONASAGREN**

a forty four (44) year old male person of 61 Statesman Drive, Havenside, Chatsworth. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor.

Accused 3: **STOLTZ, ADRIAAN JAKOBUS FICK**

a forty five (45) year old male person of 10 Stonehill Complex, 28 Serissa Avenue, Roodekrans, Roodepoort. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 4: **MOSTERT, PAUL JONATHAN**

a fifty one (51) year old male person of 06 Keeling Place, Queensburgh

He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 5: **NEL, ERIC ALFRED**

a forty one (41) year old male person of 37 Illovo Glen, Berrio Avenue, Amanzimtoti. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 7: **GHANESS, ADJITHSINGH**

a forty one (41) year old male person of 44 Old Castle Place, Newlands West, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 8: **MAKHANYA, PHUMELELA**

a forty five (45) year old male person of 90 Morewood Road, Sydenham, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 9: **OLIVIER, WILLEM CORNELIUS**

a five nine (59) year old male person of 16 Walnut Grove Complex, 03 Entombeni Road, Amanzimtoti. He is a Colonel stationed at the Organised Crime Unit, 446 Belliar Road

Accused 10: **MKHWANAZI, THEMBIKNOSI MBHEKISENI**

a forty seven (47) year old male person of Room D 008, Umlazi Police Barracks, Umlazi. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 11: **MDLALOSE, THATHAYIPHI ENOCK**

a forty eight (48) year old male person of 21 Bennie Geldenhuis, Austerville, Durban He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 13: **NAIDOO, RUBENDREN**

a thirty three (33) year old male person of 57 Evergreen Circle, Phoenix, Durban. He is a Constable Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 14: **LEE, RAYMOND CHRISTOPHER**

a thirty one (31) year old male person of 4F Queens Terrace, 100 Dipdale Road, Queensburgh, Durban. He is a Warrant Officer stationed at the Organised Crime Unit, 446 Belliar Road

Accused 15: **LOCKEM, ANTON**

a forty four (44) year old male person of 201 Moss Road, Bluff, Durban. He is a Captain stationed at the Organised Crime Unit, 446 Belliar Road

20

Accused 16: **VAN TONDER, JAN JOHANNES EUGENE**

a fifty six (56) year old male person. He resides at 244 Grosvener Road, Carrington Heights, Durban. He is a retired member of the South African Police Services who was stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Captain.

Accused 17: **DLAMUKA FELOKWAKHE THOMAS**

An adult male person of T120, Umlazi Police Barracks, Durban, KwaZulu Natal. He is stationed at Mariaan Hill base attached to the National Intervevtion Unit of the South African Police services

Accused 25: **SMITH, CHARLES JOHN**

a fourty (40) year old male person. His residential address is 34 Frederrick Avenue Bluff, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

Accused 26: **MARTEM, JEREMY**

a thirty nine (39) year old male person. His residential address is 12 Goodricke Road Morningside, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

Accused 27: **MC INNES, BRUCE DAVID**

a forty three (43) year old male person. His residential address is 87 St Winniefreds Whitefield Drive, Warner Beach, Durban. He is a member of the South African Police Services who is stationed at the Organised Crime Unit, 446 Bellair Road Cato Manor. He held the rank of a Warrant Officer.

G. THE ENTERPRISE - THE SERIOUS AND VIOLENT CRIME (SVC) SECTION OF THE DURBAN ORGANISED CRIME UNIT BASED AT CATO MANOR

21 The enterprise is defined to include "*any individual, partnership, corporation, association, or other juristic person or legal entity, and union or group of individuals associated in fact, although not a juristic person or legal entity*".

22 The Serious and Violent Crime Section (SVC) of the Durban Organised Crime Unit based at Cato Manor is a structure within the South African Police Service which is a legal entity and therefor an enterprise within the meaning of section (1) of the Prevention of Organised Crime Act, Act 121 of 1998 ("POCA.

23 A pattern of racketeering activity refers to the numerous planned, ongoing, continuous and repeated incidents of killing that the accused were involved in murder incidents which are offences referred to in Schedule 1 and includes at least two (2) offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act 1 January 1999 and the last offence occurred within ten (10) years after the commission of such prior offence. The pattern of racketeering activities are the different murder incidents linked from paragraph 7 – 9. Different members of the enterprise were involved in the various racketeering activities.

H. EVIDENCE ANALYSIS

24 The State has evidence that Booysen was directly involved in the management of SVC Section of Durban Organised Crime based at Cato Manor. This section of Organised Crime was involved in various criminal activities whilst Booysen was managing it at local and provincial levels.

The following witnesses will testify about the roles of Booysen in the management of the SVC Section based at Cato Manor and that he had more close links section more than any other section in the Organised Crime.

24

24.1 Colonel Aiyer's statements dated 3 August 2012, 31 August 2012 and 13 March 2013.

24.1.1 Colonel Aiyer will testify that during the period of 2008 to 2011 he was the commander of Durban Organised Crime Unit. By protocol SVC Section based at Cato Manor fell under his management.

24.1.2 This section was commanded by Lieutenant Colonel Olivier who was Aiyer's subordinate. However the commander of this section developed communication directly with Booysen who was the Provincial Commander of the Organised Crime Unit and later Commander of DPCI.

24.1.3 Their communication led to the role of the Unit Commander rendered redundant.

24.1.4 Colonel Aiyer will testify that Booysen was holding management meetings with this SVC section without his knowledge as the Unit Commander.

24.1.5 He will align the budget of the unit at provisional level in order to resource the SVC section without communicating with the unit Commander.

24.1.6 He will further testify that Booysen was involved in the operations of the SVC sections that made him aware of what was happening within the SVC section and he would at times issue media statements about the operations of the SVC section.

24.1.7 Booysen ignored the instructions from the Provincial Commander that he must not interfere with the operations of the unit without communicating with the Unit Commander.

24.1.8 He overruled the Unit Commander's decision to close the SVC section offices in Cato Manor and move it to the unit in the Victoria embankment.

24.1.9 This decision by Unit Commander was based on a recommendation of Director Ntshinga of the National Office.

24.1.10 This section continued to operate at Cato Manor and communicating directly with Booysen.

The statements of Colonel Aiyer are attached as – Annexures A1; A2 and A3

24.2 Statement of Bhekinkosi Dlondlo Mthiyane dated 31 July 2012

24.2.1 Mthiyane is now deceased. However the state will use the provisions of section 3 of Act 45 of 1988 to get his statement admitted as evidence.

24.2.2 Mthiyane gave a statement that during the killings of the KwaMaphumulo Taxi members by the Cato Manor SVC section he was the executive member of the Stanger Taxi Association.

24.2.3 The other members of the executive of the Stanger Association were Bongizwe Mhlongo; Sanele Zondi, Mr Ngcobo and Mr Khanyile.

24.2.4 During this period their association was in conflict with KwaMaphumulo Taxi Association and the KwaMaphumulo Taxi Association was suspected of killing Senior Superintendent Chonco.

24.2.5 The Stanger Taxi Association gave information to Cato Manor SVC Section about the KwaMaphumulo Taxi Association members in order for them to be killed by the Cato Manor SVC Section through the Inkosi Zondi who was a brother to Sanele Zondi and an ex policeman working for Cato Manor.

24.2.6 Inkosi Zondi arranged with Cato Manor SVC section and Booysen to target KwaMaphumulo Taxi Association members who were suspected to have killed Senior Superintendent Chonco.

24.2.7 The Cato Manor SVC Section began killing members of the KwaMaphumulo Taxi Association and the first person to be killed was Lindelani Buthelezi, the second people to be killed were Kopolota Ntuli and Nathi Mthembu and the third person to be killed was Mdu Mkhize and the fourth person was Magojela and the last person was Bongani Mkhize.

24.2.8 In most instances when members of KwaMaphumulo Taxi Association were killed, the Cato Manor SVC Section members would take pictures of the deceased and send them to the members of Stanger Taxi Association to commence with the process of payment.

24.2.9 Stanger Taxi Association executive collected money to be given to the Cato Manor SVC Section for the payment of each and every member of the KwaMaphumulo Taxi Association they have killed.

24.2.10 The most expensive heads were for Ndimande and Mkhize for R750 000.00 and R1 000 000.00 respectively.

24.2.11 Their money was given to Sanele Zondi and Bongizwe Mhlongo to give it to the Boss (Booysen).

24.2.12 This witness heard that certain money was handed at Tongaat toll plaza.

The statement of Bhekinkosi Dlondlo Mthiyane is attached as – Annexure B

24.3 Statement of Bongani Mandla Mkhize dated 1 July 2012

24.3.1 Bongani Mandla Mkhize will testify that he was a body guard working for Stanger Taxi Association.

24 3.2 He was guarding Bongizwe Mhlongo

24.3.3 During the period of his service the Stanger Taxi Association was in conflict with KwaMaphumulo Taxi Association. It happened that one police official was killed and the information was that he was killed by the KwaMaphumulo Taxi Association.

24.3.4 The owners of Stanger Taxi Association supplied names of people they hated to the Cato Manor SVC Section as the people who killed Chonco.

24.3.5 Some of the people who were on the list were Kopolota and Mthembu.

24.3.6 Cato Manor SVC section had an opportunity to kill Kopolota and Mthembu.

24.3.7 Bongizwe Mhlongo received photos of the deceased from Mostert who is a member of the Cato Manor SVC section by sms and Bongizwe Mhlongo was happy that the two were dead.

24.3.8 Mkhize and Bongizwe went to meet the members of Cato Manor SVC section at Toll Plaza where they met Mr Mostert and another white man.

Bongizwe had a plastic of money with him and went to the BMW driven by Mostert and when he came back he said those police officers are sharp and they have killed someone.

Statement of Bongani Mandla Mkhize is attached as - Annexure C

24.4 Statement of Simphiwe Cypran Mathonsi dated 15 March 2013

24.4.1 Mathonsi was a body guard at Stanger Taxi Association.

24.4.2 He was a trusted member by the executive.

24.4.3 They will discuss anything in his presence even when they will hire a person to kill someone.

24.4.4 Sanele Zondi and Bongizwe Mhlongo were close to Cato Manor SVC section members.

24.4.5 In 2007 he accompanied Sanele Zondi and Bongizwe Mhlongo to meet Mostert and Booysen at the Shell garage.

24.4.6 Sanele and Bongizwe went to Mostert and Booysen requesting them to cover up in the event the police were to arrest members of Stanger Taxi Association. Members of Stanger Taxi Association had to pay for this favour.

24.4.7 After a week he (Mathonsi) was called to accompany Sanele and Bongizwe to meet Mostert and Booysen at McDonald at the Gateway shopping mall and they had money contained in an envelope.

24.4.8 At the Gateway Shopping Mall, Booysen was accompanied by Mostert, who was driving.

24.4.9 Bongizwe and Sanele got into the BMW and spent about 45 minutes to an hour therein.

24.4.10 During this period there was a conflict between Stanger Taxi Association and the KwaMaphumulo Taxi Association.

24.4.11 And there was a police officer called Chonco, who was not taking sides. He would arrest without telling Cato Manor and they were uncomfortable with it.

24.4.12 And the two planned to report Chonco to Mostert and Booysen.

24.4.13 This witness heard Mostert and Booysen planning to kill Chonco but they did not want to do it themselves, they hired a hit man, so that it will appear as if KwaMaphumulo Taxi Association has killed Chonco.

24.4.14 The hit men were Mthembu, Kopolota, Ntuli and Swayo Mkhize and the Cato Manor SVC section was part of the plan.

24.4.15 Chonco was killed and after that all the hit men were killed by the Cato Manor SVC section.

24.4.16 This witness heard Sanele saying he had the list of all people who were going to be killed by Cato Manor.

24.4.17 In the list it was Bongani Mkhize who was the last person to be killed as he reported the matter to the authorities.

24.4.18 Cato Manor SVC section was paid for killing Bongani Mkhize.

24.4.19 It was not easy to find Bongani Mkhize that is why the Cato Manor SVC section will phone when they have missed Bongani Mkhize.

The statements of Mthiyane, Mkhize and Mathonsi clearly indicate that certain members of KwaMaphumulo Taxi Association were lured into the trap of killing Chonco by Stanger Taxi Association with a view to create a reason for Cato Manor SVC section to target KwaMaphumulo Taxi Association members who were in conflict with Stanger Taxi Association, this plan was hatched by the Cato Manor SVC section together with Stanger Taxi Association because Stanger Taxi Association was not happy about the manner Chonco was operating.

This is evident by the subsequent payments made by Stanger Taxi Association each and every time that a member of KwaMaphumulo Taxi Association is killed.

The Cato Manor SVC section was rewarded by eliminating the rivals of the Stanger Taxi Association while operating under the veil of South African Police Services.

Statement of Simphiwe Cypron Mathonsi is attached as Annexure D

24.5 Documents relating to the monetary awards

24.5.1 The South African Police Services verily believed that the SVC Cato Manor Section was honest in combating the taxi violence in the province and rewarded all officers who were involved in the taxi violence task team including Johan Wessel Booysen.

24.5.2 The reward was in the form of cash and certificates.

24.5.3 The motivation for the reward states the role of Johan Wessels Booysen in the operations hence he was rewarded.

24.5.4 He further motivated for payment of sources who were leading them to the hide out of the KwaMaphumulo Taxi Association members.

Mr Booysen as the Provincial Commander of Organised Crime had intimate knowledge of the operations of the SVC section when it was eliminating the KwaMaphumulo Taxi Association members instead of arresting them for any alleged offences.

As a manager he did nothing to stop this killing spree because it was fulfilling his arrangement with Stanger Taxi Association as stated in Mathonsi's statement

Documents relating to the monetary awards are attached as Annexure E.

24.6 Statement of Andrew Carsen Cochraine dated 16 May 2013

24.6.1 Andrew will state that he is a pilot who flew Booysen to the scene where Magojela the KwaMaphumulo Taxi boss was killed.

It is the prosecution team's view that this helicopter was on standby to carry Booysen pending the notification by his foot soldiers that the execution of Magojela has been fulfilled.

Statement of Andrew Carsen Cochraine is attached as Annexure F

24.7 High Court application where Booysen is a Respondent

24.7.1 The applicant, Bongani Mkhize (deceased in count 24 and chairman of the KwaMaphumulo Taxi Association) applied for a High Court order seeking to restrain the Provisional Commander, General Booysen and all police officials serving under their commander from killing, injuring, threatening, harassing or in any way intimidating him.

24.7.2 He outlined in his affidavit the conflict that existed between the Stanger Taxi association and the KwaMaphumulo Taxi association, the killing of Superintendent Chonco and the existence of the list of names the KwaMaphumulo Taxi Association members who were allegedly suspected of being involved in the killing of Chonco and offended should they be required by police they are willing to hand themselves over in the presence of their legal representatives.

24.7.3 Bongani Mkhize further refers to the interrogation of Moses Dlamini by South African Police Services members who kept referring to his name during the interrogation and also bragged that they were going to kill him and the other people who were on the list.

24.7.4 His life was in danger as he was next in line. He offered to hand himself over to SAPS to be interrogated in the presence of his lawyers as there were rumours in the papers that he is suspected of killing Superintendent Chonco. He outlined in his affidavit the killings of members of his KwaMaphumulo Taxi Association, Magojela Ndimande, Lindelani Buthelezi, Kopolota Ntuli and Nkosinathi Mthembu and also the fact that he was next in line.

24.7.5 Booysen deposed to an affidavit on behalf of South African Police Services where he clarified that there was no warrant issued for the arrest of Mkhize and Mkhize had no reason to fear for his life or his arrest. If circumstances had to arise making it necessary to arrest or to question Mkhize such will be carried out in terms of the law.

24.7.6 The court granted the application restraining the police from killing, injuring, threatening, harassing or in any way intimidating Mkhize.

24.7.7 Despite this court order Booysen allowed his members to confront Mkhize without first making contact with his attorneys and subsequently killed him in contravention of the court order.

High Court application where Booysen is a Respondent is attached as – Annexure G

24.8 Statement of Nkosinathi Shozi

24.8.1 He is an attorney who represented the KwaMaphumulo Taxi Association in legal matters since 2003. In 2007 to 2008 he was approached by Bongani Mkhize (Chairman) and Bhengu (Treasurer) to assist KwaMaphumulo Taxi Association to communicate with the SA Police Service (SAPS) with a view to prevent the ongoing killings after the death of Lindelani Buthelezi on 3 September 2008. His instructions were to tell the police that if there was any member of the association being sought for any criminal matter, including the investigation of Chonco they were prepared to hand the member over so that the law could take its course.

24.8.2 In addition to writing letters to SAPS management, he arranged a meeting with the then MEC Bheki and officials of the KwaMaphumulo Taxi Association, to prevent further killings and these attempts were fruitless. He was never told by the police or Booysen when his clients being members of KwaMaphumulo Taxi Association were sought.

The statement of Nkosinathi Shozi is attached as Annexure H

24.9 Statement of Commissioner Brown

24.9.1 He was the Provincial Head of Detectives in the province and had General Detectives, Organised Crime, Serious Violent Crime and Commercial Crime under his command. General Booysen as Provincial Head of Organised Crime reported to him directly. In 201 when SVC were disbanded some members went to ordinary

detectives but SVC section based at Cato Manor fell under the Durban Organised Crime Unit, headed by Colonel Aiyer.

24.9.2 There was a poor working relationship between SVC members and Aiyer based on his management style and perceived lack of knowledge of investigation of violent crimes. The relationship between Booysen and Lt Colonel Olivier, the section commander at SVC based at Cato Manor was that of complete trust and they communicated directly with the exclusion of the Durban Organised Crime head, Aiyer. Booysen would visit Cato Manor weekly in order to attend Operation Greed meetings. During the daily crime reports at the province when Crime Intelligence would present crime reports, Booysen would confirm the contents of the shooting incident reports and provide additional information.

The statements of Commissioner Brown are attached hereto as Annexure J1 and J2.

The prosecution team considers the above involvement of Booysen as a local and provincial manager of the SVC section based at Cato Manor sufficient to justify the decision that Booysen managed and participated in the activities of the enterprise.

25. The State has evidence linking the entire members of the enterprise including accused 1,2,3,4,5,7,8,9,10,11,13,14,15,16,25,26 and 27. The said accused as members of Durban Organised Crimes SVC section under the command and management of Major General Booysen participated in more than one incidents, as indicated in the indictment when executing the illegal activities of the enterprise.

<u>THE ENTERPRISE –</u>

25.1 The enterprise is defined to include "*any individual, partnership, corporation, association, or other juristic person or legal entity, and union or group of individuals associated in fact, although not a juristic person or legal entity*".

25.2 The KwaZulu-Natal Provincial Organised Crime Unit and Directorate for Priority Crime Investigations (DPCI) of the South African Police Services is an enterprise within the meaning of section (1) of the Prevention of Organised Crime Act, Act 121 of 1998 ("POCA), being a legal entity associated in fact.

25.3 This legal entity provided the accused with the continuity of structure under which to conduct their unlawful activities.

25.4 Accused 1 was the Commander of the Provincial Organised Crime. Accused 9 was the section Commander of the Durban Organised Crime Unit based in Cato Manor. Accused 6 was the subsection Commander of the Durban Organised Crime Unit based in Cato Manor. Accused 1, 6 and 9 managed the enterprise. Accused 1,2,3,4,5,6,7,8,9,10,11,13,14,15,16, 25, 26 and 27 were participants in the racketeering activities..

25.5 Accused 12,17,18,19, 20, 21, 22, 23, 24, 28, 29 and 30 in the proposed indictment are not charged with racketeering activities. They did not commit more than one offence in the predicate offences.

I. LIST OF PROPOSED CHARGES AND ACCUSED INVOLVED IN THEM

COUNT 1 CONTRAVENING SECTION 2(1)(f) READ WITH SECTIONS 1 ,2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – MANAGING AN ENTERPRISE;

(Accused 1, 6 and 9)

COUNT 2 CONTRAVENING SECTION 2(1)(e) READ WITH SECTIONS 1, 2(2), 2(3), 2(4) AND 3 OF THE PREVENTION OF ORGANISED CRIME ACT, ACT 121 OF 1998 – PARTICIPATING IN THE CONDUCT OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY,

(Accused 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15, 16, 25, 26 and 27)

PREDICATE OFFENCES

COUNT 3 — HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 6, 8, 13 and 22)

COUNT 4 — ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM

(Accused 4, 6, 8, 13 and 22)

COUNT 5 — DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 4, 6, 8, 13 and 22)

COUNT 6 — CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 UNLAWFUL POSSESSION OF A FIREARM

(Accused 4, 6, 8, 13 and 22)

COUNT 7 — CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WIT H SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60

OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 4, 6, 8, 13 and 22)

COUNT 8

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 1, 4, 5, 6, 8, 9, 15 and 16)

COUNT 9

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 1, 4, 5, 6, 8, 9, 15 and 16)

COUNT 10

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM

(Accused 1, 4, 5, 6, 8, 9, 15 and 16)

COUNT 11

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 1, 4, 5, 6, 8, 9, 15 and 16)

COUNT 12

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 1, 4, 5, 6, 8, 9, 15 and 16)

COUNT 13

HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 3, 4, 6, 8, 10, 11, 12, 13 and 15)

COUNT 14

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 3, 4, 6, 8, 10, 11, 12, 13 and 15)

COUNT 15

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM

(Accused 3, 4, 6, 8, 10, 11, 12, 13 and 15)

COUNT 16

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM

(Accused 3, 4, 6, 8, 10, 11, 12, 13 and 15)

COUNT 17

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 3, 4, 6, 8, 10, 11, 12, 13 and 15)

COUNT 18

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 3, 4, 6, 8, 10, 11, 12, 13 and 15)

COUNT 19

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 17 and 18)

COUNT 20

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977

(Accused 2, 3, 14, 19, 20, and 21)

COUNT 21

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121.READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 19 77 – UNLAWFUL POSSESSION OF FIREARM

37

(Accused 2, 3, 14, 19, 20, and 21)

COUNT 22

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 2, 3, 14, 19, 20, and 21)

COUNT 23

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2, 3, 14, 19, 20, and 21)

COUNT 24

THEFT

(Accused 2, 3, 14, 19, 20, and 21)

COUNT 25

HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF ACT 51 OF 1977,

(Accused 2, 3, 9, 13 and 16)

COUNT 26

CONTRAVENTION OF SECTION 120(6) OF AC ~~T 60~~ OF 2000 - POINTING WITH A FIREARM;

(Accused 2, 3, 9, 13 and 16)

COUNT 27	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM **(Accused 2, 3, 9, 13 and 16)**
COUNT 28	CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION **(Accused 2, 3, 9, 13 and 16)**
COUNT 29	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 2, 3, 9, 13 and 16)**
COUNT 30	THEFT **(Accused 2, 3, 9, 13 and 16)**
COUNT 31	HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997 AND SECTION 155(1) OF AC T 51 OF 1977; **(Accused 2, 4 and 6)**

COUNT 32

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 2, 4 and 6)

COUNT 33

CONTRAVENTION OF SECTION 90, READ WITH SECTION 1,103,117,120(1)(a) AND 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 2, 4 and 6)

COUNT 34

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2, 4 and 6)

COUNT 35

HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 36

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120, (1)(a), SECTION 1 READ WITH SCHEDULE 4 AND SECTION 15 OF

40

THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF FIREARM;
(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 37

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT 60 OF 2000 – UNLAWFUL POSSESION OF AMMUNITION;
(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 38

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 4, 5, 6, 7, 8, 11 and 13)

COUNT 39

MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)

COUNT 40

HOUSEBREAKING WITH INTENT TO COMMIT MURDER AND MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)

COUNT 41

ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM;
(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)

41

COUNT 42

CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 - POINTING WITH A FIREARM

(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)

COUNT 43

ASSAULT WITH INTENT TO DO GRIVOUS BODILY HARM;

(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)

COUNT 44

CONTRAVENTION OF SECTION 120(6) OF ACT 60 OF 2000 - POINTING WITH A FIREARM;

(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)

COUNT 45

MALICIOUS DAMAGE TO PROPERTY;

(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)

COUNT 46

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120(1)(a), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)

COUNT 47

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)

COUNT 48	CONTRAVENTION OF SECTION 3, READ WITH SECTION 1, 103, 117,120(1)(A), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF FIREARM; **(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)**
COUNT 49	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION; **(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)**
COUNT 50	THEFT **(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)**
COUNT 51	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)**
COUNT 52	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 2, 4, 5, 7, 13, 14, 19, 25, 27, 28 and 30)**
COUNT 53	MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977 **(Accused 2, 4, 5 and 6)**

COUNT 54	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM; **(Accused 2, 4, 5 and 6)**
COUNT 55	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION **(Accused 2, 4, 5 and 6)**
COUNT 56	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 2, 4, 5 and 6)**
COUNT 57	THEFT **(Accused 2, 4, 5 and 6)**
COUNT 58	MURDER, READ WITH SECTION 51 OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977 **(Accused 4, 13 and 15)**

COUNT 59	CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120(1)(a), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARMS CONTROL ACT, 60 OF 2000 – UNLAWFULLY POSSESSION OF A FIREARM; **(Accused 4, 13 and 15)**
COUNT 60	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 120(1)(a), SECTION 121 READ WITH SECTION 4 AND SECTION 151 OF FIREARMS CONTROL ACT 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION; **(Accused 4, 13 and 15)**
COUNT 61	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 4, 13 and 15)**
COUNT 62	HOUSEBREAKING WITH INTENTION TO COMMIT MURDER AND MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977; **(Accused 2, 3 and 4)**
COUNT 63	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM; **(Accused 2, 3 and 4)**

COUNT 64

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION

(Accused 2, 3 and 4)

COUNT 65

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

(Accused 2, 3 and 4)

COUNT 66

HOUSEBREAKING WITH INTENTION TO COMMIT MURDER AND MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 67

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;

(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)

COUNT 68	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION; **(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)**
COUNT 69	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 2, 4, 7, 8, 9, 11, 16, 23 and 24)**
COUNT 70	HOUSEBREAKING WITH INTENTION TO COMMIT MURDER AND MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977 **(Accused 6, 7 and 13)**
COUNT 71	MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977; **(Accused 6, 7 and 13)**
COUNT 72	MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND REA D WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 6, 7 and 13)

COUNT 73

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a), 121 AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 31 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;
(Accused 6, 7 and 13)

COUNT 74

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 6, 7 and 13)

COUNT 75

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a), 121 AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 31 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;
(Accused 6, 7 and 13)

COUNT 76

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH

SECTION 250 OF ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 6, 7 and 13)

COUNT 77

CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a), 121 AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 31 OF 1977 – UNLAWFUL POSSESSION OF FIREARM;

(Accused 6, 7 and 13)

COUNT 78

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND SCHEDULE 4 OF ACT 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;

(Accused 6, 7 and 13)

COUNT 79

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;

(Accused 6, 7 and 13)

COUNT 80

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 7, 13 14, 15 and 26)

COUNT 81

MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;

(Accused 4, 7, 13 14, 15 and 26)

COUNT 82 — MURDER; READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;
(Accused 4, 7, 13 14, 15 and 26)

COUNT 83 — ATTEMPTED MURDER READ WITH SECTION 51(2) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;
(Accused 4, 7, 13 14, 15 and 26)

COUNT 84 — CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(a), SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 4, 7, 13 14, 15 and 26)

COUNT 85 — CONTRAVENTION OF SECTION 90, READ WITH SECTIONS 1, 103, 117, 120 (1)(a), AND SECTION 121 READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 7, 13 14, 15 and 26)

SO

COUNT 86

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 4, 7, 13 14, 15 and 26)

COUNT 87

CONTRAVENTION OF SECTION 90, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 7, 13 14, 15 and 26)

COUNT 88

CONTRAVENTION OF SECTION 3, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 4, 7, 13 14, 15 and 26)

COUNT 89

CONTRAVENTION OF SECTION 90, READ WITH SECTIONS 1, 103, 117, 120 (1)(A), SECTION AND SECTION 121 READ WITH SCHEDULE 4 AND

SECTION 151 OF THE FIREARM CONTROL ACT, 60 OF 2000 AND FURTHER READ WITH SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 7, 13 14, 15 and 26)

COUNT 90 — DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 4, 7, 13 14, 15 and 26)

COUNT 91 — DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;
(Accused 4, 7, 13 14, 15 and 26)

COUNT 92 — DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE;
(Accused 4, 7, 13 14, 15 and 26)

COUNT 93 — THEFT
(Accused 4, 7, 13 14, 15 and 26)

COUNT 94 — MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977;
(Accused4, 8, 11, 16, 25 and 26)

COUNT 95	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 UNLAWFUL POSSESSION OF A FIREARM; **(Accused4, 8, 11, 16, 25 and 26)**
COUNT 96	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 UNLAWFUL POSSESSION OF AMMUNITION **(Accused4, 8, 11, 16, 25 and 26)**
COUNT 97	DEFEATING OR OBSTRUCTINGTHE COURSE OF JUSTICE **(Accused 4, 8, 11, 16, 25 and 26)**
COUNT 98	MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977 **(Accused 4, 8, 10, 11 and 15)**
COUNT 99	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURT HER READ WITH SCHEDULE 4 OF THE FIREAR MS

CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM;
(Accused 4, 8, 10, 11 and 15)

COUNT 100

CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION;
(Accused 4, 8, 10, 11 and 15)

COUNT 101

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE
(Accused 4, 8, 10, 11 and 15)

COUNT 102

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997; AND READ WITH SECTION 155(1) OF ACT 51 OF 1977
(Accused 4, 5, 13 and 30)

COUNT 103

DEFEATING OR OBSTRUCTRING THE COURSE OF JUSTICE
(Accused 4, 5, 13 and 30)

COUNT 104	MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF 1977 **(Accused 5, 6 and 27)**
COUNT 105	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM; **(Accused 5, 6 and 27)**
COUNT 106	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION; **(Accused 5, 6 and 27)**
COUNT 107	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 5, 6 and 27)**
COUNT 108	THEFT **(Accused 5, 6 and 27)**

COUNT 109	MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977; **(Accused 5, 15 and 25)**
COUNT 110	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM; **(Accused 5, 15 and 25)**
COUNT 111	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION; **(Accused 5, 15 and 25)**
COUNT 112	DEFEATING OR OBSTRUCTING THE OF JUSTICE **(Accused 5, 15 and 25)**
COUNT 113	MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997 AND READ WITH SECTION 155(1) OF ACT 51 OF 1977 **(Accused 13 and 15)**

COUNT 114	CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF A FIREARM; **(Accused 13 and 15)**
COUNT 115	CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 FURTHER READ WITH SCHEDULE 4 OF THE FIREARMS CONTROL ACT 60 OF 2000 AND SECTION 250 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – UNLAWFUL POSSESSION OF AMMUNITION; **(Accused 13 and 15)**
COUNT 116	DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE **(Accused 13 and 15)**

J: ANALYSIS OF THE MODUS OPERANDI

The modus operandi outlined above, where the accused would track or trace suspects on the basis of questioning them even where there exists not even shreds of evidence linking them to any offence. It includes instances where the accused would interfere with the scene by placing a firearm on the scene after the shooting has been completed to create the impression that the deceased had that planted firearm in his hand and was in the process of pointing or firing at the police with a view to make the police shooting justifiable within section 49(1) of the Criminal Procedure Act 51 of 1977. The following incidents are illustrations of this point:

1 Kwa-Mashu CAS 698/11/2009 Prince Thabede (Mtako)

On 26 November 2009 at 4187 Kwa-Mashu the deceased was found lying on the bed with a revolver, .38SPL Taurus revolwer with obliterated serial numbers next to his left elbow. The transfer bar of this revolver was broken and therefor incapable to fire (discharge ammunition). Adriaan Stoltz (Accused 3) said in his warning statement that the suspect drew a firearm and fired shots. Padayachee (Accused 2) says the suspect produced a firearm and pointed at them, that is when he decided to fire at the suspect.

Nqaba Mdluli (A21) and Nkanyiso Ntenza (A22) saw Mostert returning to the Quantum kombi in which they were travelling to fetch the "mbombayi". Sergeant Behari (A7) of the ballistic unit of the Forensic Science laboratory found that the revolver was defective. Jacobus Steyl (A26), a ballistic reconstructionist, states that the deceased was in a lying position with his head on the pillow when he was shot at.

2 Durban Central CAS 185/02/2009 Bongani Mkhize

On 3 February 2009, the deceased was found lying in the driver's seat of his black Lexus car. A firearm was found on the front passenger side of the car. Sergeant Tilakharee, the ballistic expert states that all shots were fired from outside to the inside of the vehicle. The accused, Dlamuka, Mfene, Padayachee, Rakesh Maharaj and Stoltz state that the deceased fired shots to their direction and they returned fire wounding the deceased. Sergeant Tilakharee's ballistic finding that all cartridge cases collected from the scene, including the two found inside the vehicle of the deceased were not linked to the firearm found in the vehicle of the deceased.

It is thus clear that this firearm depicted on photos 14 and 15 of Captain Mangena's statement (A94) was placed in the vehicle after the shooting to create the impression that Mkhize used it and tried to place the police 's life in danger.

3 Esikhawini CAS 3/4/2010 Kwazi Ndlovu 16 years old boy Count 66-69

On 1 April 2010 at about 02h00 the deceased, a 16 year old student, who had likely fallen asleep whist watching television was shot at whilst in a lying position on a couch was shot with an R5 Rifle, a 9mm Norinco Star pistol was placed under his left arm. All cartridges on the scene are 5.56mm compatible with an R5 assault rifle that was used by Padayachee (Accused 2). The 9mm Norinco Star pistol cannot be linked with any cartridges found on the scene.

Captain Mangena (A31) reconstructed the scene and confirmed after studying the post mortem report, damages on the wall, the coach on which the deceased was lying and the wounds sustained that the deceased was lying when shot at and posed no danger to the police. This firearm was clearly placed on the scene after the shooting. The police were looking for a prison escapee and were taken to this house by an informer.

4 Mandini CAS 76/09/2009 Nzameni Ntuli (Kopolota) and Nkosinathi Mthembu

On 18 September 2008 the deceased were found lying in a house at Mandini after being shot at by the accused. The ballistic reconstruction indicates that they were shot whilst lying down, the firearms that were found placed next to their bodies could not match the cartridges on the scene.

K. ANITICIPATED CHALLENGES

1. Statements of Bhekinkosi Mthiyani (Dlondlo)'s and Cyprian Mathonsi

The witnesses have since died. The state will lay a proper foundation for the admission of hearsay in terms of section 3(1) (c) of Act 45 of 1988.

2. Admissibility of Inquest affidavits

The statements made by the police officers during the inquest proceedings are official records, which are admissible in terms of Section 234, the police officials in question were on duty executing their official functions as police officials

3. Defence delaying tactics, by bringing interlocutory applications one after another

The defence is employing a tactic of delaying the commencement of the trial by informing us that there are countless applications that will be bringing such as better and further particulars even before we supply further particulars.

CREDIBILITY OF COL AIYER

The credibility of Col Aiyer, the Durban Organised Crime Unit Head will be challenged because of his differences with Gen Booysen, which led to numerous interventions by provincial management some of which were investigated by the Ministry, the accused may argue that he was jealous of the successes of Cato Manor which happened without his involvement or was jealous of Booysen's achievement in bringing down crime in the province.

L. STATEMENT OF THE LAW

26 The Prevention of Organised Crime Act, Act No 121 of 1998(hereinafter referred to as The Act) defines in section 2 thereof various criminal offences in respect of racketeering.

27 Section 1(1) of The Act states that an "Enterprise" includes "*any individual, partnership, corporation, association, or other juristic person or legal entity, and union or group of individuals associated in fact, although not a juristic person or legal entity*"

28 Section 1(1) of The Act states further that "*a pattern of racketeering activity" means the "planned, ongoing, continuous or repeated participation or involvement in any offence referred to in schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1*"

29 Section 2(1)(f) provides that:

Any person who – "*manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity" shall be guilty of an offence.*

30 Section 2(1)(e) of POCA provides that:

Any person who – *"whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity" shall be guilty of an offence.*

31 An enterprise is established by proving that it has:

(a) A common or shared purpose
(b) A formal or informal structure
(c) A system of authority
(d) Continuity

M. POCA RACKETEERING POLICY

32 It will be impossible to charge the accused individually with all the offences they have committed. Charging the accused together outside the ambit of POCA will result in misjoinders. A POCA prosecution will allow the joining of different participating accused which is otherwise not permissible.

33 A POCA prosecution will enable the State to charge the accused with all offences committed through a pattern of racketeering activity, distinctly and separately.

34 Section 2(2) of POCA allows the court to hear evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated against the accused.

35 The placing of the firearms on the crime scene is similar fact evidence.

N. ANTICIPATED DEFENCES

36 The accused will argue self-defence and rely on section 49(2) of the Criminal Procedure Act.

37 They were not participants in some of the crimes scenes, essentially relying on 'disassociation'.

38 The accused would raise a defence of bare denial on charges of theft, assault, possession of unlicenced firearms and ammunitions and malicious damage to property.

39 The State will counter these defences with:

- direct evidence
- circumstantial evidence
- expert evidence
- real evidence
- documentary evidence.
- some of the deceased were not their suspects.
- some of the deceased were shot in a supine position.
- They acted maliciously in a quest for personal benefits
- The list is not exhaustive

O. ASSET FORFEITURE UNIT

40 The investigation team has referred the matter to KZN Asset Forfeiture Unit The prosecution team has to date not received the financial investigation report from the AFU and has decided to abandon pursuing money laundering charges.


COMMISSION OF INQUIRY
INTO STATE CAPTURE

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

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

DATE: 18 AUGUST 2015

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

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

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

- accused 2 Gonasagren Padayachee;

accused 3 Adriaan Stoltz;

accused 4 Paul Mostert

accused 5 Eric Nel

accused 7 Adjithsigh Ghaness

accused 8 Phumelela Makhanya

accused 9 Willem Olivier

accused 10 Thembinkosi Mkhwanazi

accused 11 Thathayiphi Mdlalose

accused 13 Rubendran Naidoo

accused 14 Raymond Lee

accused 15 Anton Lockem

accused 16 Eugene van Tonder

accused 19 Felokwakhe Thomas Dlamuka

accused 25 Charles John Smith

accused 26 Jeremy Martem

accused 27 Bruce David McInnes

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

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

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

1.2 The fresh prosecution memorandum,

1.3 The proposed indictment,

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

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

The court stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6.1 High Court application where Booysen is a respondent

6.2 Documents relating to the monetary awards

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

6.4 Statement of Bhekinkosi Mthiyane Ndlondlo dated 31 July 2012

6.5 Statement of Andrew Carsen Cochrane dated 16 May 2012

6.6 Statements of Commissioner Brown dated 8 and 9 May 2013

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

6.8 Statement of Simphiwe Cypran Mathonsi dated 15 March 2013 and

6.9 Statement of Bongani Mandla Mkhize dated 1 August 2012.

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

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

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

CATO MANOR PROSECUTION PRESENTATION 9 July 2015

Adv Sello Maema

Adv Khulekani Mathenjwa

Adv Jabulani Mlotshwa

Adv Mahlubi Ntlakaza

Adv Matshidiso Moleko

Adv Pumeza Futshane

Adv M Noko
DPP KZN
(Supervisor)

National Prosecuting Authority of South Africa
DPP South Gauteng

JWB-261

The Accused

Racketeering Charges

Section 2(1) (f)- Managing an Enterprise

Accused 1 - Johan Booysen
Accused 6 - Neville Eva (Deceased)
Accused 9 - Willem Cornelius Olivier
Accused 15 – Anton Lockem
Accused 16 – Eugene van Tonder

The Accused

Section 2(1) (e) – Participating in the activities of the Enterprise

Accused 1- Johan Booysen
Accused 2- Gonasagren Padayachee
Accused 3 Adriaan Jokobus Stoltz
Accused 4- Paul Jonathan Mostert
Accused 5- Eric Alfred Nel
Accused 6- Neville Eva (deceased)
Accused 7- Adjithsingh Ghaness

Sec 2(1)(e) Accused continued

Accused 8- Phumelela Makhanya

Accused 9- Willem Cornelius Olivier

Accused 10- Thembinkosi Mbhekiseni Mkhwanazi

Accused 11- Thathayiphi Enock Mdlalose

Accused 13- Rubendren Naidoo

Accused 14- Raymond Christopher Lee

Accused 15- Anton Lockem

Accused 16- Jan Johannes Eugene van Tonder

Accused 25- Charles John Smith

Accused 26- Jeremy Martem

Accused 27- Bruce David Mc Innes

JMB-264

Brief Background

Taxi violence killings between KwaMaphumulo & Stanger Taxi Associations followed by the killing o Sup Govender, Sup Chonco and Inkosi Mbongelen Zondi (Ex- Kito cop)

Sup Chonco - provincial co-ordinator tasked tc investigate violence between Kwa-Maphumulo Tax Association (KTA) and Stanger taxi Associatior (STA)

killed on 27 August 2008 whilst transporting accusec persons to court – KTA suspected of involvement ir Chonco's killing

Brief Background Continued

Inkosi Zondi was suspected of having leaked infc about the whereabouts of Magojela Ndimande

Bongane Mkhize & Magojela Ndimande were suspected by Cato Manor (Kito) to have orchestratec the killing of Inkosi Zondi

Kito had no evidence linking them or anyone to the killing

JMB-266

The Dockets

Kwa Dukuza CAS39/09/2008 Dec: Lindelani Buthelezi

(Taxi Owner – Kwa Maphumulo T A)

03 September 2008: **Counts 3-7**

Under pretext of arresting the deceased - suspected involvement in the killing of Sup Chonco,
59 Rose Road, Stanger Manor
owned by Steven Naidoo - deceased renting a room

presence of his girlfriend Thandeka Sokhulu (A21) - were asleep.

Kwa Dukuza Docket continued

Accused 4,8,13 and 22 broke, open the door

accused 6 kept guard outside.

The deceased lifted up both his hands

girlfriend- placed separate room

covered Thandeka Sokhulu with a blanket, assaulted her open hands and kicked & booted feet **(Count 4)**

Accused had 7.65 9mm firearm with serial number obliterated - placed this firearm next to the deceased create an impression deceased was armed and/or would have used the firearm or used the firearm to shoot them endanger their lives

The Dockets continued

Howick CAS 106/9/2008

Deceased 1: Magojela Ndimande
(Taxi Owner – Kwa-Maphumulo T A)
Deceased 2: Sibusiso Tembe:
(Body guard)

16 September 2008 **Counts 8 – 12**

Dec 2 - issued - 9mm Parabellum Pistol with serial no. 158452
Ruger 14 rifle with serial no SK2114.
(Taxi Violence VIP Protection Unit)

Prior Arrest 29 August 2008 Mthunzini Police Station killing of Superintendent Chonco, handed over to members Organised Crime Unit questioning released not linked

Howick Docket Continued

On 16 September 2008 (17 days) pursued the deceased again. caught on the N3 Highway near Howick, where they were killed.

Accused 4, 5, 6, 8, 15 and 16 present and falsely alleged that the second deceased shot at them and they returned fire.

Accused 1 and 9 (Managers of Enterprise) arrived on the scene in a helicopter.

Howick Docket Continued

Tempering with scene- AK 47 serial no 1975-849754 placed to create same impression of attack

Ballistic Expert Steyl (A41) Hyundai's windows closed- no indication that shots were fired through the closed windows

AK47 cartridges places on top of blood inside car

Allegations of door opened negated by lack of cartridges on the roadway

Picture of AK47 depicted inside the car at the scene

Accused 4 warned security company to remove the guard (See A43- 16/9/08)

JWB-271

The Dockets Continued

Mandini CAS 76/09/2008

Deceased 1 – Mzameni Johannes Ntuli
Deceased 2 – Nkosinathi Wilson Mthembu
(Taxi owners Kwa Maphumulo T A)

18 September 2008 **Counts 13 – 18**

under pretext of intending to arrest the two deceased for killing Sup Chonco, house number 4 Oribi Road, Mandini owned by Lindie Joyce Sindisiwe Gabi, deceased 1's girlfriend

Mandini Docket Continued

Accused 3, 4 &13 entered the bedroom & fired shots at deceased

Accused 6,8,10, 11, 12 & 15 – guarding the house for escapees

Ballistic Expert Steyl (A37)

Dec 1 shot from back whilst lying on the floor, with exit wound on carpet under head

Deceased 2 in standing & lying position (5 shots)

Negating any danger posed by the deceased

The Dockets Continued

Umkomaas CAS 235/10/2008 Deceased – Mduduzi Mkhize
(Inkabi - hitman)

18 October 2008 **Counts 19**

suspicion that he was a suspect in the killing of Superintendent Zethembe Chonco. He was arrested in Pietermaritzburg and was then transported to Scottburg for questioning. was willing to point out Nathi Khumalo.

On route to point Khumalo, whilst handcuffed at the back of police sedan, he was shot by Accused 17 alleging that deceased was trying to grab firearm of Accused18 **improbable**

The Dockets Continued

Durban Central CAS 185/2/2009

Deceased Bongani Mkhize

(Chairman- Kwa

Maphumulo T A)

3 February 2009 **Counts 20 – 24**

After the killings of **Lindelani Buthelezi, Magojela Timson Ndimande, Mzameni Johannes Ntuli Nkosinathi Wilson Mthembu** and **Mduduzi Mkhize** - members of KTA

JWB-275

Durban Central Docket Continued

Deceased approached the High Court on 14 November 2008 and successfully obtained an interdict against the police not to kill him. He averred that he was next in line. The attorney of the deceased made an undertaking to hand over the deceased if sought by the police. Nevertheless, on 03 February 2009, the accused waylaid the deceased thus contravening the court interdict.

Durban Central Docket Continued

NIU (National Intervention Unit) members and members of the Cato Manor Organised crime

Wanted on Bhekithemba CAS 113/9/09 – Inkos Zondi's docket

Warrant Officer Zungu **(I/O)** not aware of this operation

Had no warrant of arrest for deceased

JWB-277

Durban Central Docket continued

Around13:00 - deceased was spotted driving a Blacl Lexus Vehicle reg nr ND 148 765 along Ridge Road The deceased went into Mc Cord Drive, then tc Umngeni road where he was shot (rain of bullets)

A firearm with serial number obliterated - placed or the floor of front passenger seat of the Lexus tc create same impression of attack/danger.

None of the cartridges found on the scene match the firearm found inside the deceased's vehicle

Durban Central docket Continued

- Deceased's two cell phones stolen (Count 24)
- Acc 14 – alleged taking them to war room

- Accused 2,3,14,19,20 chased & shot deceasec along Umngeni Road, Durban fatally wounded ir the driver's seat of Lexus

JWB-279

The Dockets Continued

Pinetown CAS668/5/2009

Dec- Sibongiseni Ndimande

member – KTA (younger bro

23 May 2009 – **Counts 25 – 30**

Accused 2,3,16 forcefully entered deceased's house

Accused 9, 13 guarding outside for escapees

Accused pointed firearm at Zanele Madaba (Coun

26 & stole her cell phone (Count 30)

JWB-280

Pinetown Docket Continued

Deceased had child in his hands, Accused removed child from him, thrown to wife- instructed to leave bedroom

Accused 2,3,16 fired shots at deceased fatally wounding him

Placing of firearm next to deceased – impression that f/arm used to endanger their lives

JWB-281

The Dockets Continued

Rustenburg CAS 1098/9/09

Deceased – Sifiso Ndimande

Member of KTA

20 September 2009 **Counts 31- 34**

Accused 2,4,6 travelled to Rustenburg to deceased's hideout, 2 & 4 entered & fired shots at deceased fatally wounding him whilst 6 was guarding outside for escapees

Placing of firearm to create threat impression

The Dockets Continued

Berea CAS 288/5/2008

Deceased – Thabo Msimang

24 May 2008 **Counts 35 – 38**

Deceased's apartment on 3rd floor of 32 Coleberg Greyville

Accused 4,5,6 & 13 Forcefully entered with crowbar fired shots at deceased who ran to balcony & fel down/ pushed to ground floor – further shots fired as he lay on ground

Berea Docket Continued

Acc 7,8 7 11 secured the ground floor area fo possible escapees

Firearm placed next to deceased to create threa impression

JWB-284

The Dockets Continued

Melmorth CAS 142/11/2008

Deceased 1- Bongani Biyela

Deceased 2- Khayisani Biyela

23 November 2008 **Counts 39 – 52**

Deceased were awakened by loud bang early morning whilst sleeping as doors & windows were broken (Count 45)

Accused 2 & 4 Entered rondavel of Richard Biyela (A?), pointed him with firearms (Count 42)

JWB-285

Melmorth Docket Continued

Assaulted him (Count 41) dragged out of room

Baba Biyela saw Makhosazana, wife of his brothe assaulted (Count 43) & pointed with firearm (Coun 44)

He saw his 17yrs old son, Khanyisani lying inside his rondavel in a pool of blood (Count 40)

Bongani Biyela was also killed (Count 39)

Firearms placed next to deceased to create threat

Accused 2, 4 fired shots

Accused 5,7,13,14,19,25,27,28 & 30 - present

Dockets continued

Kwa-Mashu CAS 629/4/2009

Deceased – Thokozane Njapha

27 April 2009 **Counts 53 - 57**

Early morning Accused 2,4,5 & 6 proceeded to deceased's premises at G section Kwa-Mashu forced entry fired shots at deceased in bedroom fatally wounding him (Count 53)

Deceased was 204 witness in cash-in –transi robbery- Kwa-Maphumulo

Accused stole cash & cell phone of deceased & wife (Count 57)

Kwa-Mashu Docket Continued

Accused placed firearm next to deceased to creat threat impression

Wife & Son eye-witnesses

Ballistic Expert- Steyl- deceased sat on the bec facing dressing table & shooter was in standing position to the left of deceased which dispels notior that accused were under attack

Dockets Continued

Phoenix CAS 377/8/2009

Deceased- Lindokuhle Nzuza

10 August 2009 **Counts 58 -61**

Deceased accosted by Accused 4, 13 & 15 as he was driving alongside M25, Phoenix, drove paralle his car & fired shots at him. Deceased car stalled accused alighted & fired further shots at deceasec as he lay defenceless

Accused placed a firearm next to deceased to create threat impression

ANNEXURE "JWB19"

CRIMINAL PROCEEDINGS

In the matter between

THE STATE

And

HUMBULANI INNOCENT KHUBA

DEFEATING THE ENDS OF JUSTICE AND FRAUD: PRETORIA CENTRAL CAS 2454/05/2015

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1. On Wednesday of 24/02/2016 at 18h45 I was at home when three males arrived and introduced themselves as members of the DPCI based in Pretoria. They introduced themselves as Brigadier N Xaba, Lt Col H W Maluleke and Captain Sewele. Brigadier N Xaba who was the main speaker of the group; informed me that the purpose of their visit was to obtain a warning statement in connection with a case of defeating the ends of justice and fraud opened against me. According to him, these charges arise from the two recommendation reports made in rendition case which I understood to be Diepsloot Cas 390/07/2012. I was provided with the case number for defeating the ends of justice and fraud case which is Pretoria Central Cas 2454/05/2015.

2 I remembered that it was the same case which Brigadier Rammela and Col Mahlangu of the DPCI showed me on 3 October 2015 when they requested me to make a witness statement implicating Mr McBride and Mr Sesoko in order to be reinstated after my dismissal without a hearing on the same matter. The same case had a charge of perjury and was cited in my founding affidavit to the Labour Court (Case No J2031/15), page 18 and paragraph 71. This is confirmed by telephonic call made to me by Col Mahlangu which was recorded and transcribed in which he encouraged me to make a statement against above mentioned individuals in order to be reinstated.

3 Brigadier Xaba gave me two pages document with 25 questions which he requested that I should respond to in my warning statement. The last question (question 25) requires me to give additional information in justification of my action. I hereby start with question 25 which provide with an opportunity to give background and challenges encountered during the investigation of Diepsloot Cas 390/07/2012.

4. Background

4.1 On 23 October 2012, Sesoko, the Acting Head of Investigations, handed a letter of appointment and a docket to me to investigate the illegal renditions of five Zimbabwean nationals. The letter was from the acting Executive Director Ms K Mbeki. However the investigation of Rendition case against the DPCI was requested by Minister Mthethwa in 2011 and shortly after the request, the Police Secretary, Ms Jenny Iris-Qhobosheane gave instruction to the then Executive Director Mr Beukman (in a meeting which I also attended) to hold-off the investigation until further communication from the Minister. At that time I was informed that I would be a lead investigator hence the request that I be part of the meeting between Ms Qhobosheane and the former Executive Director Mr Beukman.

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4.2 Mr Sesoko informed me that the reason for my appointment was that General Sibiya complained about the conduct of the North West Task team which was initially assembled to investigate cases of alleged assault against him, including Diepsloot Cas 390/07/2012. At that time I was dealing with high profile cases in the department which included Cator Manor "DEATH SQUARD" in Durban.

4.3 I was instructed to assemble my own team to assist me in the investigation, which I did. The team was comprised of the following individuals, Mr Kenneth Ratshitali, Mr L Maphetho, Mr N Mulaudzi and Mr. T Mashaphu who are all investigators from Limpopo IPID office. The docket contained 13 statements from members of the Crime Intelligence Department, friends and relatives of those deported to Zimbabwe. It was clear from the commissioned statements that the investigation was conducted by Col Maukangwe and Captain Koza of Crime Intelligence (CIG).

5. ***Challenges in the investigation of Diepsloot Cas 390/12/2012***

5.1 When I began with my investigations, Ms. Koekie Mbeki , the then Acting Executive Director of IPID, instructed me to collaborate with a member of Crime Intelligence, Colonel Moukangwe (*"Moukangwe"*) in the investigation. Ms Mbeki also instructed me to keep Moukangwe involvement in the matter secret.

5.2 I found Ms Mbeki's instruction not in keeping with the Departmental practices and processes. The instruction was unusual and problematic because members of the Crime Intelligence were themselves involved in the arrest of the Zimbabwean Nationals. Nonetheless I complied with Ms Mbeki's instructions.

5.3 Upon meeting with Moukangwe, he told me to work with two members from the National Prosecuting Authority (*"NPA"*), namely, Adv. Anthony Mosing (*"Mosing"*) and Billy Moeletsi (*"Moeletsi"*). He advised that the pair had been guiding the investigation since its inception.

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5.4 Shortly after I began my investigation; I briefed Mbeki on the case and informed her that I would consult with Mr Sesoko in the course of investigation. This was common practice. As the National Head of Investigations at IPID, Sesoko was consulted and briefed on all national investigations. To my surprise Ms Mbeki categorically instructed me not to work with or discuss the case with Mr Sesoko. She stated that the person I could collaborate with was Mr Moukangwe of CIG. This was the first and the last time I received instruction to exclude the National Head of investigation on national project investigation in my almost 16 years of service with the department.

5.5 I then complied with the instruction of the Acting Executive Director and informed Mr Sesoko about it. I investigated the case, sometimes accompanied by Mr Moukangwe. However every time I gathered crucial evidence in his absence, I would telephonically informed him of the type of evidence obtained. He would always request me to fax or email him a copy. I enquired from the acting Executive Director whether I should share the copies of the docket with him. She informed me that he is a member of the investigation team and has a right to the content of the docket. She reiterated that the only thing required of me was to keep his involvement secret.

5.6 My worst fear about the arrangement was confirmed when Sunday Times started to publish certain evidence as they appears in the docket. Mr Moukangwe always wanted me to send copies of the documentary evidence and witness statements to an email which is ~~'une16@gmail.com~~ even though I had his private email which is ~~botsotsomoukangwe@gmail.com~~. He preferred that I email from Southern Sun hotel on Church Street in Pretoria rather than using the Department's email. The Sunday Times of 13 October 2013 had just published the details of Madilonga's statement and how it implicated Dramat. I was very concerned about the safety of Madilonga whom I regarded as key witness. I phoned Adv. Mosing the same Sunday and he also expressed his disappointment. I then requested Ms Mbeki in a lette

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dated 31/10/2013 that everybody involved in the investigation especially my team be polygraphed. The acting Executive Director told me that she would look into my request but nothing was done. Adv. Mosing expressed his interest in undergoing polygraph test with the rest of the investigative team. However, Col Moukangwe asked why I was worried about leaking of information whereas the Minister and my boss were not. He said they would never ask me about it, and really did not.

5.7 On the other hand, General Nhlemeza, the then Deputy Provincial Commissioner in Limpopo requested a meeting with me few months after obtaining Lt Col Madilonga's statement in 2013, I met with General Nhlemeza. We met at Wimpy, Cycad Centre in Polokwane. He said he had valuable information that could assist me in the investigation of rendition case. General Nhlemeza and I were close from working relation between IPID and SAPS in the province.

5.8 The General was with an officer from Eastern Cape claiming that when he attended a course in Cape-Town, Lt Col Maluleke confessed to him that he arrested Moyo in Zimbabwe by posing as a South African doctor who wanted to treat Moyo in South Africa. I interviewed him in the presence of General Nhlemeza and took notes by writing on my phone notepad. Advocate Mosing also took interest in the case regarding Moyo when I informed him of what General Nhlemeza has brought through Eastern Cape officer and also what was in Maluleke's laptop. He did his own investigation and emailed me a statement which was about the arrest of Moyo, which he indicated that he got it from the person who prosecuted Moyo. He also instructed me to obtain Moyo's statement from prison and check his hospital record at Musina hospital of which I did. However I could not confirm the allegation that Lt Col Maluleke posed as a doctor or he was in Zimbabwe when Moyo was arrested. Moyo story was not part of the March 2014 report but part of January 2014 report. This is also part of why I am being charged for not including it in March 2014 report despite its irrelevance to the case.

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5.9 During the meeting, General Nhlemeza informed me that he had transferred Lt Col Madilonga to Burgersfort and if I need him for anything I should contact him. I informed him that I am worried about Col Madilonga safety since he is a key witness. He assured me that Madilonga is his man and he is taking care of him. He then requested my wife's number as he suspected that my own number might have been intercepted. As a result, I started to have concerns about the credibility of Madilonga's statement. The main red flag was a recordal in Madilonga's second statement, which suggests that he had been put under pressure to give manufactured evidence in November 2011. I then took his statement for analysis by expert as confirmed by email dated 04/10/2013. The expert confirmed my suspicion.

5.10 In September 2013, General Nhlemeza called me using my wife's number and requested me to come to his house. When I arrived he asked me about the progress in the case. I informed him that there are still outstanding statements including the warnings statements of the suspects which I would be able to obtain before the end of the month. He told me that he regret to inform me that his political principals want him to head the hawks and not IPID. I said to him that I am disappointed because I was expecting him to join us as he earlier said. He promises to keep contact and assist in any investigation that I would be tasked to do.

5.11 Again in October 2013, my wife called me while I was watching TV and informed me that "Mhlekazi" (referring to General Nhlemeza) was at the gate. She then handed me her phone and he requested me to order the security to open for him as he had valuable information to tell me. When he was inside, he said that he has urgent information to tell. He said on Friday he was at the Airport and he met with Mdluli who requested him to tell me that I must not be afraid when dealing with rendition case because there were people who were looking after me. He said he was asked by Mdluli to deploy people for my safety and that if I see any suspicious car behind me I should call him. I was surprised because I never met or spoke with Mdluli. During my entire investigation with Col Moukangwe, he never mentioned

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Mdluli's name. However, I did not enquire anything on what he said but told General Nhlemeza that if I see anything suspicious, I would call him. General Nhlemeza asked, when would I submit my report to NPA. I informed him that even though I had requested warning statement from Dramat, I was battling to get hold of General Lebeya who signed one of the success reports. He then called someone immediately who gave him General Lebeya's number. He said my report was the one holding everything regarding his move to the Hawks. I then called General Lebeya in his presence and put him on an open speaker. I requested him to provide me with a statement regarding rendition and he said I should come to his office in Pretoria. After refreshments, General Nhlemeza left. What General Nhlemeza said got me worried. I spoke to my wife saying that by accepting the request to investigate rendition case, I do not know what I got myself into.

5.12 The article of 13 October 2013 coupled with what General Nhlemeza said gave me a final thought to request the acting Executive Director to remove me from rendition investigation. I did not tell her about what General Nhlemeza said but I only told her that I was not happy with the leaking of information. She said I had to continue with the investigation of the case because there was no one who could do it and that the Minister would not be happy with that.

5.13 I only informed one of IPID employees whom I trusted about what happened when General Nhlemeza visited me. When I sent a report to Adv. Mosing, General Nhlemeza stopped asking me about the report. The last time I met with General Nhlemeza was on 06/12/2014 at Wimpy Cycad Centre. He had just called me to tell me the good news. I arrived at approximately 15h00 with my wife but she remained in the car. I found him seated inside. He said that his time to move to the Hawks had arrived and that there was going to be a hit on Dramat. He encouraged me to watch the news on TV in the next coming weeks. What he told me happened exactly as he said. His last communication with my wife was 31/01/2015 where he sent her a message at 16h06.

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5.14 During January 2014, I met with Mosing and delivered the investigation report to him. The report did not have the outstanding evidence with regard to the warning statement of Sibiya and the cell phone records providing the street location of the relevant individuals making and/or receiving calls. Adv. Mosing, Moeletsi and Moukangwe had previous met on several occasions with me and they gave their input on the analysis of evidence contained in the report. I was adamant that the report had to be approved by the IPID Head as it was a national investigation. At that time the acting Executive Director was no longer coming to the office. When I enquired from Tshiamo Mahibila, the Secretary to the Acting Executive Director, she said that Ms Mbeki only signs financial documents of the IPID and not investigation related matters. Advocate Mosing told me that nevertheless I should sign the report and send it to him. There are numerous emails exchanged between me and Adv. Mosing on this issue including the one where I requested him to give me time.

5.15 I must state that the cell phone data analysis report that was in the docket did not give an indication of the location of the relevant persons making or receiving calls. However, Mosing was impatient and pressured me into submitting a report on the investigation even though he earlier requested me to instruct the Expert to cover such points.

5.16 February 2014, Sibiya responded to the questions previously sent to him. However few days before receiving Sibiya's statement, I also received the cell phone data analysis report from the expert in the manner and form required by Mosing.

5.17 On 27 February 2015, I submitted Sibiya's response to Mosing by email. On 28 February 2015, Mosing responded via email as follows, *"Dear Mr Khuba, in light of the fact that the matter has been referred to the DPP of South Gauteng for decision, you are requested to file these evidence in the docket which is presently with the DPP SG and in future forward any additional evidence or other matter directly with him. Kind Regards."*

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5.14 During January 2014, I met with Mosing and delivered the investigation report to him. The report did not have the outstanding evidence with regard to the warning statement of Sibiya and the cell phone records providing the street location of the relevant individuals making and/or receiving calls. Adv. Mosing, Moeletsi and Moukangwe had previous met on several occasions with me and they gave their input on the analysis of evidence contained in the report. I was adamant that the report had to be approved by the IPID Head as it was a national investigation. At that time the acting Executive Director was no longer coming to the office. When I enquired from Tshiamo Mahibila, the Secretary to the Acting Executive Director, she said that Ms Mbeki only signs financial documents of the IPID and not investigation related matters. Advocate Mosing told me that nevertheless I should sign the report and send it to him. There are numerous emails exchanged between me and Adv. Mosing on this issue including the one where I requested him to give me time.

5.15 I must state that the cell phone data analysis report that was in the docket did not give an indication of the location of the relevant persons making or receiving calls. However, Mosing was impatient and pressured me into submitting a report on the investigation even though he earlier requested me to instruct the Expert to cover such points.

5.16 February 2014, Sibiya responded to the questions previously sent to him. However few days before receiving Sibiya's statement, I also received the cell phone data analysis report from the expert in the manner and form required by Mosing.

5.17 On 27 February 2015, I submitted Sibiya's response to Mosing by email. On 28 February 2015, Mosing responded via email as follows, *"Dear Mr Khuba, in light of the fact that the matter has been referred to the DPP of South Gauteng for decision, you are requested to file these evidence in the docket which is presently with the DPP SG and in future forward any additional evidence or other matter directly with him. Kind Regards."*

H I

5.18 On 3 March 2015, Robert McBride (*"McBride"*) commenced employment as the Executive Head of IPID.

6. The Hawks members have been in my house four times now regarding the same case. I shiver to the core of my spine with fear because I just realised that I investigated a case which was so politically charged to an extent that certain outcome were needed. I was fired without a hearing and even that seems not to be enough. These charges of defeating the ends of justice and fraud are as baffling as my departmental case itself. It is my first time to hear that a recommendation which is just the view of the investigator about the case can give birth to a criminal charge.

6.1 In 2013 I was given appointment letter to investigate Boksburg CAS 322/04/2011, 21/04/2011 and 486/03/2011 involving General Sibiya. The case was already investigated by Mr De Jager, an assistant Director in Gauteng office. He had made recommendation report in which he recommended that General Sibiya should not be charged criminally. I review the already signed report and gathered additional evidence. On 13 November 2013 I made a report in which I recommended that General Sibiya be criminally charged. However, the DPP Gauteng informed me that despite my recommendation they are still of the view that there is no enough evidence to sustain a prima facie case. The question is where did they get the view that there is no evidence because my report clearly recommended criminal charges against him? It is clear that NPA is not bound by the view of the investigator on any case but guided by the evidence in the docket. They decided not to prosecute him in this case even though I recommended prosecution.

6.2 Mr Beukman tasked me to investigate a case of *Mzilikazi wa Afrika* in August 2011 wherein he was arrested in Gauteng by the Hawks and transported to Nelspruit for detention. The case was reported by a Member of Parliament and already investigated by Poopedi who was a Monitor in Gauteng office. He submitted a report in which he recommended disciplinary steps against members of the Hawks. The report was approved by Adv. Moleshe who was

H /

the Provincial Head at the time. I reviewed his report and gathered additional evidence and consulted Criminal Procedure Act as well as SAPS Standing orders. On 06 September 2011 I gave a report with a recommendation that no member of the Hawks be criminally or departmentally charged. The findings in my report were then communicated to the Member of Parliament concerned. No one brought criminal or departmental charges against me on these cases.

7. Every time when I think of what I got myself into by accepting the task, it gives me nightmares. I fear for my personal safety because members of the Hawks had already made advances, asking me to make a statement that implicates McBride and Sesoko in order to be re-instated into my position. It seems as I am viewed as the only gate to deal with McBride and it kills me with fear. Who knows what is next with me, I am really afraid. These are the most powerful people in the country and it seems as my life is at their mercy. I spend sleepless nights thinking of the worst. I just pray that all ends in opening cases against me without any physical harm. I will be able to defend myself in court. All the evidence that I have regarding what happened during the investigation, I am ready to produce in court.

8. When I concluded an agreement with the employer on 23/09/2015, it was because I feared the worst and took my family interest at heart. I grew without a father and took myself to the University sleeping under bridges in order to attend evening classes. I never wanted my children to go through what I went through. It is clear that sometimes no matter how hard one try to choose a path, some paths chooses us.

9. I would like to respond to the remaining 24 questions as follows;

9.1 Question 1:

See 4.1 above.

9.2 Question 2:

See 4.2 and 5.1 above.

9.3 Question 3

See 5.3 above.

9.4 Question 4

See 5.1 above.

9.5 Question 5:

The investigation was not finished but nevertheless Advocate Mosing wanted the report and the docket. See 5.14 above.

9.6 Question 6:

Yes

9.7 Question 7:

Handed to Adv. Mosing.

9.8 Question 8

Advocate Mosing and Billy Moeletsi

9.9 Question 9:

I recommended criminal charges against General Sibiya, General Dramat, Lt Col Maluleke, Captain Nkosi, Warrant Officer Makoe and Constable Radebe.

9.10 Question 10:

Yes.

9.11 Question 11.

New evidence, Mosing email and McBride gave me permission to go to DPP.

9.12 Question 12

Attach new evidence, update the docket and to do final report in terms of IPID regulations and IPID SOP.

9.13 Question 13

Attached new evidence in Sesoko's office and compiled final report.

9.14 Question 14

New evidence and review of existing evidence.

9.15 Question 15

It was with Mosing because I personally handed to him. And when I collected the docket, there was no report.

9.16 Question 16

Mr Sesoko

9.17 Question 17

New evidence and review of existing evidence.

9.18 Question 18

I was reminded that according to the IPID Act the Directorate makes recommendation to NPA and not with NPA.

9.19 Question 19

Yes

9.20 Question 20

I signed as an Investigator, Mr Sesoko as Supervisor and Head of investigation and McBride as an approving authority.

9.21 Question 21

I handed it to Mr Sesoko whom I believed that he gave it to Mr McBride.

H/

9.22 Question 22

No

9.23 Question 23

We arrived at different recommendation after new evidence and review of existing evidence.

9.24 Question 24

Yes

COMPILED AND SIGNED AT POLOKWANE ON THE 3RD DAY OF MARCH 2016

Innocent Humbulani Khuba

ANNEXURE "JWB20"

Ronelle Vermaak

States under Oath in English:

1

I am a Brigadier in the South African Police Service (SAPS) with Persal number 0409673-8. I am currently stationed at Management Intervention, Opera Plaza, South African Police Service Head Office, Pretorius Street Pretoria.

2

I joined the SAPS on 1984-06-30. After I had completed my training at the Police Training College in Pretoria West, I was posted to several stations and units throughout South Africa until I eventually returned to Pretoria in 1998. On my return I was posted to Senior Management Appointments, Personnel Management at SAPS Head Office. I held the rank of Lieutenant Colonel at the time. In 2001 I moved to the Detective Service Division, Head Office and in 2004 became the Section Head: Human Resource Management (HRM).

3

I applied for the position of Section Head: Support Services in the Directorate for Priority Crime Investigation (DPCI), also known as the Hawks in 2009. I was successful and started in February 2010. I met with Lieutenant General Dramat (hereinafter referred to as 'Dramat') and my personnel for the first time on 2010-01-04, which was basically a welcoming session before we started our duties at Support Services. I was very positive and excited at the time as I had been promoted to the rank of Director. We were to embark on a project to set up a new Support unit within the DPCI. This would enable me, along with my team to create my own working environment and put processes in place that were correct from the outset. I would not be required to first rectify old challenges before implementing my own.

4

After approximately six months into my new job, two of my Section Commanders who held the ranks of Colonel, had been arrested for corruption. I was upset because I had expected this unit, the DPCI, to be squeaky clean and its personnel were supposed to be beyond reproach. The one had been the Head of Finances and the other the Head of Supply Chain Management (SCM).

5

The period after my promotion and appointment was tough due to growing pains of the unit itself and there were several challenges to have processes implemented. After the two Colonels had been arrested there was no one to take their place. At this stage the structure of the DPCI had still not been approved and the reporting lines were blurred. Lieutenant General Lebeya (hereinafter referred to as 'Lebeya') had been appointed as the Deputy National Head of the DPCI. Brigadier Voskuil (hereinafter referred to as 'Voskuil') was brought to DPCI, Head Office Pretoria by Dramat. As a standard practise, some of my support personnel, including the previously referred to suspended Colonels, would engage directly with Lebeya and Dramat. I formed the

view that I was being excluded from several decision making processes that would negatively impact on my effective management of the Support Component.

6

I need to emphasise here that generally people outside the environment cannot imagine the enormity of the task at setting up the protocols and processes of a totally new structure such as the DPCI.

7

Voskuil, who was a very close friend and ally of Dramat, but who was based in the Western Cape, was appointed to the DPCI and sat in the Priority Crime Management Centre (PCMC) in Cape Town from October 2010. He assisted with the Supply Chain Management (SCM) matters. This caused some confusion for DPCI employees as well as external people as to who exactly the Section Head: Support Services was; me or Voskuil. People were being appointed at SCM where Colonel Marubane had been in charge, without my knowledge. Colonel Mike Reddy was appointed into the DPCI in February 2011 as the Section Commander: Finance.

8

Matters continued as usual within the DPCI up until December 2014 when I went on leave. At this point I was very proud at what we had achieved in the DPCI as we had built it up from scratch to a professional and competent unit. Although there were challenges with the legislation and our independence and the interpretation thereof by others, I was still positive for our future within the DPCI.

9

While on leave during December 2014 and away from Gauteng, I received a call from the Section Commander of HRM, Colonel Devasahayam (hereinafter referred to as 'Devasahayam') informing me that Dramat had been suspended. I was shocked at the news.

10

When I arrived back at work in January 2015, I attended a meeting chaired by General Ntlemeza (hereinafter referred to as 'Ntlemeza'). He introduced himself to me as the new Acting Head of the DPCI. He appeared to have already introduced himself to the others attending the meeting as he was only talking to me. He banged the table with his open palms of his hands appearing to emphasise what he was saying in the meeting. He told us that he is running the SAPS along with the National Commissioner and that he was the Head of the DPCI, the second most important person in the SAPS. At the time General Riah Phiyega was the National Commissioner of the SAPS. Ntlemeza informed us in no uncertain terms that we were not to contact the suspended Dramat. Due to the manner of his personality he portrayed, I formed the view that one could not debate anything with this man.

11

A few weeks later, on a Monday in 2015, Dramat was set to return to the office as the courts had overturned his suspension. Dramat called me over the weekend and instructed me to arrange transport for him from OR Tambo International Airport. I did not arrange this over the weekend as I believed there was enough time to do so on the Monday. Dramats' Personal Assistant, Pumla Mphothulo had also called me and requested a vehicle to collect Dramat from the airport.

12

On the Monday I attended the Management meeting and while we were standing outside Ntlemeza's office, Ntlemeza arrived in his vehicle. When Ntlemeza joined the circle of senior officers, someone made a comment that set off a discussion about Dramat. Ntlemeza enquired as to who had been in contact with Dramat and he stated that we all thought that Dramat was coming back. I owned up and said that I spoke to him over the weekend. He became furious and shouted at me asking why I hadn't called him at the time. I responded to say that I was going to inform him at the morning meeting. I felt that, at this point, he had lost his trust in me by forming the opinion that I was still loyal to Dramat.

13

At one of Ntlemeza's meetings, which turned into the general tone of all meetings, he stated that he would monitor our calls and conversations, both land line and cellphones, track our vehicles, said that he knew which schools our children attended and could find out where we were at any time of the day or night. He further told us that even if we were in church we should tell the pastor to stop preaching because our General was calling us, and take the call. Ntlemeza ruled by naked aggression, intimidation and instilling fear into us, or at least some of us which included me. He stipulated that the phone should ring no longer than three times and took me to task on several occasions about not answering his calls timeously.

14

In 2015 there was a specific incident when posts for secretaries were advertised and Major Adele Sonnekus (hereinafter referred to as 'Sonnekus') from DPCI KwaZulu Natal called me. She informed me that a box of applications for promotion had been stolen from a vehicle. I advised her to inform Major General Booysen (hereinafter referred to as 'Booysen'), the DPCI KwaZulu Natal Provincial Head at the time. I also advised her that she should compile an information note informing Ntlemeza and recommending that the post for KwaZulu Natal (KZN) be withdrawn and re-advertised later. I was still waiting for the factual report from Sonnekus when someone else obviously informed Ntlemeza as to what had transpired, but with incorrect facts. I was then approached by Major General Mnonopi (hereinafter referred to as 'Mnonopi') to provide her with an affidavit as to why I had not informed Ntlemeza about the incident. I provided an affidavit but was later approached by the Legal Officer, Major General Mpomani (hereinafter referred to as 'Mpomani') who wanted me to re-write my affidavit with incorrect facts. Essentially he wanted me to implicate Sonnekus in wrongdoing. I refused. Sonnekus was in any event suspended later even though she had merely

been the messenger. I informed Ntlemeza sometime later of the actual events, but he accused me of attempting to cover up for Booysen and insinuated that us whites were covering up for each other. I was upset by this accusation as it was not true, and I dared him to polygraph me to establish if I was lying about the incident, or not. Nlemeza however backed down later.

15

This affected me to such an extent that I no longer took Booysen's calls. Even when he arrived at our offices in Pretoria while on suspension, I would hide from him and lock myself in my office so that we would not be seen talking with one another, for fear of being accused that we were plotting against Ntlemeza.

16

Later in 2015 Mompani accused me of not managing discipline according to the Discipline Regulations. This was in a Management meeting where all senior managers were present. He implied that Devasayaham and I did not know the processes and it was because of this that discipline was not being managed properly.

17

On several occasions I became aware that people had been suspended but we would not have received documents relating to the suspensions. I would request the documentation from Ntlemeza's Staff Officer, Colonel Gwayi but none were forthcoming. As such we could not open files and I informed Mompane of this.

18

In May 2015 I was instructed by Ntlemeza to fly to Cape Town with Reddy and Lieutenant Colonel Mokgadi (hereinafter referred to as 'Mokgadi') as part of the team for the post promotions for the entire DPCI. Lieutenant Colonel Daphne Moorghia-Pillay (hereinafter referred to as 'Moorghia-Pillay'), who was assisting Mokgadi, travelled on her own from Pretoria and joined us in Cape Town. Moorghia-Pillay was the Personal Assistant to the then Head of the Forensic Science Laboratory (FSL), Lieutenant General Phahlane (hereinafter referred to as 'Phahlane'). The FSL is a separate Division within the SAPS, as opposed to the DPCI. The reason for Moorghia-Pillay being part of the process remains a mystery to this day. The panel members for adjudicating the applications for the posts also joined us in Cape Town as they had travelled from different parts of the country. The boxes with the applications had been transported by car from Pretoria to Cape Town. We all stayed at the Nelson Mandela Hotel in the Cape Town CBD at great cost to the DPCI. I believe that it would have been more cost efficient to have undertaken the entire process at the DPCI Head Office in Silverton, Pretoria. The tasks allocated to Reddy and myself were to ensure that everything was well with the panel members, such as their accommodation being in order and that they were continuously provided with food and refreshments. Major General Ngembe (hereinafter referred to as 'Ngembe) of KZN Province sat as the chairperson for all the advertised posts in the Support environment. Ngembe held the belief that, as long as we do what Ntlemeza wants, everything will be in order.

19

When it was decided to mark certain vehicles with the Hawks logo and colours, which is referred to as 'wrapping', Ntlemeza insisted that we use a specific company in Limpopo. I cannot recall the name of the Company though. We used the company as they were able to provide the services we required. Ntlemeza, however insisted that we use the same company to provide promotional material such as flags, banners, etc. I refused because it was a different commodity and providing promotional material was not their core function. We used a local company based in Gauteng. Ntlemeza was furious with me and called me approximately five times that night screaming at me telling me how useless I was and that I didn't know what I was doing. He would utter these words then end the call, not allowing me to respond and explain. I made enquiries with Lieutenant General Kruser (hereinafter referred to as 'Kruser'), who was the Divisional Commissioner of SCM, and asked for guidance on this matter as I felt degraded by the uncalled for and malicious actions of Ntlemeza. Kruser's return e-mail to me included Ntlemeza where Kruser informed him to keep away from the Support Services processes as they were being correctly applied. Ntlemeza again screamed at me telling me I was useless. I believe he was taken aback for being wrapped over the knuckles by Kruser.

20

In another instance Ntlemeza called me from a meeting he was attending in Mthatha. Ntlemeza must have still been in the meeting because I could hear other people in the background. When he called me, he sarcastically asked if I was the Support Head of the DPCI and if I had been to Mthatha. I responded by saying that I was the Support Head and that I had not been to Mthatha. He instructed me to get on a plane immediately and fly to Mthatha to inspect the broken furniture there. I flew to Mthatha the next day and found a few broken chairs in the DPCI offices, of which I took photos. I then flew back to Gauteng. The chairs that Ntlemeza had referred to had already been noted, before I flew to Mthatha and were to be replaced in the following financial year.

21

A lady by the name of Innocent, working in Ntlemeza' office, wanted me to approve a flight for Ntlemeza's wife, who was also in the SAPS but from a different environment. I refused saying that the environment she was in should approve the ticket. Ntlemeza and his wife were to attend the Pomulsca function. After I had refused the request, Ntlemeza called me and again and ranted as to how useless I was for disobeying his instructions.

22

Corroboration for this continuous lambasting and reprimands can possibly be obtained from minutes of management meetings held, and which should be filed at DPCI Head Office. I cannot confirm whether in fact these minutes contains same as I did not see those minutes.

23

I attended a meeting at the SAPS Training Academy in Pretoria West where Ntlemeza again reiterated, while ranting, that those who were not with him should apply for a transfer. I later heard that Ntlemeza wanted to replace me with a Colonel from SAPS Head Office, Personnel Records.

24

It was after this that I decided enough was enough, and applied for a transfer away from the DPCI. This was near the end of 2015. I had decided that I would rather jump and land in a place of my own making than be pushed and belittled and not know where Ntlemeza would place me. I felt that I was being pushed into a corner and that Ntlemeza could transfer me at anytime to any place and I would have no control over such. I established that there was a vacant post at Medical Administration, Finance and Administration, Head Office and I applied for it. Ntlemeza approved the transfer and on a management meeting he stated that Voskuil and Vermaak are transferred with immediate effect and that I should write a letter which he would sign the same day and then we should go. Ntlemeza stressed again that he wanted the letters on that same day. I was then totally convinced that Ntlemeza had succeeded in getting rid of me and that his continuous ranting and belittlement paid off.

25

When I left the DPCI, I was relieved that I would be moving away from that extremely stressful environment, while at the same time feeling emotional that it was me who had to walk away from the DPCI when it was in fact not my fault or due to any wrongdoing on my side. We had started this unit from scratch and built it up administratively into a relatively successful crime fighting entity. Even so, I remained hopeful that the DPCI would go from strength to strength.

26

When I arrived to take up my post to which I was transferred to, the Divisional Commissioner: Finance and Administration said he knew nothing of the transfer. I then demanded to see the Acting National Commissioner, Phahlane as Ntlemeza had assured me that he had discussed it with the Acting National Commissioner. Instead Ntlemeza called me and instructed me to report back to the DPCI. When I arrived the same day, Ntlemeza informed me that my transfer was not managed correctly in that he had not consulted with Phahlane. Ntlemeza then apologised to me and then said that my only responsibility would be that of training and that Brigadier Mhlongo, (hereinafter referred to as 'Mhlongo') who he had moved into my post, would be responsible for the rest of the Support Head responsibilities. Before Mhlongo was promoted, she was a Colonel at Head Office in the Commercial Crime environment and had no experience in the Support environment. Ntlemeza also removed my secretary and redeployed her to Major General Khana, who had been appointed as the Head of Commercial Crime in the DPCI.

27

Lieutenant Colonel Dreyer, Captain Botha and I were removed from our posts because, in my view, we were an obstacle in the chain of command to approve, or not approve questionable procurement processes.

28

The next three months from October to December 2015, was a terrible time for me. I had just lost my mother and was part of an organisation that no longer wanted me. As a result I neglected my family, especially my two sons who were writing matric (grade 12) at the time. I felt as if I was a bad wife, a bad mother and a bad worker. This affected my health terribly, both physically and emotionally to the point that I was depressed. I couldn't sleep and my blood pressure was out of control. I felt as if I was about to suffer a total emotional breakdown. When I received calls from Ntlemeza while at home, I would have a physical alarmed reaction that would cause me to jump up and leave the room where my family was. It did this so that they could not hear Ntlemeza shouting at and berating me as this would have upset them too. It upset my husband to the extent that he wanted to grab the phone out of my hand and tell Ntlemeza exactly what he thought of him. I didn't dare let him do that for fear of losing my job. I equated this constant bullying by Ntlemeza as someone suffering from Battered Wife Syndrome, as that is exactly how I felt at the time.

29

After my recall and placement at Training, Ntlemeza never called or spoke to me during those three months. On 2015-12-15 Ntlemeza summoned me to his office and told me that my services were no longer needed and that I must go. I asked whereto and he responded by saying that someone would call and inform me. He then got up and left his boardroom without saying another word. I left the office and went on leave. I attempted to secure an audience with Deputy National Commissioner, Lieutenant General Mgwenya (hereinafter referred to as 'Mgwenya') but I was not successful. I then returned to the DPCI offices after I returned from my leave so that I would not be regarded as being Absent Without Leave (AWOL). I knew that if had done so, it would have provided an excellent reason to fire me. Eventually Major General Matakata summoned me to her office and enquired as to why I was still at the DPCI offices. I told her that I had nowhere to go and asked if she knew where I should report to. She stated that she was also unaware of where I should go. On 2016-02-08 I was informed by the office of Kruser that I had to attend to a meeting at SCM Head Office in Silverton. I attended the meeting, which was chaired by Kruser who informed me that I had to report to the then Inspectorate Division, which is now known as Management Intervention. I was informed that I will be the Section Head: Support Services, based at the Opera Plaza building in Pretoria.

30

I only realised fully the extent of the damage this episode had done to me when I attended a Strategic Planning meeting late in 2018. After Lebeya had been appointed as the National Head of the DPCI, Mgwenya informed me, in the presence of Lieutenant General Ntshiea that I could return to the DPCI. I was so shocked and

alarmed at this that I had a sudden uncontrolled emotional outburst and refused outright, in a raised voice that I would not return. After all I had been chased away from the unit because I was apparently useless in the eyes of Ntlemeza and all these other Generals had turned their backs on me. I told them that they could take me to court if they so wished. That night I could not sleep because my stress had returned as to what may happen if I did go back to the DPCI. Eventually, and by the grace of God, nothing came of this and I am still at Management Intervention to this day.

The following questions were put to me in person by the Commissioner of Oaths and I entered the answers thereto in my own handwriting:

Do you know and understand the contents of this declaration?

Yes

Do you have any objection in taking the prescribed oath?

No

Do you consider the prescribed oath to be binding on your conscience?

Yes

I swear that this statement is the truth, so help me God.

Vermaak

R VERMAAK

I certify that the deponent has acknowledged that she knows and understands the contents of this declaration which was sworn to before me and the deponent's signature was placed thereon in my presence at Pretoria on this the 8th day of February 2019 at 17 h 15.

PIETER SENEKAL
Commissioner of Oaths
Republic of South Africa
South African Police Service
Management Intervention
Complaints Management and Coordination
231 Pretorius Street
PRETORIA
Brigadier: Persal 00878715

ANNEXURE "JWB21"

IN THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NUMBER 9799/2015

MAJOR GENERAL JOHANN WESSEL BOOYSEN **Applicant**

And

NATIONAL HEAD OF THE DIRECTORATE FOR

PRIORITY CRIME INVESTIGATION **First Respondent**

MINISTER OF POLICE **Second Respondent**

JUDGMENT

VAN ZYL ,J:

1. The applicant, a serving officer in the South African Police Service holding the rank of Major-General, was appointed as the Provincial Head of the Directorate for Priority Crime Prevention for KwaZulu-Natal with effect from 1 March 2010. By notice issued by the first respondent and dated 14 September 2015 he was suspended from duty with immediate effect. A copy of the notice is annexed marked "D" to the applicant's

founding affidavit and will for convenience hereafter be referred to simply as the suspension notice.

2. In terms of the suspension notice it was issued by virtue of the provisions of Regulation 13(1) of the South African Police Discipline Regulations, 2006 (the Regulations), as promulgated in terms of section 24(1) of the South African Police Service Act, 1995 (Act 68 of 1995) and published on 3 July 2006. Regulation 13 is headed "Precautionary suspension" and sub-regulation (1) provides as follows-

> *"The employer may suspend with full remuneration or temporarily transfer an employee on conditions, if any, determined by the National Commissioner."*

3. In terms of the definitions contained in Regulation 1 the employer is defined as the National Commissioner of Police or "*any person delegated by him or her to perform any function in terms of these Regulations*". During argument counsel advised that the parties are *ad idem* that the first respondent was duly vested with the necessary authority to issue a suspension notice in terms of Regulation 13(1).

4. The applicant initiated proceedings by way of an urgent application issued on 17 September 2015 and seeking to set aside the suspension notice. The first respondent gave notice of intention to oppose. The second respondent, being the Minister of Police, was merely cited as an

interested party and abides the decision of the court. For convenience the first respondent is herein referred to as the respondent. The matter came before Sishi J on 21 September 2015 when it was adjourned by consent to a date to be allocated for opposed argument and directions were given regarding the exchange of affidavits and heads of argument. The matter then came before me for argument 27 October 2015.

5. The application was carefully framed so as to avoid being couched as an administrative review. On the approach taken by the applicant the nature of the proceeding is one attacking the validity of the first respondent's decision on the principle of legality. The applicant contends that the decision to suspend him was unlawful because it was taken *mala fide*, for some ulterior purpose and was not one the respondent could reasonably have arrived at if he had actually considered the relevant facts, including the representations made by the applicant prior to his suspension.

6. By contrast it was submitted on behalf of the respondent *in limine* that the nature of the application was one of an administrative review which could only competently be brought in terms of the provisions of the Administrative Justice Act 3 of 2000 (PAJA) and then only where the conduct complained of was a decision taken by an administrative functionary and was an administrative act.

7. In developing his argument Mr Mokhari SC, who appeared for the respondent together with Mr Abraham and Mr Mokhatla, drew attention to the decision of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paragraphs 44 – 45 and submitted that there was no distinction between judicial review under the Constitution or in terms of the common law and that the latter had been subsumed by the enactment of PAJA, which now provides for the review of administrative action.

8. With reference *inter alia* to the decision in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) counsel submitted that it was trite law that a decision to suspend or dismiss a State employee did not amount to administrative action or conduct, was therefore not susceptible to review before this Court which lacked jurisdiction to hear the matter and by reason thereof the application stood to be dismissed.

9. Mr Van Niekerk SC, who appeared with Ms Allen for the applicant, submitted that the applicant placed no reliance upon PAJA at all. In this regard counsel emphasized that the application was premised upon the principle of legality and which fell beyond the scope of administrative action as contemplated in PAJA. In short, counsel submitted that

whereas PAJA required the action to be impugned to be administrative action as defined in the Act, the principle of legality extends into a broader constitutional field beyond this requirement.

10. In *Chirwa* (supra) and with reference to the dismissal by Transnet of the applicant, Ngcobo J considered that the act of dismissal amounted to the exercise of a public power because it was vested in a public functionary, who was required to exercise such power in the public interest (at para 138).

11. The courts have recognized their ability and indeed a duty to scrutinize all aspects of the exercise of public power which must comply with the prescripts of the Constitution. In *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA), Nugent JA remarked upon this developing approach at para 60 and at para 61 endorsed the views of Professor Hoexter in her work Administrative Law in South Africa 2 ed at page 254 where the learned author suggested that in time constitutional review based upon the principle of legality and administrative review were likely to converge.

12. In this regard counsel for the applicant also drew attention to the recognition of a process for judicial review under the principle of legality. In *Khumalo and Ano v Member of the Executive Council for Education:*

KwaZulu-Natal (2014) 35 ILJ 613 (CC) Skweyiya, J stated at para 28 that;

> *"The principle of legality is applicable to all exercises of public power and not only to 'administrative action' as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational."*

13. With reference to the decision in *Pharmaceutical Manufacturers Association* (supra) as relied upon by counsel for the respondent, counsel for the applicant referred to the remarks at para 17 of that judgment where the Constitutional Court outlined the different ways in which the exercise of public power was regulated by the Constitution, with one of them being constitutional controls flowing from the doctrine of legality. In *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA), Navsa JA, relying upon this passage, remarked that *"This is the principle of legality, an incident of the rule of law."* (at para 1) and at para 47 said that:

> *"In present-day jurisprudence acting with an ulterior motive or purpose is subsumed under the principle of legality. Section 6(2)(e)(ii) of PAJA makes administrative action taken for an ulterior purpose or motive subject to review. The classification of an action taken by a member of government is immaterial. As stated at the commencement of this judgment, the legislature, the executive and judiciary, in every sphere, are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law."*

14. Finally counsel for the applicant handed up a transcript of the very recent judgment in the matter of *The South African Broadcasting Corporation Soc Ltd and Others v the Democratic Alliance and Others* (393/2015) [2015] ZASCA 156 (8 October 2015) and drew attention to para 59 where the court of appeal summarized the current approach with reference *inter alia* to the decisions in *Pharmaceutical Manufacturers Association* (supra) and *Scalabrini Centre (supra).*

15. In the light of the above I am persuaded that counsel for the applicant are indeed correct in their submission that the court is entitled to consider the present application as one based upon the principle of legality and the respondent's argument *in limine* must fail.

16. It is common cause that on 11 August 2015 the respondent served notice upon the applicant (annexure A to the founding affidavit) calling upon him to make written representations as to why the respondent should not place the applicant on suspension pending (the outcome of) an investigation into certain allegations against the applicant.

17. The allegations, according to the notice, attributed the following misconduct to the applicant, namely that;

    (a) During October 2008 the applicant had recommended himself and certain members of his then unit for cash rewards of R15 384-62

each together with a certificates (of commendation) by the National Commissioner (of Police);

(b) Such recommendation amounted to a fraudulent misrepresentation by the applicant, in that the case dockets referred to in support of the recommendation had no relevance to the killing of a Superintendent Choncho and by way of example reference was made to Howick CAS 106/08/2008.

(d) It was further alleged that as a result of such misrepresentation the sum of R15 384-62 was paid to the applicant and to other officers then under his command in circumstances where no monetary awards should to have been made.

18. It is likewise common cause that the applicant, by letter dated and delivered on 17 August 2015 (annexure B) responded to the notification in considerable detail and that the respondent thereafter in a written notice dated 14 September 2015 (annexure D) suspended the applicant from his employment with immediate effect.

19. The relevant portions of the suspension notice (annexure D) advised the applicant, as follows:-

> *"3. Serious allegations exist against you which warrant an exhaustive investigation and possible disciplinary charges being preferred against you. I have considered your representations and am of the view that there is basis for placing you on precautionary suspension pending finalization of the contemplated investigation.*

4. *This letter now serves as formal notice of your precautionary suspension with full remuneration of your employment by the Directorate for Priority Crime Investigation ("DPCI"), effective immediately until completion of the investigation and/or possible disciplinary proceedings related to gross misconduct, dishonesty and misrepresentation with the intention to defraud the DPCI; alternatively, the South African Police Services ("SAPS")."*

20. The approach of the applicant at the outset is premised upon the alleged unlawfulness of the decision to suspend him. Counsel submitted that such a suspension could only be justified where firstly the employer had reason to believe both that the employee had engaged in serious misconduct and in addition that there was some objectively justifiable reason to deny the employee access to the workplace during the intervening period whilst the investigation was in progress.

21. The applicant contended that in all the circumstances of the matter the respondent could not have harbored any *bona fide* belief that any misconduct had in fact been committed and even less so that the applicant himself had committed any misconduct. In this regard it was submitted that there could have been no facts at the disposal of the respondent to give rise to any such belief.

22. In developing his argument counsel for the applicant submitted that in giving the initial notice (annexure A) the respondent contended that the information at his disposal revealed that the applicant had made a fraudulent misrepresentation and in particular had cited case dockets in

support of his alleged recommendation for the making of monetary rewards, *inter alia*, to himself. In this regard specific reliance was placed upon Howick docket CAS 106/08/2008.

23. The applicant had, in response thereto, pointed out that the body of the submission (annexure C to the applicant's founding affidavit) had been prepared by then Superintendent W. Olivier, but utilizing a standard format document which reflected the signatory as the applicant. However, because the applicant himself was a potential beneficiary, he had transmitted the draft to his then superior officer Assistant Commissioner P T Brown, the Provincial Head of Detectives, who considered the proposals contained therein and made the actual recommendation for R10 000-00 .

24. When the recommendation document itself is examined, it is apparent from its heading that enquiries in regard thereto are to be directed to Senior Superintendent Aiyer and/or Superintendent W Olivier. It is marked on its first page for "ATT: DIR BOOYSEN", suggesting that the author(s) of the draft intended the Applicant as its recipient. It is also clear from the list of potential beneficiaries on the first page that the applicant's name is at the top of the list, so that if he were to have considered the proposals and to have made any recommendation

thereon, he would have found himself in a situation of a conflict of interests.

25. The typescript of the document deals with the background and motivation for awards to be made to the various beneficiaries and concludes with space for any recommendation to be entered in longhand under a heading "Comments:", followed by a line where a signature is to be affixed. Here the name of the applicant appears in print, but had been deleted and a stamp with the name of "Asst. Comm. P. T. Brown" affixed in its place together with his apparent signature. In the space provided for comments the following appear in longhand, namely;

> *"Recommended that members receive a certificate of commendation by the National Commissioner and an incentive of R10 000-00."*

26. Beneath the place for signature of the recommendation and in typescript under the heading "Award Options:" appear two categories, namely monetary awards and non-monetary awards. The monetary award options are listed in order of priority, starting with the highest award being the S A Police Service Gold Cross for Bravery coupled with a monetary award of R35 000-00 (plus applicable tax) and ending with the lowest award to a police official, being a Certificate of Commendation from the National Commissioner coupled with a monetary award of R10 000-00 (plus applicable tax).

27. In context the document suggests that the draft, without any entry under the heading "*Comments*", was submitted to Assistant Commissioner Brown who, having considered its contents, decided firstly upon the making of a recommendation for a monetary award and secondly at what level that award should be recommended. Having made a decision he entered his recommendation in longhand under the "*Comments*" heading and signed the document before forwarding it for consideration by the relevant authorities.

28. In his written response to the notice of intention to suspend him the applicant stressed that he had no hand in compiling or making the recommendation concerned, either in draft or final form. He also attached thereto an affidavit by Lieutenant Colonel (previously Superintendent) Olivier, now retired, wherein the latter confirmed that he had forwarded the draft recommendation, which had been prepared in his office, to the applicant for consideration but that the applicant had declined to do so because he considered it inappropriate. At a later stage he again had sight of the recommendation which by then had been signed by Assistant Commissioner P T Brown and who had also "*written a recommendation in his own handwriting.*"

29. The affidavit of Olivier, in its penultimate paragraph, also referred to the issue of the case dockets to which reference was made in the letter of recommendation and explained that both CAS 106/8/2008 and CAS 107/8/2008 represented typing errors and that the "8" in each of them should have been a "9". He pointed out that these two dockets were opened after "the shooting". With reference to paragraph 3 of the letter of recommendation it is apparent that these dockets were alleged to have been opened following a shooting which occurred near the Cedara turn-off on the N3 highway in the Howick area on 16 September 2008 and in which two alleged suspects were killed. The letter of recommendation, at the end of paragraph 3 states that "*The following cases were opened: Howick CAS106/8/2008: Attempted Murder and possession of unlicensed firearms - Howick CAS107/8/2008: Inquest.*" In his affidavit Olivier said that the charges in Howick CAS106/9/2008 related to charges opened against the police members involved in the shooting and that Howick CAS107/9/2008 related to the inquest into the deaths of the alleged suspects.

30. In his response the applicant also pointed out that the monetary reward involved was R10 000-00 and not R15384-62 as alleged by the respondent in the suspension notice. That too is apparent from the scale of possible awards contained at the conclusion of the letter of recommendation (annexure C). The applicant further pointed out that

Howick "*CAS 106/08/2008*" did not relate to "*a house breaking* case" as alleged to by the respondent in paragraph 5 of the suspension notice, but in fact to theft of a motor vehicle. He then drew an analogy between these errors and the typing errors relevant to the Howick dockets and observed that errors of this nature did not establish that any misrepresentation was intended.

31. In his written response the applicant also dealt with the other dockets referred to in the letter of recommendation, but which were not specifically referred to by the respondent in the suspension notice. The allegation of a general nature as contained in the suspension notice was to the effect that the case dockets referred to therein "*have no relevance whatsoever to the killing of Supt Choncho.*" With regard to KwaDukuza CAS 150/08/08, as referred to in paragraph 2 of the letter of recommendation, it is apparent that this related directly to the killing of Superintendent Choncho on 27 August 2008. With regard to the remaining docket references the applicant explained that these related to peripheral investigations.

32. In his written response to the suspension notice the applicant in addition dealt at some length with the background and previous steps taken against him. He did so in order to demonstrate that the suspension notice was tainted by ulterior motives. In all the applicant asserted that

the docket references were relevant to the matters dealt with in the letter of recommendation and he denied both that any misrepresentation had occurred and that he had misrepresented any facts. He accordingly also denied the South African Police Service had been "*financially and reputationally*" prejudiced as alleged by the respondent.

33. Against this background the respondent admittedly issued the suspension notice and in paragraph 3 thereof asserted that;

> *"I have considered your representations and am of the view that there is (a) basis for placing you on precautionary suspension pending finalization of the contemplated investigation."*

The nature of the investigation appeared from paragraph 4 of the suspension notice, as follows;

> *".. related to gross misconduct, dishonesty and misrepresentation with the intention to defraud the DPCI; alternatively, the South African Police Service ('SAPS')."*

34. In the present application the applicant broadly repeated the facts foreshadowed in his written response to the notice of intention to suspend him. He also attached confirmatory affidavits by the former Superintendent Olivier and Assistant Commissioner Brown, both now retired. With regard to the latter the applicant alleged that some three weeks prior to his own approach to Brown, this witness had been

approached for a statement by the respondent and had made a statement which accords with the applicant's version of events.

35. In his answering affidavit the respondent denies that he personally had approached Brown for a statement but confirmed that Brown had been approached on his behalf and had given an *"unsigned statement"*, presumably to Colonel K M Mabuela, who was in charge of the investigation, but that the respondent himself had never had sight of this statement. In his confirmatory affidavit on behalf of the respondent Col Mabuela confirmed the respondent's averments relating to him.

36. What is noteworthy is that there is no denial that the draft statement obtained by Col Mabuela from Brown, in fact accorded with Brown's version in support of the applicant. Since Brown deposed to his confirmatory affidavit on 17 September 2015 and the suspension notice was issued on 14 September 2015, it follows that Col Mabuela was advised by Brown some weeks earlier that the applicant was not involved in the reward recommendation (annexure C) but that this was finalized and signed by Brown himself. What remains unexplained is why the respondent had not consulted Col Mabuela as to Brown's version of events prior to making his decision to suspend the applicant. This is all the more disturbing since an affidavit from Olivier was attached to the applicant's response to the notice of intention to suspend.

37. Despite the fact that both Olivier and Brown had deposed to confirmatory affidavits in support of the applicant's version of how the recommendation (annexure C) came to be prepared, finalized, signed and forwarded for ultimate approval, the respondent avoided dealing with their versions and did not comment in answer upon their affidavits. These therefore remain unchallenged.

38. There is also no indication that the respondent, after the applicant had pointed out that the references to the Howick docket numbers CAS 106/08/2008 and CAS 107/08/2008 were incorrect and that the correct docket numbers contained "09", signifying September 2008 events, had in fact followed up or referred to the dockets under their corrected docket numbers. Instead the respondent merely repeated, in paragraph 27.9 of his answering affidavit, that the award was based *inter alia* upon the incorrect docket numbers of which CAS 106/08/2008 related to theft of a motor vehicle and CAS 107/08/2008 to housebreaking.

39. In fact, there is no substantive indication that the respondent had read and considered, or followed up upon, any of the material details contained in the applicant's response to the notice of intention to suspend him.

40. With regard to the applicant's averments in his founding affidavit, the respondent contented himself with broad denials of personal knowledge of the allegations. This is particularly apparent with reference to paragraph 12 of the founding affidavit where the applicant set out in detail the various unsuccessful disciplinary actions and criminal charges brought against him by various functionaries acting under the auspices of the South African Police Force. These are relevant because the alleged motivations date back to the same period and the incidents relevant to the recommendations contained in annexure C and which allegedly form the basis for the applicant's present suspension.

41. Save to admit that the disciplinary hearing presided over by Adv Cassim SC had exonerated the applicant and recommended his immediate reinstatement, the respondent denied personal knowledge of the remaining averments contained in paragraph 12 of the founding affidavit and "*put the applicant to the proof thereof*".

42. In my view the respondent's claims of personal ignorance do not raise any real or substantial conflicts of fact regarding the history of unsuccessful attempts to discipline or charge the applicant.

43. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), Corbett JA stated at page 634 H – 635 B;

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858(A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H)."

44. The respondent nevertheless, in answer to the applicant's direct allegations of *male fides* for ignoring Brown's version of events, responded to the applicants averments in paragraphs 24 and 25 of his founding affidavit by merely denying that he ever had sight of Brown's unsigned statement and then expressed the unsupported opinion in paragraph 29.2 of his answering affidavit that the applicant;

> *"... was clearly the author of the memorandum referred to in paragraph 25 of his affidavit* (annexure C) *and a careful scrutiny of this document, reveals this. It was with respect, an afterthought that the applicant could not sign the document as he was one of the recipients of the incentives. I have no knowledge of the remainder of the allegations herein. I deny that my conduct is unlawful and male fide and put the applicant to the proof thereof."*

45. The respondent also neglected to explain why, in the absence of personal knowledge, he failed to enquire into the background events relevant to

the applicant and the allegations against him before exercising his decision to suspend him. In his response to the notice of intention to suspend the applicant had pertinently in paragraph 12 of annexure B alleged that;

> *"... I should point out to you, that after months of investigation by Major General Mabula and a team of detectives, and Mr Glen Angus from IPID guided by at least six prosecutors, I was never charged for fraud in this regard. This also raises another question, as to who 'has recently' brought the so-called misrepresentation, as stated in your notice, to your attention? The only explanation I can conceive of is that it comes from Major General Mabula or some-one from his team. He, as well as his team, has had the disputed documents in his possession since 2012."*

46. In seeking to justify the suspension the respondent did not deal with any of the detailed background matters raised by the applicant. Instead he stated in his answering affidavit that;

> "[23.2] *The applicant's allegations of ulterior motives and mala fides have no basis. They are merely conjecture. What the applicant is simply doing in this instance is to refuse to submit himself to the discipline of his employer as applicable to all members in the ministry of police.*
> *[23.3] All the employer seeks to achieve is to conduct a thorough investigation into the serious and prima facie allegations of misconduct against the employee. ...*
> *[23.4] The applicant has appeared in a disciplinary inquiry before and was exonerated. There is no reason whatsoever for this unfounded allegations by the applicant. The employer is within its right to suspend the employee while it investigates the allegations of serious misconduct against an employee."*

47. These responses are also relevant against the background of the events to which the applicant referred in his founding affidavit. They represent

opinion, unsubstantiated by factual averments in support of the conclusions to which the respondent claims to have come.

48. By blandly asserting to be within his rights to suspend the applicant while he investigates suggests an unfettered and arbitrary discretion, to be exercised at will as a matter of entitlement, irrespective of whether the allegations objectively have any merit.

49. In my view the discretion to suspend must have a rational basis before it can lawfully be exercised. Suspension, even with full benefits, has a drastically adverse impact upon the subject of the suspension. Where, as here, the suspension is effected based upon allegations of fraud, dishonesty and misrepresentation the inevitable stigma attaching to and the assault upon the dignity of the subject of the suspension is exacerbated.

50. Section 22 of the Constitution of the Republic provides that;

> *"[22] Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."*

51. With regard thereto Ngcobo J held in *Affordable Medicines Trust and Others v Minister of Health and Others*2006 (3) SA 247 (CC) at paragraph 59 that;

> *"[59] What is at stake is more than one's right to earn a living, important though that is. .... One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence'"*

52. The interconnection between the right to dignity and the right to work is well recognized (*Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC), Leeuw AJ at paragraph 35). An unjustified and arbitrary suspension from employment is thus constitutionally offensive, despite the fact that the suspension is with full benefits.

53. In the circumstances of the present matter the respondent sought to emphasise that the allegations were serious and that the suspension was a precautionary measure pending investigation thereof. But what remained unanswered were the applicant's assertions that the subject matter of the allegations were not new, had been the subject of investigation in the past and against the background of sustained unsuccessful efforts to suspend or discipline him, amounted to a sinister attempt again to remove him from office on a pretext, for reasons which remain unclear.

54. There is no indication from the answering affidavits when the investigations of Colonel Mabuela commenced, but merely that the

allegations had, according to paragraph 1 of the notice of intention to suspend dated 9 August 2015, "*recently*" come to the attention of the respondent. There is also no indication of how these allegations came to his attention, nor what steps, if any, the respondent took to verify the facts contained in the applicant's written response to the notice of intention to suspend him.

55. The suspension notice itself merely records in paragraph 3 thereof that the respondent had considered the applicant's representations, but without comment upon their validity. It continued that "*there is a basis*" for placing the applicant upon a precautionary suspension, but without elaboration as to what such basis comprised.

56. In his answering affidavit the respondent referred to alleged inaccuracies in the written recommendations (annexure C) but without dealing with the applicant's explanations thereof, or with the impact of such alleged inaccuracies upon the adjudication process when the awards were made.

57. In paragraph 19.11 of his founding affidavit the applicant alleged that before any reward was paid, the recommendation therefor was scrutinized and approved by Awards Committees at provincial and national levels. The respondent in reply avoided responding thereto. It thus remains unclear whether the verification process relating to the

recommendation bearing the signature of Brown, was in fact misled by any matter contained in the recommendation. Nor was it demonstrated, with reference to the "*correct*" docket numbers as identified by the applicant in his response, that the content of the recommendation was materially incorrect or misleading. Apart from the incorrect Howick docket numbers the remaining content of the recommendation has also not been shown to be materially inaccurate, nor has the respondent demonstrated that it did not comply with the criteria for such recommendations and awards.

58. With regard to docket reference numbers it is not in dispute that the second set of numerals reflects the month of the year in which the docket is opened. In this instance the events to which the recommendation (annexure C) refer in paragraph 3 thereof commenced with effect from 15 September 2008 and culminated in the shooting which occurred on 16 September 2008. It was then alleged that as a result Howick docket numbers CAS 106/08/08 and 107/08/08 were opened. This is not the kind of error which is likely to mislead even a junior police official. The probabilities of the experienced members of the Awards committees being misled, appear remote.

59. In the end the nature of the allegations being levelled against the applicant may be summarized as follows. In the first instance the

allegation was made that the applicant had recommended himself for a monetary award of R15 384,62. It has been conclusively shown that the award was only R10 000,00 and that the level of the award was as determined and written in longhand by Brown at the conclusion of annexure C. It is thus clear that the respondent's information on the amount of the award was mistaken, as was his information that it was the applicant who made the recommendation.

60. Secondly the incorrect Howick docket numbers have been shown to be typing errors and there is no suggestion that the correct docket numbers (CAS 106/09/08 and CAS 107/09/08), as identified by the applicant in his response to the respondent, did not in fact relate to the submissions contained in paragraph 3 of annexure C. Nothing sinister can therefore be inferred from the inclusion of the incorrect docket numbers in the recommendation.

61. Thirdly it was alleged that the general content of the recommendation was misleading and amounted to a misrepresentation and, impliedly, that it did mislead the awards committees at provincial and national levels into making the awards to the various members concerned, including the applicant. As already discussed, there is an insufficient factual basis for drawing the conclusion that the recommendation was misleading. But, even if it were, then there is not a shred of evidence that

the applicant was in any way involved in formulating its content and the respondent's conclusion to the contrary is, at best, entirely speculative.

62. The claim that as a result of the conduct of the applicant the South African Police Service has suffered prejudice is not sustained by the facts before the court. The claim that it suffered reputational damage is without merit, particularly since there is no suggestion that awards of this nature are ever published for general information.

63. The applicant has pointed to the series of actions taken against him as being indicative of the respondent acting with an ulterior motive. Whilst denying such a motive, the respondent has not placed in dispute the previous actions taken against the applicant, or that they were unsuccessful. A strong suggestion arises that there is an ongoing move, possibly even a campaign to unseat the applicant. But there is not sufficient evidence before the court to draw firm conclusions in this regard and neither party has sought a referral for the hearing of oral evidence in order to resolve these factual conflicts.

64. What is however noteworthy is that the respondent had embarked, for reasons unclear, upon a course of action as against the applicant which was unsustainable upon the information at his disposal. When the applicant responded with detailed and motivated submissions to the

notice of intention to suspend him, the respondent effectively ignored these and proceeded with the suspension in any event. When the applicant instituted the present application to set aside the suspension, the respondent doggedly opposed the relief sought.

65. One of the grounds of opposition was that the matter was not urgent. This ground was persisted in despite the fact that the matter had been postponed for the exchange of affidavits before being enrolled for opposed argument. There are, of course, degrees of urgency. But counsel for the applicant drew the analogy between offending against the right not to be unlawfully suspended from employment and the right not to be unlawfully detained. Both are constitutionally offensive. Relying upon the remarks in *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA) at paragraph 10 where Malan JA said that "*A 'detained person has an absolute right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention*", counsel for the applicant submitted that an unlawful suspension likewise should not be tolerated for any longer than absolutely necessary and that the matter was therefore one of sufficient urgency to be heard and determined. I agree.

66. Given the circumstances counsel for the applicant submitted that the proper order would be one granting the alternative relief sought by the

applicant and as set out in paragraph 44 of his replying affidavit. This envisages the setting aside of the suspension of the applicant as originally sought, but in addition that the suspension would remain ineffective for the duration of any disciplinary proceedings brought against the applicant and arising out of the notification issued to the applicant and advising him of a departmental investigation regarding "*fraud*". A copy thereof is attached to the notice of intention to suspend (annexure A) previously referred to. The fraud allegation is the same allegation contemplated in the notice of intention to suspend.

67. The respondent's objection to the alternative relief thus contended for was based upon the submission that it was impermissible for the applicant, in reply, to seek relief in the alternative which differed from that which was sought at the outset. The approach to this issue was authoritatively restated in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) by Ngcobo, J in paragraph 9, as follows;

> "*The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed' These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?*"

68. In the present matter the respondent was aware of the additional relief which the applicant intended seeking (as foreshadowed in his replying affidavit) in good time prior to preparing for the hearing. The "*fraud*" is the same issue which formed the subject matter of the complaint about the suspension from the outset and dates back to 2008. There is no serious suggestion that the documents relevant to such investigation could be vulnerable to interference by the applicant, whose undisputed averment was that these have been in the possession of various investigators for some years. In any event and despite that, as already indicated, there is not even *prima facie* evidence that such fraud had been committed, or if it had, that the applicant is implicated therein. Against the background of sustained unsuccessful attempts in the past to remove the applicant from office, it is not unreasonable to suppose that further attempts in this regard may be made, despite the paucity of evidence against the applicant. In my judgment relief, in the nature of the alternative relief now sought by the applicant, is justified in all the circumstances and no injustice would result from the granting thereof in the form contained in the order set out below.

69. With regard to costs it is not in dispute between the parties that the employment of senior counsel by each side was justified, in each instance assisted by a junior counsel. The applicant, however, seeks a

costs order as against the respondent personally on the scale as between attorney and client.

70. In *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA), Navsa JA remarked in paragraph 52 that;

> *"Our present constitutional order is such that the state should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of their constitutional rights."*

In the same judgment and in relation to the issue of costs the learned Judge of appeal in paragraph 54 said that:-

> *"The special costs order, namely, on the attorney and client scale, sought by the board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers.'*

71. The respondent in the present matter may well give serious consideration to the *caveat* thus expressed by the supreme court of appeal. However, upon the totality of the information before me I am not persuaded that, for present purposes, an order for costs *de boniis propriis* against the respondent personally would be justified. The conduct of the respondent nevertheless deserves censure and as a mark of the court's disapproval I consider that costs on the scale as between attorney and client would be justified.

72. In the result I make the following order, namely:-

a. The suspension of the applicant from his employment with the South African Police Service, as communicated to him by the first respondent on 14 September 2015 by written notice of that date, is hereby set aside.

b. Pending the outcome of any disciplinary proceedings instituted by the South African Police Service against the applicant and arising out of the aforesaid notice of suspension and/or the Notification of Departmental Investigation dated 11 August 2015, the applicant shall not be liable to suspension from his employment with the South African Police Service by reason thereof.

c. The first respondent is ordered to pay the costs of this application, including the costs reserved on 21 September 2015 and including the costs of two counsel, on the scale as between attorney and client.

VAN ZYL, J.

JUDGMENT RESERVED: 27/10/2015

JUDGMENT HANDED DOWN: 18/11/2015

COUNSEL FOR APPLICANT: G O van NIEKERK SC

K ALLEN

Instructed by Shepstone & Wylie Durban

Ref: MGM/KLB/CARL/26298.1

COUNSEL FOR FIRST RESPONDENT: W MOKHARI SC

F ABRAHAM

T MOKHATLA

Instructed by Hogan Lovells c/o Chapman Dyer Incorporated, Durban Ref: V Bhoola/B Naidoo

ANNEXURE "JWB22"

JOHAN WESSEL BOOYSEN

STATES IN ENGLISH UNDER OATH

1.

I am an adult male aged 59. I can be contacted on 082 632 4025.

2.

I retired from the SAPS DPCI (HAWKS) on 28 February 2017 with the rank of Major General.

3.

Prior to my retirement I was involved in a protracted litigation dispute against the erstwhile national Head of DPCI Lieutenant General Berning Ntlemeza. The High Court in Kwazulu-Natal had ruled in my favor after which Ntlemeza applied for leave to appeal – which was rejected. He subsequently petitioned the Supreme Court of appeal. The matter did not proceed since my retirement had made the SCA matter moot, and Ntlemeza thus did not prosecute the appeal.

4.

From the onset I want to state that I did not trust Ntlemeza. I will expound on the reasons should it be required.

5.

Ntlemeza has now been effectively removed from the office by virtue of a High Court order. His subsequent appeal to the SCA has now been disposed of. I have good reason to believe that he will not return to office. Hence I want to make the following disclosure to the current acting Head of DPCI Lieutenant General Matakata, whom I trust.

6.

During 2014, after the suspension and early retirement of Lieutenant General Dramat, Ntlemeza was appointed as acting Head of the DPLI.

7.

The vacant post was later advertised. I applied for the position and was shortlisted for an interview in the minister's office. The interview took place on the 19th August 2014 in Cape Town.

8.

However the following transpired before the interview at Minister Nhleko's office.

9.

On the 16th of August 2015 at about 14:50 I was met by Duduzane Zuma the son of the State President. (I will detail the circumstances that led to this meeting more fully if so required.)

10.

At the time my son Eben was present and we traveled in his vehicle.

11.

The arrangement was to meet Duduzane Zuma near Sandton Gautrain station. After missing each other we eventually met near the Gautrain station. I was standing outside Eben's car when I noticed a bla ck

Rolls Royce pull up behind us. I noticed the driver was Duduzane Zuma. After telling Eben to follow us, I got into the Rolls Royce with Duduzane. I was under the impression that it was a courtesy meeting. We drove off and had a general conversation about run of the mill issues. After driving for about fifteen minutes we entered an area called Saxon World. We pulled up in front of a heavily guarded gate. After entering Eben alighted from his car and asked me if we were at the place he thought we were. I responded in the affirmative. It was evident to me that we were at the Gupta's residents.

12.

We were taken into the house. In the foyer we were asked for our cellphones to be handed over. We were then taken to what appeared to be a lounge. One of the persons present was introduced as Mr. Gupta. I did not hear the name, but it appeared to me as Tony Gupta from newspaper photographs I had seen before.

13.

We spoke about school education and other daily issues whilst having refreshments. At one stage Mr. Gupta said to Eben if he had any business ventures that he needed to get off the ground that he should talk to them.

14.

Later on the conversation moved on to the possibility that I may become the new Head of the DPCI. I was surprised and somewhat shocked that Mr. Gupta was privy to the fact that I had been shortlisted to become the Head of DPCI. Being alive to the media hype around the Gupta's, I was hesitant to engage with him. Mr. Gupta jokingly said to me that should I be appointed that we should meet in Durban for supper. I laughed and said we can. At this juncture I felt uncomfortable and asked Eben to leave to room.

15.

I was not appointed in the post, but Ntlemeza was. His appointment came as a surprise to me because I never saw him during the interviews in the Ministers office. He also made a public statement at a National meeting in Polokwane that he had not applied for the post. Unless of course he had been interviewed separately which begs the question why he was treated differently?

16.

I want to be clear that he did not make any promises or create any expectations regarding my possible appointment as DPCI Head. I did however find it odd and disconcerting that he knew that I was a possible candidate for the post and secondly that the meeting had taken place. I certainly never solicited a meeting with the Gupta's.

17.

I do not know why I was taken to the Gupta's premises. I do however find it odd that I had been lured to their premises, three days before my interview with Minister Nathi Nhleko and a panel in the minister's office in Cape Town. The only possible yet speculative reason I can conceive of is that if I would have been appointed he wanted to create the impression that it was of his doing or input, with the resultant possible expectation of a quid pro quo in one form or another.

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

JW Booysen

ANNEXURE "JWB23"

NO ANNEXURE

There is no reference to an Annexure "JWC23" in the Affidavit

ANNEXURE "JWB24"

FUL vs NDPP, SAPS and Richard Mdluli: The judgment

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA (NORTH GAUTENG, PRETORIA)

C

ASE 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 Act3 ("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 the SCA and the CC finding the appointment of the previous incumbent, Advocate Simelane, to be unconstitutional on the grounds of his being unfit to hold office. 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 Act4 ("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.

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.

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 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 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 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 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 Act11 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 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 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.

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 Act15 ("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.

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, 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 Special Director24 may give written directions to a prosecutor within his or her area of jurisdiction who institutes or carries on prosecutions25.

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 DPP26 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:

"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 the 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 Office28 the House of Lords (per Lord Bingham) expressed the need for deference and caution, stating that 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 Act35 ("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 *National Director of Public Prosecutions v Zuma39*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 Others40* 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 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 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 follows48:

"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 the modalities of interpretation, the text, historical intent, the ethos of our culture of justification, prudential and structural considerations, and doctrine, all point 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.

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.

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 the 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 *NationalDirector 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 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

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 Energy55* 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 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.

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 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 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 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 unlawful68 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 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 is 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 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 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.

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 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 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.

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 rest 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 proceedings81 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 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 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 Act84 ("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

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 also 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 Others86* 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 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 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 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; instructed by the State Attorney

Date heard: 11 and 12 September 2013

Date of judgment: 23 September 2013

Footnotes:

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

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.

7 Act 45 of 1988

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

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

10 Act 40 of 1994

11 Act 58 of 1959.

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

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

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

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

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

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

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.

27 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 8.

28 [2008] UKHL 60 at paras 30-32

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 .

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.

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.

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

50 2013 (1) SA 248 (CC)

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

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.

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.

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

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.

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

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).

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.

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

71 2009 (2) SA 277 (SCA)

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

73 1999 (4) SA 367 (T) at 372G-H

74 2010 (4) SA 327 (CC) para 38

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.

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.

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.

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

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

87 Regulation 13(4).

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

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ANNEXURE "JWB25"

IN THE DISCIPLINARY HEARING OF:

THE SOUTH AFRICAN POLICE SERVICE ("SAPS") The Employer

and

MAJOR-GENERAL JW BOOYSEN ("BOOYSEN") The Employee

FINDINGS

Introduction

1. Major-General Johan Wessel Booysen ("**Booysen**"), the Provincial Head of Priority Crime Investigation in Kwa-Zulu Natal, was placed on suspension since 30 August 2012[1] and was charged on 13 February 2014 with misconduct.[2]

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[1] Booysen was previously suspended in terms of Regulation 13(4) of SAPS Disciplinary Regulations, i.e. suspension on full pay as a precautionary measure. The Labour Court set the suspension aside. Subsequent thereto and on 24 August 2012, Booysen was charged in the Durban Regional Court on charges relating to racketeering. This triggered the suspension of 30 August 2012. On 26 February 2014, the Kwa-Zulu Natal High Court under Case No: 4665/2010, on review, set aside the decision to prosecute Booysen on the racketeering charge. In his findings, Judge Gorven pointed out that setting aside the authorisations and decisions to prosecute Booysen does not mean that fresh authorisations cannot be issued or fresh decisions taken to prosecute if there is a rational basis for these decisions (paragraph 39).

[2] Bundle – pages 1-10

2. The Deputy National Commissioner, Lieutenant-General Mbekela, appointed me in terms of Regulation 14(1) of the SAPS Disciplinary Regulations, 2006 to preside as chairperson in respect of the allegations of misconduct made against Booysen. These findings are intended to serve before Lt-Gen. Mbekela in order enable him to deal with the matter sensibly and judiciously.

3. Advocate Feroze Boda assisted by Advocate Sumayya Tilly represented the SAPS, namely the employer party, and attorney Carl van der Merwe of Durban represented Booysen, the employee.

Complaint

4. The nub of the complaint is that Booysen conducted himself in a manner, so it is alleged, that it is likely to damage the trust relationship of employer and employee in that Booysen did not conduct himself appropriately in relation to three separate incidents.[3]

5. The three events are detailed in the charge sheet, and I propose to reiterate the essence thereof.

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[3] The charge sheet appears at pages A-J of the employer's bundle which I have designated as "the bundle". At pages 1-21 of the bundle appears the Regulations for the SAPS promulgated under Section 24(1) of the South African Police Service Act, 68 of 1995 ("the SAPS Act"). Section 20 of the Regulations identifies conduct which is tantamount to misconduct. SAPS restricted its complaint of misconduct on the provisions of Section 20(f) and (p) which respectively provides as follows:

> *"(f) conduct which is prejudicial to the administration, discipline or efficiency of a department; and*
> *(p) conducts himself in an improper, disgraceful and unacceptable manner."*

The Bongani Mkhize case

6. The contention is that Booysen attended the scene where Mkhize was shot and killed by a member or members of the Cato Manor Unit ("the Unit"). Before Mkhize was killed and on 14 November 2008, Mkhize had obtained a court interdict against the Unit, including Booysen to the effect that the Unit should not unlawfully interfere with Mkhize's person, liberty or life. Mkhize was shot and killed by members of the Unit on 3 February 2009.

7. The contention is that Booysen did not take any disciplinary action against any person arising from the court interdict nor did he take steps to ensure that the court order was complied with.

8. The employer further contends that subsequent to 3 February 2009, the objective facts showed that Mkhize was shot in the back and that all the shots in his vehicle were shot from the outside. The evidential material, namely ballistic indications, according to the employer, demonstrated that he (Mkhize) could not have shot at the police. Thus, the employer contends, Booysen failed to take steps to interrogate an internal report which and other factors, which were effectively a cover-up to protect those who killed Mkhize.

9. The further case of the employer is that those persons who were allegedly responsible for the killing of Mkhize fell under Booysen's jurisdiction and were his subordinates, and that Booysen ought to have taken disciplinary action against one or more of them.

The case of the 16 year-old boy – Kwazi Ndlovu

10. Members of the Unit were summoned to assist correctional services officers to follow a lead that certain escaped prisoners from Westville Prison were taking refuge in a house located in Esikhawini Township ("**the township**").

11. The police were pursuing one of the escapee's, Tsili Mzimela. Upon entering the house, a shoot-out took place and a sixteen year old youth, namely Ndlovu, lying on a sofa in the house was shot and killed. The employer argues that there was no basis to suggest that the youth posed a risk to the police. There was no evidence, the employer contends, that the youth fired at the police and his killing was unjustified and hence unlawful.

12. The employer's case is that the shooting of the youth was callous and unnecessary. The reports made by internal investigators sought to cover-up the shooting as being reasonable.

13. On a proper analysis of the objective facts, the employer argues that Booysen, as head of the Unit, should have taken disciplinary measures against those individuals in his Unit implicated in this matter.

The Sunday Times article of 11 December 2011

14. At the time when the Unit was under Booysen's supervisory jurisdiction as the Head of Durban Priority Crime Investigation unit (**"the DPCI"**) and on 11 December, the Sunday Times published a report of and concerning the Unit. This article is critical of the conduct of the Unit and placed the SAPS into disrepute. Booysen, it is alleged, took no action against any person in the Unit, further did not investigate the report and took no steps to discipline the members of the Unit.

General

15. Twenty eight (28) persons in the Unit were suspended during or about 11 September 2012 after Head Office investigated the matter.

16. Overall, it is contended that the Unit was not properly supervised and controlled by Booysen, was undisciplined and brought the SAPS into disrepute. Booysen is accused of mismanaging the Unit and this cast the SAPS in a poor light.

17. These three events or incidents identified above are meticulously described in the charge sheet augmented by the supporting documents in support of the employer's case. The supporting documents are identified in the charge sheet and form part of the employer's bundle.

18. Prior to evaluating the evidential material presented at the hearing, I wish to make a few general but, I believe, relevant and pertinent observations concerning the conduct of these proceedings.

General observations

19. These proceedings were marred by delays occasioned by the employer's witnesses being unavailable, or instructions not forthcoming. In the main, it is the Commissioner of Police, Ms Ria Phiyega, who conducted the proceedings by being the person in charge of giving instructions.

20. Both Mr Boda, ably assisted by Ms Tilly, conducted themselves professionally and diligently. I am grateful for the manner in which they presented a difficult and sensitive case and the dignified and excellent presentation of instructions which they carried out.

21. Ordinarily, and in my past ten years of experience chairing disciplinary enquiries, it is usually the employee that seeks delays and employs other technical defences to avoid the merits being ventilated.

22. In this case, Booysen wanted his day in court sooner than later so that he could, from his perspective, return to field duty to do that which he know best - police work - to make our society safer and workable. In my evaluation of the evidence, I will consciously scrutinise material facts uninfluenced by political considerations and motive. I do this deliberately because these entire proceedings appear to have been permeated by a political agenda.

23. In short, I propose to evaluate the probabilities by reference to objective facts to determine whether Booysen misconducted himself or not.[4] In so

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[4] The degree of proof required by the civil standard is easier to express in words than the criminal standard, because it involves a comparative rather than a quantitative test. In the words of Lord Denning, *"it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say "we think it more probable than not" the burden is discharged, but if the probabilities are equal it is not."* (see: SA Law of Evidence, Hoffmann & Zeffertt, 4th ed., page 526). Recently, the court mindful of the dicta of Wessels JA in **National Employers' Mutual & General Insurance Association v Gany** 1931 AD 187 at 199 as diluted in effect in **African Eagle Life Assurance Co Ltd v Cainer** 1980 (2) SA 234 (W) gave the following guidelines in evaluating the evidence in **Stellenbosch Farmers' Winery Group Ltd v Martell et Cie** 2003 (1) SA 11 (SCA) para [5] at 14 as follows:

> ***"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."***

doing, I wish to avoid being influenced by extraneous factors which may or may not have a bearing on the matter.

24. The material placed before me is overwhelming. The transcript of the proceedings is some 651 pages. The bundles are voluminous. Booysen presented facts contained in a host of affidavits which were not challenged.

25. The salient features underlying the charges are, however, not problematic and rather confined. This is a case which compels an adjudicator of facts to isolate the wood from the trees, and this is what I propose to do. I have read as much as I can and I have carefully considered the respective heads of argument. I am grateful for the assistance rendered to me by the legal representatives.

Evaluation of evidential material

Bongani Mkhize case

26. No direct evidence was placed before me. The witnesses who testified on behalf of SAPS could not directly implicate Booysen in any wrongdoing. Much reliance was placed on an order obtained by the late Mkhize in the Durban High Court under Case No: 13759/08 against the police including Booysen to the effect that the police and Booysen are interdicted from

"killing, injuring, threatening and harassing or in any way intimidating Mkhize".

27. Whatever the merits of the order may or may not be and whether a court ought to remind people not to act unlawfully, is not the subject matter of the investigation before me. I must, however, evaluate the relevance of the order in the light of the prevailing circumstances under which Mkhize was killed and whether such circumstances implicate Booysen in wrongdoing and, if so, to obtain an explanation from Booysen.

28. I do note that in Booysen's answering affidavit in the High Court application, Booysen deals with each of the allegations made in Mkhize's founding affidavit. I have already expressed the view that it is not my place to comment on the rationale for the consent order which has been described above. It may well have been an order by consent out of expediency on the premise that it concerned future conduct and there was no harm in an order interdicting and condemning unlawful future conduct.

29. For purposes of this hearing, SAPS contends that Mkhize was killed unjustifiably and hence the lack of any disciplinary measures against those implicated in the shooting of Mkhize (and all of them fell ultimately under the command of Booysen) implicates Booysen in conduct unbecoming of a person in Booysen's position. In this context I point out that the estate of Mkhize has sued the Minister of Police for damages arising from the killing of Mkhize by police officers in Case No: 3178/11 in the High Court,

Pietermaritzburg. The Minister has pleaded that its officers acted lawfully and reasonably in shooting Mkhize in self-defence.[5]

30. It appears that the only objective evidence which SAPS relies upon to support its contention that Mkhize did not fire at the police and therefore the police's version that they shot Mkhize in self-defence is false is the ballistic report of Captain Christiaan Mangena.[6] This report is dated 12 March 2012 whilst Mkhize was killed on 14 November 2008. The report ignores the findings[7] of Superintendent Maria Dorathea Elizabeth Stoltz ("**Stoltz**"), a chemist attached to the Forensic Science Laboratory in Pretoria. Stoltz is the chief forensic analyst at the police laboratory and concluded that exhibit "CCIRH" tested positive for primer residue. The sample was, as illustrated in the affidavit of Constable Simphiwe Charles Mkhize,[8] who attended the scene of the crime, a test strip of the right hand of the deceased, duly containerised and dispatched in terms of police process and procedure for testing in Pretoria at the SAPS forensic laboratory.

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5 Exhibit "D2"

6 Bundle – pages 106-130.

7 Exhibit "D3"

8 Exhibit "D4"

31. In my view, Captain Mangena, who prepared the ballistics report some four years later, did not have regard to the objective findings of Stoltz. It raises, to my mind at least, an improper purpose in seeking to discredit Booysen, unless there is a reasonable innocent explanation.

32. The late Mkhize was a notorious gangster. As appears in the Police docket (affidavits and extracts of which were placed before me as exhibits), Mkhize was a suspect in the murder of Nkosi Zondi. It appears that Mkhize was under investigation for a number of serious crimes carried out in the KwaZulu-Natal Province.

33. It is sad to learn that Mkhize shot at the officer involved in investigating the crimes Mkhize stood accused of. Mkhize missed and shot the investigator's young daughter instead, a child well below the age of 10. Subsequent thereto, the father of the young girl, the investigator, and the only witness to the shooting of his daughter, was murdered.

34. It is not my place to be critical of court orders, but I have grave reservations as to whether the Court interrogated the propriety of the application and the usefulness of any order which it made. What I am convinced of is a lack of expertise in the State Attorney's office and those generally briefed to present a case on behalf of the State. The opposition to the application showed no understanding of the purpose of Mkhize's application, a tactical manoeuvre to put the Police off-guard. It seems to me, sad to say, that Mkhize's application had the desired effect. The main

suspected wrong-doer manipulated the legal system to appear to be the victim.

35. I have carefully considered the report of senior superintendent J Romer, concerning the circumstances in which Mkhize was followed leading ultimately to a shoot-out between the Police and Mkhize and the death of Mkhize.

36. There is no evidential material that there was no shoot-out but only a one-sided shooting by the Police. Romer states under oath (Exhibit D5) that he found a firearm on the passenger side of Mkhize. He "carefully lifted ... using a single finger through the trigger guard method ... upon sniffing around the muzzle of the barrel, I distinctly detected the smell of gunpowder that had recently been burnt with the discharge of a round or rounds of ammunition." Romer is a colonel in the SAPS and received intensive musketry training at the SA Police and, other than formal education, is experienced in the discharge of firearms.

37. I have difficulty understanding the case against Booysen when there was a thorough internal investigation in the Mkhize shooting and no evidence was found implicating any policeman in any wrong-doing in the incident involving the shooting of Mkhize. Christopher Vorster, employed as an assistant director in the Independent Police Investigative Directorate ("IPID"), described that if there was any suspected wrong-doing on the part of the police, in an incident such as that of Mkhize, there would be a

recommendation to the immediate Commander for an enquiry to be held. There was no such recommendation in this case.

38. The affidavit of Major General Moodley, described that there was a meeting every morning chaired by the Provincial Commissioner and attended by Deputy Provincial Commissioner, Component Heads and Provincial Commanders where incidents that occurred during the previous 24 hours are discussed. This included police shootings in particular where a senior police officer was of the opinion that a specific shooting incident warranted further attention or, specifically, a disciplinary enquiry.

39. The affidavit of Major-General Patrick Thomas Brown ("**Brown**") (which I deal with more fully below) was to the effect that at the material time he was the Provincial Head, Detective Services, and he was accountable to the Deputy Provincial Commissioner. He further elaborates in his affidavit that, when the interdict court papers were received at provincial Headquarters it was Provincial Commissioner Ngidi that gave directions that Booysen deal with the matter with the assistance of Legal Services.

40. The nub of the complaint is that Booysen should have done more to ensure that the Court Order was complied with, i.e., that police officers were not to pursue or unlawfully harm Mkhize. I find no persuasive reason to indict Booysen of any wrongdoing in the shoot-out whereby police officers pursued Mkhize, which resulted in Mkhize being killed. The other complaint is that Booysen was *de facto* in control of the unit which was

involved in the Mkhize shooting and he should have thus taken disciplinary steps against the police officers involved in the shooting of Mkhize.

41. I find that there is no basis to justify a complaint of this nature. There is no evidential material cognisable in law to suggest that any police officer acted improperly and therefore it is wrong to hold Booysen to account for anything untoward. Moreover, at the relevant time the Provincial Commissioner was Hamilton Ngidi. There were two Deputy Provincial Commissioners, namely Masemola and Brown. There then followed in hierarchal order, Booysen as Senior Provincial Commander of Organised Crime. It is wrong to single out Booysen in these circumstances as being responsible to conduct any disciplinary enquiry or other investigation those police officers involved in the shooting of Mkhize.

42. There is an Independent Police Directorate who are responsible for investigating wrongdoing on the part of police officers. Additionally, the office of the NDPP will or ought to prosecute police officers who conduct themselves unlawfully.

43. The suggestion that the Independent Police Directorate were somehow undermined by Booysen is not supported by any factual content. The evidence of Col. Ayer, the direct commander of the Cato Manor Unit, that Booysen in reality controlled the "CNU" and undermined Col. Ayer, to the extent that Col. Ayer was rendered ineffective, was unpersuasive having regard to the content and quality of Col. Ayer's testimony.

44. I found Col. Ayer to be a dismal witness in material respects. He is obsessed by the notion of his own importance and his entire testimony was permeated by his political acceptability and self-importance. I find him not to be the kind of professional policeman one would expect holding the rank he holds. His tenor of evidence as I have indicated above, is one in which he emphasises his own importance but lacking in conduct justifying any usefulness. I think those in charge of the SAPS ought to carefully Col. Ayer's continuous role in the police force. In his quest for acceptance and self-importance, he was determined to tarnish Booysen's reputation and dignitas irrespective of the cost to the overall interests of the Police Force. If in fact the employer party actually believed that it could establish a case against the employee based on the evidence of Col. Ayer, this was a serious error of judgment and, worse still, a strong indication that the employer sought to create a case where one did not exist.

45. Col. Ayer's affidavit and other documentary communications he relies upon is punctuated by invective and occasionally pure hatred for Booysen. He is obsessed by the notion that there is a vendetta to have him killed – to the extent that he is paranoid. I find no substance in this speculative realm of make believe. Osander, a Greek philosopher, observed that *"envy is the pain of mind of which successful persons cause to their neighbours"*. This, think, is the case with Col. Ayer.

46. In my view, the employer has not discharged the onus to demonstrate that Booysen misconducted himself in relation to this charge. Booysen by this conduct or lack of action did not prejudice the administration, discipline or efficiency of the office with which he is associated (Regulation 20(f)), nor did he commit any common law or statutory offence (Regulation 20(z)).

The case of Kwazi Ndlovu

47 SAPS relies upon reports to the effect that members of the Organised Crime Unit stormed into the house where an alleged fugitive, an escapee from prison, was apparently taking shelter and that, in shooting the youth, Ndlovu, the police acted hastily and thereafter disappeared from the scene. There was inadequate follow-up, in particular, there was no substantiation that the firearm found next to the deceased youth was used by the youth to shoot at the police.

48. In cross-examination on behalf of Booysen, the affidavit of the then Provincial Head, Major-General Patrick Thomas Brown,[9] was introduced in evidence. Brown was in attendance at one of the hearings before me, but was not called by SAPS to testify.

49. As I understand the position, Booysen reported to Brown. In order to appreciate Booysen's defence on this charge, it is useful to repeat paragraphs 2, 3 and 4 of the affidavit of Brown who, I point out is now

[9] Exhibit "D13"

retired from active service. Brown held the position of Provincial Head, Detective Services of KwaZulu-Natal from 1 January 2000 until his retirement. Paragraphs 2, 3 and 4 of his affidavit reads as follows:

"2. *The Detective Organogram for the Province was as follows:*

> *I, as Provincial Head, was directly accountable to the Deputy Provincial Commissioner, Operations and to Provincial Commissioner. Specialised detectives in the Province who fell under General Detectives, Organised Crime, Serious and Violent Crime and Commercial Crime were under my command. In March of 2010 with the establishment of DPCI (Hawks), Organised Crime now fell under the direct command of the Deputy Provincial Commissioner responsible for the Hawks.*

3. *The four components each had a Provincial Commander who reported directly to me. They were accommodated in the Provincial Headquarters. The Provincial Commanders managed their Units at different centres within the Province. Each of the Units had a Unit Commander with Section Heads to assist him/her in the management of the Unit. General Detectives were commanded by Detective Area Heads and Detective Branch Commanders.*

4. *The lines of communications for reports to and from my office following this chain of command. This would be from the station/unit member though his branch or unit commander to the Detective Area Head or Provincial Commander to my office. I would forward these onto the Deputy Provincial Commissioner Operations and him in*

turn to the Provincial Commander. Where necessary there was also communication to National Component Heads and the National Head of Detectives. Reports on daily serious crime incidents were reported by the Unit Commanders to their respective Provincial Commanders and they in turn to me. I would then take the necessary steps to inform the relevant Provincial and National authorities. These reports were also recorded at the Provincial nodal point and discussed in depth during the daily morning Provincial crime meeting."

50. It would appear that this complaint was never raised with Brown nor did it feature in the daily morning provincial crime meetings where all relevant parties were present.

51. It is thus Booysen's case that it is peculiar that this complaint was not raised with Brown, nor at the daily meeting attended by each of the four provincial commanders who reported to Brown in his capacity as Provincial Head directly accountable to the Deputy Provincial Commissioner.

52. Booysen's legal representative, in cross-examining the case of the employer party, referred to exhibit "D16" which, as is pointed out in clause 13.4 thereof, the escapee was armed and accordingly those policemen pursuing him were required to take appropriate action. Further, that exhibit "E", an affidavit by Sergeant Tilakdharee, an assistant forensic analyst attached to the Ballistics Unit of the Forensic Science Laboratory, pointed out that on 14 April 2009, he recovered a pistol, a Vektor model,

apparently belonging to the deceased. Ndlovu, with one 9mm calibre fired bullet.

53. It is unfair, Booysen argues, to raise this matter at his doorstep at this enquiry which, he argues, is set up to unfairly discredit him. Lieutenant-Colonel Nthembu, who gave evidence on behalf of the employer testified that it was the responsibility of the immediate commander to take disciplinary steps. He, however, agreed that Booysen was not the immediate commander and that, in terms of the Regulations, the command structure regarding this incident was led by Captain Lockem, the group commander.

54. It was contended on behalf of the employer that it was obvious that the youth was an innocent bystander and that the incident called out for an investigation. I do not have enough facts and material before me to make a judgment call as to the innocence of the youth who was shot during this follow-up procedure where dangerous fugitives took shelter in the youth's home and I cannot make any reliable findings in this regard. Booysen's evidence was that when he heard about the incident, he contacted the commanding officer in the territorial area of jurisdiction who had assured him that the matter was under control.

55. I cannot be unmindful of the fact that a senior investigator with IPID, namely Mr B Ncanana testified to the effect that fingerprints were not taken of the firearm and the scene was contaminated. However, his

statement was taken 2 years after the incident and that no-one relied upon by him could have had the requisite knowledge of the contents of the incident at the material time. He further conceded that the failure to have taken fingerprints by the investigating officer constituted misconduct which should have been reported to the commander in charge.

56. According to Ncanana, Booysen was not a commander of the unit involved in this investigation.[10] This witness also confirmed that monthly meetings are held between IPID and SAPS to address issues in which IPID was concerned as to the improper conduct of a police officer. And further that the Ndlovu matter was never raised and that IPID did not bring to Booysen's attention any impropriety or improper conduct warranting further investigation.

57 The issue is whether Booysen should have followed up this investigation or not. According to Booysen, he did follow it up by calling the responsible commander of the area once it came to his knowledge that a shooting had taken place which had resulted in the death of the deceased, Ndlovu. It should further be taken into account that the NDPP declined to prosecute any policeman involved in the shooting.

58. In the premises, I am unpersuaded that anything more was required of Booysen in regard to this incident and that, holistically speaking, it cannot

[10] In paragraph 6 of Captain Ncube's statement, Lt-Colonel Oliver, is cited as the unit commander. In his affidavit dated 18 April 2012, Captain Ncube states that Mr Ncanana from IPID arrived at the scene.

be suggested that his conduct brought the SAPS into disrepute or that Booysen misconducted himself in any respect.

Sunday Times article of 11 December 2011

59. Booysen's argument is that the case of the SAPS is misplaced. Exhibit "D6" (inclusive of "D1" to "D9") read together with "D7" proved that, at the instance of Booysen, Lieutenant-Colonel Nyuswa from Port Shepstone Organised Crime Investigation Unit conducted an investigation surrounding the article published in the Sunday Times newspaper.

60. This resulted in Warrant-Officer Naidoo being cautioned and counselled. The findings are set out in exhibit "6(2)" and ancillary supporting documents form part of exhibit "D6".

61. Exhibit "D7" is an affidavit by Mr Winkelman, the Provincial Legal Officer, holding the rank of Brigadier. He was consulted by Booysen on the legal steps that could be taken against police officers depicted in the article. Similarly, the affidavit of Lieutenant-Colonel Van Rensburg demonstrates step taken to investigate the circumstances surrounding this article.[11] The further affidavits to be found at "D9" and "D10" by Mr Vorster from the Independent Police Investigative Directorate and Colonel Hoosen are further testimony to active measures adopted and implemented by Booysen against those implicated in the article.

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[11] Exhibit "D8"

62. Finally, the affidavit of Major-General Moodley[12] on this issue makes the point that it is the responsibility of the Unit Commander to institute appropriate disciplinary steps and not the Provincial Commander, unless there is an issue warranting the Provincial Commander to get involved. This is a line function and it is argued that it is wrong to simply implicate Booysen without having established a basis as to why the line manager did not carry out functions in the first place and why there were reasons for Booysen to get involved.

63. It would be wrong, in my view in the circumstances, to castigate Booysen for any wrongdoing involving the publication of the Sunday Times article and the consequences arising therefrom.

Ulterior purpose, politics and the sad reality of South Africa

64. After the appointment of Booysen as head of the Hawks in KwaZulu-Natal during March 2010, an investigation commenced under his direction into certain procurement irregularities within the SAPS.

65. Initial investigations by the investigating officer (a colonel) revealed possible corruption involving senior SAPS officers and a private individual.

66. Thereafter, the investigation took some interesting turns:

[12] Exhibit "D12"

66.1. On 10 May 2010, the Provincial Commissioner of Police, Kwa-Zulu-Natal instructed Booysen to stop the investigation;

66.2. On 19 May 2010, the Deputy National Commissioner of Police, Lieutenant-General Dramat, informed Booysen that he should continue with the investigation under the supervision of a brigadier from Pretoria;

66.3. On 31 May 2010, a preliminary report into the investigation was handed to the Provincial Commissioner of Police.

66.4. On 15 June 2010, Booysen was summoned to the office of the Provincial Commissioner where he was introduced to one of the suspects at the time and his legal representatives. The Provincial Commissioner then instructed Booysen to have the investigating officer in the investigation investigated.

66.5. On 28 June 2010, Booysen received a call from the erstwhile National Commissioner, General Bheki Cele, who instructed Booysen to continue with the investigation and not to entertain any interference. The General further informed Booysen that the investigators would report directly to him and not via the brigadier from Pretoria.

66.6. The original investigation then continued.

66.7 On 8 August 2011, Booysen caused a colonel in the SAPS (one of the suspects) to be arrested for attempting to bribe him with a R2 million payment to compromise the investigation.

66.8. On 11 December 2011, an article appearing in the Sunday Times which described the Cato Manor SVC section as a "death squad" and which also accused Booysen of being complicit in their alleged actions.

66.9. On 14 December 2011, Booysen was informed by the Deputy National Commissioner that three major generals had been appointed to investigate the allegations made in the Sunday Times. Booysen was visited by one of the generals a day or two later and offered his full co-operation.

66.10. Other events took place thereafter, but Booysen refrained from recounting them as he did not wish to "muddy the water". Suffice to say that it came to Booysen's knowledge that a certain individual had predicted that the suspension of the colonel who had attempted to bribe Booysen would be uplifted and that Booysen would be suspended.

66.11. A few days later, Booysen came to learn of the "prediction", the colonel's suspension was uplifted.

66.12. On 12 August 2012, Booysen was served with a notice of intention to suspend him and on 30 August 2012 he was suspended from active duty.

Disturbing events and evidence

67 Colonel Vassen Soobramoney ("**Soobramoney**"), formerly an investigator at the Durban Commercial Crime Unit of the South African Police Services, was briefed by Brig. Andre Lategan, the former Provincial Head of Commercial Crime, KwaZulu-Natal on 3 May 2012 to register an enquiry known as "Crime Enquiry 05/07/2010" - this related to procurement irregularity involving Capt. Aswin Narainpershad and Col Navin Madhoe ("**Madhoe**") and the director of Gold Coast Trading CC, one Toshan Panday ("**Panday**"). Madhoe is the police officer referred to above that tried to influence Booysen with a R2 million bribe, and the colonel suspended and whose suspension was uplifted.

68. Soobramoney gave detailed evidence as to a *prima facie* case of corruption involving Madhoe and Panday. Soobramoney's investigation had reached an advanced stage when he was unexpectedly visited by two senior officers from Gauteng, namely Richard Mdluli and one Lawrence. These two officers informed him that his life was in danger and that he should immediately relocate to Gauteng. He followed instructions and relocated to Gauteng, and since then has been isolated from active duty and, in a nutshell, rendered ineffective. This was some three years ago.

Soobramoney explained to me how his life has since then been a living hell because he is not allocated any work, which has resulted in him being in a state of depression and that he has more than once attempted to take his own life. His family life has been affected and all that he would like to do is to render active service, because policing is his passion and his life.

69. Soobramoney's evidence was clear. The Provincial Commissioner of police in KwaZulu-Natal, Lt. Gen. Ngobeni, as well as Madhoe and Panday were involved in corrupt practices resulting in large sums of money of the SAPS being unaccounted for; on his testimony it was clear to me that Ngobeni caused him to be, literally speaking, "orchestrated out of KwaZulu-Natal".

70. In this context, Booysen's evidence was that on more than one occasion he was summonsed to Ngobeni's offices where he was confronted with Madhoe, Panday and the latter's legal counsel to explain why he was conducting further investigations into the conduct of Madhoe and Panday. I found this bizarre - that a National Commissioner will subject her police officer to be confronted by Panday and his counsel as if Booysen was the wrongdoer. In my view this makes a mockery of policing in our country and brings the police structures into disrepute.

71. Of course, Booysen's complaint, if not the distress he finds himself in, is the fact that Madhoe is still in office whilst he is suspended. Soobramoney's investigations emanating from Panday's bank statements

reveals *prima facie* a corrupt relationship between Panday and Madhoe. Booysen's sting operation resulting in Madhoe attempting to bribe him was in conjunction with the office of the NDPP and it is a sad reflection that since late 2011, when all this took place, Madhoe is in active duty and Booysen is suspended.

72. In these circumstances, the objective facts demonstrate an agenda to get rid of Booysen because he was perceived (rightly so I may add), as a determined, professional, competent and tenacious policeman who would arduously strive to bring the wrongdoers to book.

73. I would have expected Provincial Commissioner Ngobeni to come and give evidence before me to deal with these serious and damning allegations concerning her which not only discredits the South African Police Services but suggests corruption at the highest level.

74. On the last day of the sitting, almost a month after serious allegations against the Provincial Commissioner of KwaZulu-Natal were made under oath with detailed amplification, and in rebuttal, not the Provincial Commissioner Ngobeni, but Genl. Phiyega, the National Commissioner testified

75. I do not want to be critical of Genl. Phiyega, more than is necessary. Her evidence was, evasive and unsatisfactory in material respects. Short of telling me that she took the decision to prosecute Booysen because she was unhappy with his conduct apropos the three events that I have dealt

with above (and forming the basis of the misconduct charges), she had no insight nor any knowledge of any details of the factual content relating to these events. She was sadly unable to deal with the state of play of senior police officers in particular, the Provincial Commissioner Ngobeni and Madhoe, other than to say that the concerns regarding them will be dealt with "in due course". I find this wholly unsatisfactory and supports, if not augments, the contention that the charges against Booysen were contrived to get rid of him. I would be failing in my duty not to bring this to the attention of Lt. Gen. Mbekela.

Conclusion

76. The employer has not discharged the onus of demonstrating wrong-doing on the part of the employee, Major-General Johan Wessel Booysen.

77 In my view it would be unjust not to forthwith reinstate Booysen to his position as Provincial Head of Priority Crime Investigation in KwaZulu-Natal so that he can do what he is best suited to do, that is to fight crime.

NAZEER CASSIM SC
Chairperson

Sandton, Chambers
16 September 2014

ANNEXURE "JWB26"

COLONEL B PADAYACHEE

CRIME INTELLIGENCE

PROVINCIAL HEAD OFFICE

DURBAN

KWA-ZULU NATAL

1.

I am a Colonel in the South African Police Service serving under the Provincial Head, Crime Intelligence, Provincial Head Office Durban. I was appointed in the South African Police Service in 1982 and have 36 years' service. I am currently the Section Commander at Intelligence Collection.

2.

During the period of the investigation relating to the Soccer world 2010 corruption and fraud case involving R 60 million (CAS 781/06/2010), I was the Section Commander Security Intelligence. I have been working with Crime Intelligence Project Driven investigations since 2000.

3.

During the course of the investigation large scale corruption was uncovered involving, *inter alia,* Senior SMS Police Officials, Police Officers as well as very influential and prominent Government Officials/individuals. I am aware of the existence of much evidence that is available to prove this. I am informed that for purposes of the terms of reference of this Enquiry the details of the evidence need not be set out. This evidence will be put before the State Capture Commission.

4.

One of these individuals who is implicated in this investigation is **Mr Edward Zuma** (hereinafter referred to as "Zuma"), son of the former President Jacob Zuma.

21

5.

The investigation revealed that Zuma approached Major General Johan Booysen (hereinafter referred to as "Booysen") with regard to the Thoshan Panday (herenafter referred to as "Panday") corruption cases and requested his assistance, more particularly in retrieving money, that was being withheld by the State because of the pending cases against Panday, for example, the R60 million Fraud and Corruption case which emanated from the 2010 Soccer World Cup. Confirmed factual evidence reflect that Zuma contacted Panday and that he met with Booysen. I am personally able to confirm that this is reflected in the evidence.

6.

Several intercepted calls revealed serious death threats against Booysen. During one of the intercepted communications between Panday and one **Colonel Rajen Aiyer** (hereinafter referred to as "Aiyer"), Panday said the following to Aiyer: "***the only way you can help me is to take Booysen out***". This was a serious threat which was communicated to Booysen to be vigilant and take proactive steps to safeguard himself and his family. I had personally heard this from the intercepted call.

The investigation revealed that Aiyer sounded and appeared to be desperate both financially and emotionally. It was common knowledge that he was also going through a difficult divorce.

It was further established that Aiyer was physically in possession of a fully automatic R5 Assault Rifle.

This was communicated to Section Head, Commercial Crime, Brigadier Lategan

(hereinafter referred to as "Lategan") who then took possession of the R5 rifle from Aiyer. It is unknown why he was in possession of the rifle as this is a non-standard weapon and is only issued to operational members during specific operations. For purposes of this Enquiry further elaboration in relation hereto is not required.

7.

The investigation factually revealed that Panday was desperate to get rid of Booysen. I have been privy to that factual information.

8.

The evidence at our disposal indicates that Panday liaised with several prominent high profile individuals as well as senior
Police officials to assist him in this regard. Large sums of money were also paid to corrupt officials.

9.

The investigation factually revealed that Panday requested one **Mr Deebo Mzobe** (hereinafter referred to as "Mzobe") to assist him in getting rid of Booysen ("**Clipping his wings**"). Mzobe is the cousin of former President Jacob Zuma.

This information about Mzobe being the cousin to President Jacob Zuma is public knowledge and also reported in the media.

Panday told Mzobe that they need to "***clip Booysen's wings***" and suggested to Mzobe that they have a meeting and briefing on

"how to take care of Booysen because he is obviously now standing in the way of everything". I have listened to this recording and confirm this.

Mzobe requested some money from Panday, which the latter said he will ***"sort out for him"***.

This evidence is factual and reflected in the transcripts of recordings that are in the possession of SAPS.

10.

I informed Booysen that the threats against him were serious and that Panday has sought assistance from very "powerful individuals" to deal with him and the investigating officers. These threats were communicated to Booysen on different occasions either telephonically or personally.

The above evidence is factual, received through my investigation and I can confirm that that is what the evidence reflects..

11.

The investigation also revealed a conspiracy between Colonel Aiyer, Panday and Sunday Times journalist, **Mr Wa Africa** (hereinafter referred to as "Wa Africa"). Factual evidence is available where Wa Africa requested criminal dockets from Panday. He even gave Panday the criminal case numbers. Panday, in turn, then requested these dockets from one Captain Pipes Hafajee (hereinafter referred to as "Hafajee").

Wa Afrika was well informed and he knew that Booysen was going to be arrested and suspended, He also told Panday that Booysen flew in a helicopter and blocked the path of suspects and the Cato Manor members then shot and killed the deceased in Howick case. He gave Panday the case numbers.

LP

Aiyer gave crime scene photographs to Panday who in turn gave it to Wa Africa. These photos were published with headline news "***Cato Manor Death Squad***". Booysen was thereafter charged with Fraud and Corruption as well as running a so-called "Hit Squad". Wa Afrika met with Panday at Umhlanga in February 2012.

The **main**, single witness in these charges against Booysen and members of the Cato Manor Organised Crime Unit, ironically, was the same Aiyer, whom had conspired with Panday earlier. Booysen was thereafter suspended as a result of these charges.

The investigation revealed that Aiyer was on the payroll of Panday and as a result of his (Aiyer's) actions and contribution, Panday was successful in having Booysen removed. I am able to confirm this.

11.

Further facts;

11.1 **FORMER ACTING DIRECTOR OF PUBLIC PROSECUTIONS: KWAZULU-NATAL, ADVOCATE SIMPHIWE MLOTSHWA**

The former Acting Director of Public Prosecutions: KwaZulu-Natal, **Advocate Simphiwe Mlotshwa** (hereinafter referred to as "Mlotshwa") was removed from his acting position after he refused to withdraw all Panday related matters. I drew this inference from my own conclusions as well as articles in the media.

His life was even threatened and he thereafter had bodyguards assigned to him. I physically saw him with body guards.

After refusing to withdraw the Panday related matters on the grounds that there were *prima facie* cases against Panday and others, he was replaced by current Director of Public Prosecutions, **Advocate Moipone Noko** (hereinafter refe rred to as "Noko"). I base this on my own observations and articles in the media.

Noko, within a short period of her appointment, withdrew all the cases against Panday and his associates.

Mlotshwa thereafter resigned and is now practicing as an advocate and a member of the Society of Advocates: Pietermaritzburg.

11.2 **ADVOCATE BHEKI MANYATHI** (Senior State Advocate DPP: KZN)

Advocate Bheki Manyathi (hereinafter referred to as "Manyathi"), Senior State Advocate at the Director of Public Prosecutions: KwaZulu-Natal was the prosecutor in the R2 million Corruption case against Panday and co-accused Colonel Madhoe.

At the time, Manyathi was recommended to be promoted to the position of Senior Deputy Director of Public Prosecutions as Regional Head of the SCCU, in KwaZulu-Natal. This is my personal knowledge as I knew him and I interacted with him.

His refusal to withdraw the case against Panday and Madhoe resulted in the appointment being withdrawn on the eve of his appointment. This is my own conclusion and my personal observation. This I say because of the systematic sequence of events around the Panday and Madhoe matters.

Manyathi resigned thereafter and is currently in private practice at the Society of Advocates in Durban.

Panday conspired with a Sunday Times journalist, WaAfrica and published the Cato Manor Death Squad article to discredit Booysen.

Information and photos were furnished by Panday to the journalists.

The journalists even informed Panday that Booysen was going to be removed

from the case and will be suspended.

Booysen was indeed removed from office and suspended.

These very same journalists were awarded prize money and awards for the articles they published.

The journalists and their articles were recently publicly discredited and the Sunday Times issued a formal apology to Booysen.

All prize money and awards were subsequently returned as well.

Aiyer assisted with and was instrumental in the publication of these false articles by the journalists. He supplied official SAPS photographs to Panday who in turn handed those to the journalists.

The interceptions and further investigations revealed that Aiyer was on the payroll of Panday.

He has since been dismissed from the SAPS for defeating the ends of justice.

12.

In 2012 Booysen, after much negative media coverage, was suspended from office.

COLONEL
B P DAYACHEE

LP

I certify that the deponent has acknowledged to me that he knows and understands the contents of this declaration, that he has no objection to taking the prescribed oath and considers it to be binding on his conscience.

LP 17/01/04

Thus signed and sworn to before me at ~~PIETERMARITZBURG~~ Durban on this 04th day of FEBRUARY **2019**.

~~JUSTICE~~ SGT MAJOKA

COMMISSIONER OF OATHS

LETHOKUTHULA PETER MAJOKA
SOUTH AFRICAN POLICE SERVICES
CRIME INTELLIGENCE
PROVINCIAL HEAD OFFICE
DURBAN

SOUTH AFRICAN POLICE SERVICE
PROVINCIAL CRIME INTELLIGENCE
2019 -02- 04
KWAZULU NATAL

COLONEL B PADAYACHEE

CRIME INTELLIGENCE

PROVINCIAL HEAD OFFICE

DURBAN

KWA-ZULU NATAL

1.

I am a Colonel in the South African Police Service serving under the Provincial Head, Crime Intelligence, Provincial Head Office Durban. I was appointed in the South African Police Service in 1982 and have 36 years' service. I am currently the Section Commander at Intelligence Collection.

2.

During the period of the operation in question, I was the Section Commander Security Intelligence. I have been working with Crime Intelligence Project Driven investigations since 2000.

3.

During November 2010, I was tasked by the Provincial Head, Crime Intelligence, to investigate serious death threats against the investigating officers tasked with the investigation of the 2010 Soccer World Cup Corruption, Durban Central CAS 781/06/2010 - Fraud and Corruption.

4.

Major General Moodley (hereinafter referred to as "Moodley") handed a written request to me which had been compiled by Brigadier Lategan (hereinafter referred to as "Lategan"), Section Head: Specialised Commercial Crime. The request included a statement of Colonel Van Loggerenberg (hereinafter referred to as "Van Loggerenberg") which clearly set out the threats made against the officer and his team. The threats were also physically directed at him and his family.

5.

On receiving the investigation, I immediately activated an intelligence network and initiated an application for monitoring and interception of communication in terms of Section 18 of Act 70 of 2002 (hereinafter referred to as "the application").

6.

The authorised interception was directed against the main suspect in the investigation Mr Thoshan Panday (hereinafter referred to as "Panday") and his co-accused. The information received from the report of Van Loggerenberg stated that the main suspect responsible for the death threats was Panday The investigation confirmed that the death threats were real and the investigators were informed accordingly.

7.

The application is subject to very strict and stringent protocols and has to be factual and correct in respect of every aspect.

8.

The application is first perused by the Provincial Office for Monitoring and Interception. It is thereafter forwarded to the Head Office Monitoring and Interception Section, where it is further checked and verified .

The application is then taken to the Crime Intelligence Head Office Legal Section where it is further checked for legal justification and legal principles.

9.

The application is then perused and recommended by the National

Commissioner of Police or his delegate. Currently this authority is delegated by the National Commissioner to the Divisional Commissioner of Crime Intelligence.

10.

These applications are thoroughly perused by the Divisional Commissioner and it is only recommended if he/she is satisfied that the application is *bona fide* and legally justified. Recommendations can at times take several weeks.

11.

After the application is recommended, it is taken to the Designated Judge who Authorises such applications. There is only one Designated Judge for the whole country.

12.

The Designated Judge also thoroughly peruses the application. There has been occasions where the applications were not approved or returned for rectifications or amendments.

13.

The application in question followed the relevant protocols, legal principles and was approved by the Designated Judge, Judge Khumalo on 2010/11/15 for a period of 3 months from date of approval.

14.

The approved application was referenced as Direction 235/2010. The interception data commenced from the 18 November 2010.

15.

The original data is stored at Crime Intelligence Head OIC. The OIC makes copies of the interception data on compact discs ("CDs") and these CDs are forwarded to the applicant/investigators.

16.

The data/recordings are secured by encryption codes and can only be accessed with the encryption codex.

17.

Applications for an extension (hereinafter referred to as the "extension application") of the interception Directive are also subject to the same strict protocols as the initial application.

18.

The extension application has to be well motivated setting out clearly the reasons for the extensions.

19.

Full factual reports must also be included in the extension application stating what was found during the investigation and factual reasons for the extension.

20.

Full factual reports were included in all extension applications to the Designated Judge.

21.

The factual reports and progress reports in the extension applications were such that the Judge granted several further extensions.

22.

The application was factual and had sufficient legal grounds. This is also supported by the fact that after Judge Khumalo retired, Judge Makgoro was appointed as the Designated Judge in his place.

23.

Judge Makgoro after thoroughly perusing the extension applications approved several extensions thereafter. These subsequent approvals by the well-respected Judge Makgoro further endorses the factual and seriousness of the content of the application.

24.

All interception data was managed by me and was secured in a locked safe after hours.

25.

The interception data received, are copies of the original data and are regarded as working data.

26.

Once transcripts are required for specific data, an application is made for the original data following the chain of evidence protocols.

27.

This chain of evidence protocol is also applied when the data is transcribed.

28.

All interception data is strictly managed and safeguarded within the Minimum Security Standards of Crime Intelligence Policies and Guidelines.

29.

During the course of the investigation large scale corruption was uncovered involving, *inter alia,* Senior SMS Police Officials, Police Officers as well as very influential and prominent Government Officials/individuals.

30.

One of these individuals included **Mr Edward Zuma (hereinafter referred to as "Zuma"), son of the former President Jacob Zuma.**

31.

The investigation revealed that Zuma approached Major General Booysen (hereinafter referred to as "Booysen") with regard to the Panday corruption cases and requested his assistance. Confirmed factual evidence showed that Zuma contacted Panday and confirmed that he met with Booysen. His message was **"Booysen is begging to see me" "Lets play him".**

32.

The investigation clearly established an enterprise with Panday at the helm of the syndicate and several police officials actively participating in the furtherance of the objectives of the corrupt enterprise and benefitting from the proceeds of the crime.

33.

Panday was desperate to make the case against him "go away" and was prepared to pay any amount of money to achieve this objective, including

approaching persons to assist in "taking out" investigators. Large sums of money were indeed paid out.

34.

Several intercepted calls revealed serious death threats against Booysen. During one of the intercepted communications between Panday and one Colonel Rajen Aiyer (hereinafter referred to as "Aiyer"), Panday said the following to Aiyer: "**the only way you can help me is to take Booysen out**".

This was a serious threat which was communicated to Booysen to be vigilant and take proactive steps to safeguard himself and his family.

Aiyer sounded and appeared to be desperate both financially and emotionally. It was further established that Aiyer was physically in possession of a fully automatic R5 Assault Rifle.

This was communicated to Lategan who then took possession of the R5 rifle from Aiyer. It is unknown why he was in possession of the rifle as this is a non-standard weapon and is only issued to operational members during specific operations.

35.

It was factually revealed during the investigation that Panday was desperate to get rid of Booysen.

36.

Panday liaised with several prominent high profile individuals as well as senior Police officials to assist him in this regard. Large sums of money were also paid to corrupt officials.

37.

The investigation factually revealed that Panday requested one Mr Deebo Mzobe (hereinafter referred to as "Mzobe") to assist him in getting rid of Booysen ("**Clipping his wings**"). Mzobe is the cousin of former **President Jacob Zuma.**

Panday told Mzobe that they need to "**clip Booysen's wings**" and suggested to Mzobe that they have a meeting and briefing on **"how to take care of Booysen because he is obviously now standing in the way of everything".**

Mzobe requested some money from Panday, which the latter said he will "sort out for him".

38.

The recordings of the "**clipping his wings**" conversations are available. The intercepted recordings are evidence which is included in the transcripts compiled for the Corruption matter (Durban Central CAS 466/09/2011).

39.

This threat was communicated to Booysen during briefing sessions in respect of the threats against him and the investigators.

40.

Booysen was warned that the threats against him were serious and that Panday has sought assistance from very " powerful individuals" to deal with him and the investigating officers.

41.

This included having investigating officers replaced.

42.

Factual evidence is available where force numbers of investigating officers were requested and given to high profile influential individuals to assist in having the investigating officers replaced.

43.

The investigation also revealed a conspiracy between Aiyer, Panday and Sunday Times journalist, Mr WaAfrica (hereinafter referred to as "WaAfrica"). Factual evidence is available where WaAfrica requested criminal dockets from Panday. He even gave Panday the criminal case numbers. Panday then requested these dockets from one Capt Pipes Hafajee (hereinafter referred to as "Hafajee").

Aiyer gave crime scene photographs to Panday who in turn gave it to WaAfrica. These photos were published with headline news "Cato Manor Death Squad". Booysen was thereafter charged with Fraud and Corruption as well as running a so-called "Hit Squad".

The main, single witness in these charges, ironically, was the same Aiyer, whom had conspired with Panday earlier. Booysen was thereafter suspended as a result of these charges.

The investigation revealed that Aiyer was on the payroll of Panday and as a result of his (Aiyer) actions and contribution, Panday was successful in having Booysen removed.

Due to the sensitive nature of the information revealed during the abovementioned investigation, I made several attempts to bring the

contents thereof to the personal attention of the National Commissioner and Divisional Commissioner: Crime Intelligence for urgent intervention and Guidance, with no response.

44.

During July 2015 I received a letter from the former National Commissioner, General Phiyega, ordering me to surrender the recordings to her office within 48 hours.

45.

I found this highly irregular and unlawful as I was the legally authorised applicant authorised by the designated Judge, to intercept and be in possession of the Interception recordings.

46.

The legal procedure to obtain the recordings/copy thereof or access thereto, is to bring an application in terms of Section 205 of the Criminal Procedure Act 51 of 1977.

47.

A serious threat was made that if I failed to comply with the instruction I will be charged departmentally. I was given 48 hours to surrender the recordings or face disciplinary action.

48.

I thereafter reluctantly complied and handed over the complete recorded interceptions under duress.

49.

The Acting Divisional Commissioner, General Zulu, was informed that the handing over of the recordings were unlawful and that there were pending cases which were still *subjudice*. In spite of my caution, she instructed me to hand over the recordings.

50.

The complete recordings were personally handed over by me directly to General Zulu.

51.

I am the lawful custodian of the intercepted recordings, authorised by the Designated Judge to be in possession and utilise such recordings as may be required by law for investigation and court purposes .

52.

Herewith the following relevant cases that were registered against Panday:

Durban Central CAS 781/06/2010 Fraud (R60 million) – 2010 Soccer World Cup

Durban Central CAS 122/03/2012 Fraud

Durban Central CAS 466/09/2011 Corruption (R2 million) – Bribery of Booysen

There are several other outstanding criminal cases which were not registered due to the lack of will from the NPA/DPP to prosecute Panday and his associates

54 .

All the above cases were withdrawn on a single controversial representation made by Panday. The representations were neither investigated, nor did the

Director of Public Prosecutions KwaZulu-Natal, Advocate Moipone Noko, apply her mind to the relevant cases which she declined to prosecute. Her decisions caused utter shock and discontent amongst the senior prosecutors responsible for the cases.

55.

Serious concerns were highlighted in Advocate Noko's decisions to decline to prosecute all the cases involving Panday and his associates. The timing of her decisions are also relevant as it coincided with the extension of the contract for the former KwaZulu-Natal Provincial Police Commissioner Lieutenant General Ngobeni who together with her husband, General Lucas Ngobeni, received gratifications from Panday. Factual evidence is available to support the corrupt relationship between Panday, General Ngobeni and her husband General Lucas Ngobeni.

56.

It has to be emphasised that the investigation has been fraught with intimidation, threats and interference from the outset to date.

57.

It is very clear that the SAPS and NPA were captured in respect of the criminal investigations against highly influential criminal suspects .

58 .

The evidence is available to support the above statement.

59.

Herewith a time line with chain of events which clearly indicates State Capture :

59.1 **FORMER ACTING DIRECTOR OF PUBLIC PROSECUTIONS: KWAZULU-NATAL, ADVOCATE SIMPHIWE MLOTSHWA**

The **former Acting Director of Public Prosecutions: KwaZulu-Natal, Advocate Mlotshwa** was removed from his acting position after he refused to withdraw all Panday related matters.

His life was even threatened and he thereafter had bodyguards assigned to him.

After refusing to withdraw the Panday related matters on the grounds that there were *prima facie* cases against Panday and others, he was replaced by current **Director of Public Prosecutions, Advocate Noko**.

Advocate Noko, within a short period of her appointment, withdrew all the cases against Panday and his associates.

Advocate Mlotshwa thereafter resigned and is now practicing as an advocate and a member of the Society of Advocates: Pietermaritzburg.

59.2 **ADVOCATE BHEKI MANYATHI** (Senior State Advocate DPP: KZN)

Advocate Manyathi, Senior State Advocate at the Director of Public Prosecutions: KwaZulu-Natal was the prosecutor in the R2 million Corruption case against Panday and co-accused Colonel Madhoe.

At the time, Advocate Manyathi was recommended to be promoted to the position of Senior Deputy Director of Public Prosecutions, Regional Head of the SCCU, in KwaZulu-Natal.

His refusal to withdraw the case against Panday and Madhoe resulted in the appointment being withdrawn on the eve of his appointment.

Advocate Manyathi resigned thereafter and is currently in private practice at the Society of Advocates in Durban.

59.3 ADVOCATE MOIPONE NOKO: DIRECTOR OF PUBLIC PROSECUTIONS KWAZULU-NATAL

Shortly after the appointment of Advocate Noko as Director of Public Prosecutions in KwaZulu-Natal, she withdrew all the criminal cases against Panday.

59.4 COLONEL LEN SHERRIF

Colonel Len Sherrif was the investigating officer in the R2 million Corruption case, where Panday and Madhoe bribed Booysen.

Colonel L Sheriff was falsely set up in a fraudulent sting operation by Panday and his associates and was subsequently removed as investigating officer from the case.

Panday conspired with a Sunday Times journalist, WaAfrica and published the Cato Manor Death Squad article to discredit Booysen.

Information and photos were furnished by Panday to the journalists.

The journalists even informed Panday that Booysen was going to be removed from the case and will be suspended.

Booysen was indeed removed from office and suspended.

These very same journalists were awarded prize money and awards for the articles they published.

The journalists and their articles were recently publicly discredited and the Sunday Times issued a formal apology to Booysen.

All prize money and awards were subsequently returned as well.

Aiyer assisted with and was instrumental in the false articles published by the journalists. He supplied official SAPS photographs to Panday who in turn handed those to the journalists.

The interceptions and further investigations revealed that Aiyer was on the payroll of Panday.

He has since been dismissed from the SAPS for defeating the ends of justice.

60.

In 2012 Booysen, after much negative media coverage, was suspended from office.

61.

The ongoing capture of the Criminal Justice system ensured that he did not return to his post or office.

62.

Booysen retired in 2017.

63.

Immediately after the suspension of Booysen, I became a target and was subjected to threats and intimidation.

64.

I was served with a 48 hour notice transfer from my office. I immediately appealed to the then Acting Divisional Commissioner of Crime Intelligence, General Chris Ngcobo, who intervened and caused my reinstatement.

65.

After much harassment and intimidation, including death threats, I was suspended in 2014.

66.

I was suspended for almost a year without any charges being brought or any disciplinary hearing being held.

67.

I approached the courts for intervention and the suspension was declared unlawful. I was thereafter reinstated.

68.

The threats and intimidation however still continued.

69.

Two weeks after I was suspended, Major General Anwar Dramat, National Head of DPCI (Hawks) was also suspended (on Christmas eve).

70.

A month later Mr Robert McBride, National Head of IPID was also suspended.

71.

The sequence of the events and suspensions clearly show the Political influence of Panday in respect of State capture.

72.

It was very clear that Panday was politically well connected as a result of his close relationship with the former President Zuma and his family.

73.

It is even alleged that the former President Zuma spoke directly to Panday. The recorded interceptions also revealed Panday boasting about his visits to Nkandla and contracts that he had been given by the President. One of these included a contract to build houses.

74.

The interceptions revealed that Panday openly boasted about his relationship with the President and his family.

75.

Prior to the removal and suspension of Booysen, the initial investigating officer in the case of Corruption (Durban Central CAS 466/09/2011) was removed after being set up by Panday in a sting operation.

76.

This operation was successful in removing the investigating officer Colonel Sheriff as a result of collusion and conspiracy between Panday and two DPCI investigating officers namely Colonel W S Mhlongo and Colonel C Jones.

77.

Colonel Jones arranged the sting operation and Colonel Sheriff was removed from the investigation.

78.

There are several other senior officers who also assisted Panday with his criminal enterprise, these include Detective Branch Commanders who closed criminal dockets on Panday's instruction and also took the dockets to him in return for payment.

79

It was factually revealed in the recordings that Panday was the "go to person" for Police promotions, transfers and sorting out criminal dockets/cases for suspects/accused

80.

It was clear from the interceptions that the Criminal justice system was indeed captured. This included the courts (DoJ and Judiciary), Correctional Services (DCS), S A Police Service and the NPA.

81.

The interceptions also revealed that:

- Suspects were referred to magistrates and prosecutors at certain courts where their release on bail would be guaranteed;

- Arrangements and payments were made to Correctional Service officials for suspects who had been detained at Correctional Services to be placed in hospital wards at the facility;

- Case dockets closed by certain Branch Commanders, on the instructions of Panday.

82.

This is all I wish to state at this stage.

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

COLONEL
B PADAYACHEE

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was submitted by him.
This affidavit was sworn to before me and the deponent's signature was placed ther on in my presence at Durban on 2019/01/28 at 13:30

COMMISSIONER OF OATHS

SA POLICE SERVICE
DURBAN

SOUTH AFRICAN POLICE SERVICE
PROVINCIAL CRIME INTELLIGENCE
2019 -01- 28
KWAZULU NATAL

ANNEXURE "JWB27"

Z 15 (81/142289)

SIBUSISO WILLIAM ZUNGU
STATES UNDER OATH IN ENGLISH :

1 AM AN ADULT MALE 54 YEARS UNEMPLOYED AND I AM THE WITNES IN THIS MATTER.

2.

I WAS WORKING EMPLOYED BY SOUTH AFRICAN SERVICES FROM 1996/08/01 TILL 2017/04/31. DURING MY CAREER I WORKED AT PROVINCIAL OFFICE KZN POLITICAL VIOLENT TASK TEAM UNDER BRIGADIER MADONSELA.

3.

THE YEAR 2010 I WAS TASKED TO INVESTIGATE A MURDER CASE WHERE INKOSI ZONDI WAS SHOT AND KILLED AT UMLAZI TOWNSHIP DURBAN. I ATTENDED THE SCENE AT UMLAZ ON MY ARRIVAL AT THE SCENE MEMBERS OF CATO MANOR CAPTAIN LOCKEM WAS THERE

3.

I TOOK THE SAID DOCKET FROM CAPTAIN LOCKEM FOR FURTHER INVESTIGATION. TWO SUSPECT WERE ARRESTED FOR THE SAID CASE AND ONE OF THEM MADE A CONFFESION. ON HIS CONFESION HE MENTIONED THE WHOLE PLAN THE PLACE WHERE THE CONSPIRACY TOOK PLACE AS WELL AS THE PEOPLE WHO WERE PRESENT.

4.

THE CONFESION FURTHER MENTIONED THAT THE DECEASED GAVE INFORMATION OF THE WHEREABOUT OF MAGOJELA WHO WAS

A WANTED BY THE CATO MANOR SERIOUS AND VIOLENT UNIT. THE CHAIRMAN MR MKHIZE (DECEASED) CONTRIBUTED WITH MONEY TO ASSIST MAGOJELA'S BROTHERS TO KILL THE DECEASED INKOSI ZONDI THAT IS ACCORDING TO THE SUSPECT CONFESION.

5.

THE MORNING WHEN MR MKHIZE WAS SHOT AND KILLED I LEFT IN THE MORNING TO STANGER FOR OPARATION TO ARREST THE SECOND SUSPECT. I HEARD ON RADIO THAT MR MKHIZE (DECEASED) WAS SHOT AND KILLED. I WAS APPROACHED BY MISS WILLIAMS OF IPID FOR MY STATEMENT AS MR MKHIZE (DECEASED) WAS ~~ONE OF MY~~ SUSPECT OF INKOSI ZONDI (DECEASED) CASE I FINISHED MISS WILLIAMS OF IPID WITH MY STATEMEN S.N.2

6

ON 2011/04/31 I WENT OVER TO CRIME INTELLIGENCE HEAD OFFICE. DURING THE SAME YEAR I WAS PHONED BY UNKNOWN PERSON WHO SAID HE WAS FROM THE HAWKS NATIONAL OFFICE REGARDING THE DEATH OF MR MKHIZE AND WE AGREED TO ~~MEET~~ MEET AT PINETOWN SAPS OLD MAIN ROAD. S.N.2

7.

ON MY ARRIVAL AT PINETOWN SAPS I MET ~~SIX~~ ~~A FOUR~~ FIVE INDIALES AND ONE WHITE MALE WHO THEY S.N.2.

CONT

IDENTIFIED THEMSELVES AS OFFICES FROM HAWKS NATIONAL OFFICE. WE ALL WENT TO THE BOARDROOM AND I WAS THEN TOLD THE REASON FOR THE MEETING.

8

I WAS SHOWN MY STATEMENT WHICH I MADE TO MISS WILLIAMS OF IPID AND THE FIVE OFFICES TOLD ME THAT THEY WERE NOT HAPPY ABOUT MY STATEMENT. I WAS ASKED IF WHY S.W.2 CATO MANOR, NIU WERE INVOLVED ON MY CASE (INKOSI ZONDI) ALSO WHY I DIDN'T ATTENDED THE SCENE. I WAS ALSO ASKED WHY I WAS LOOKING FOR MR MKHIZE (DECEASED) OR APPLY FOR A WARRANT OF ARREST IF HE WAS REALLY A SUSPECT.

9

I WAS ALSO ASKED IF WHY I DIDN'T MENTIONED ON MY STATEMENT THAT GENERAL BOYSEN HAD A MEETING WITH ME, CATO MANOR AND NIU AT CATO MANOR OFFICES AND GAVE INSTRUCTION TO CATO MANOR AND NIU TO LOOK FOR MR MKHIZE NOT TO ARREST BUT KILLED HIM.

10

I TOLD THEM THAT I WILL NEVER CHANGE MY STATEMENT AND I CONFIRM THAT THE DECEASED MR MKHIZE WAS MY SUSPECT. I HAVE INFORM THE SIX OFFICES THAT BOOYSEN NEVER INVOLVED ON MY CASE NOR GAVE ANY INSTRUCTION TO ARREST OR KILL

Z 15 (81/142289)

MR MKHIZE. I TOLD THEM THAT CATO MANOR AND NIU WERE PART OF THE TEAM AS THE MATTER WAS A HIGH PROFILE

11

ONE FROM THE SIX ASKED ME WHERE I WAS WORKING AND TOLD HIM I WAS UNEMPLOYED. HE WAS SO UPSET AND SAID TO ME YOU THING YOU CLEVER. ONE IDENTIFY HIMSELF AS GENERAL S.W.2. ~~BUL~~ MABULA SAID I MUST CHANGE MY STATEMENT SO THAT IT WILL MENTIONED THAT GENERAL BOOYSEN GAVE THE SAID INSTRUCTION AND THAT THE DECEASED WAS NOT A SUSPECT OF MY CASE AND I REFUSED.

12.

AS THE CONSULTATION BECOME INTOROGATION I THROW MY KEYS AND MY CEL PHONE ONE THE TABLE AND TOLD THEM THAT I REMAIN SILENCE. I WAS TAKEN TO S.W.2 THE CHARGE OFFICE ~~WH~~. WITH A HOPE TO BE ARRESTED AND THEY CHANGED THEIR MINDS AND I LEFT.

13

I THEN PHONED GENERAL BOOYSEN ASKING HIM TO MEET URGENT WHICH HE AGREE AT KENTURY AMANZIMTOTI. I WAS SO UPSET S.W.2. AND TOLD GENERAL BOOYSEN. GENERAL ASKED ME TO PUT IT DOWN IN WRITTING IF I WANTED WHICH I DID ON MY FREE WILL. I WAS NEVER FORCED, PROMISED, INTIMIDATED BY ANYONE TO MEET GENERAL BOOYSEN AND GAVE HIM MY STATEMENT

Z 15 (81/142289)

"I KNOW AND UNDERSTAND THE CONTENT OF THIS DECLARATION"

"I HAVE NO OBJECTIONS IN TAKING THE PRESCRIBED OATH"

"I CONSIDER OATH TO BE BINDING ON MY CONSIENCE

PLACE: HILLCREST

DATE: 2018/11/22.

S.N MAKUA

Elaine Regina Latchanah - States under oath in English :-

1.

I, Elaine Regina Latchanah, with PERSAL number 70017956, an Indian female, employed as a Captain in the SAPS : DPCI : Organised Crime Durban : Support Head : Kwazulu Natal, 136 Victoria Embankment : 4th floor, Room 15, Telephone Number 031 – 333 8009 and Cell phone 071 481 2460.

2.

I was placed as the Support Head : DPCI Organised Crime Durban, Kwazulu Natal on 2017/02/06.

3.

I was appointed as a Secretary to Major General Booysen in 2010. As a Secretary part of my duties were to make and receive calls including confirmation of appointments. According to my recollection a person, who identified himself as Mr Edward Zuma, requested an appointment with Major General Booysen. Mr Zuma called several times to secure an appointment. A date which I do not recall was agreed upon after consulting with Major General Booysen. Mr Edward Zuma did not inform me as to what the meeting was about. Mr Edward Zuma did arrive on the day agreed upon and met with Major General Booysen in General Booysen's office. I do not recall how long the meeting was and after the meeting Mr Zuma left.

4.

I know and understand the contents of this statement.

I have no objection of taking the prescribed oath.

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

PLACE : DURBAN DATE : 23 NOVEMBER 2018 TIME : 09 : 30

DEPONENTS SIGNATURE : .....CAPT LATCHANAHER

I hereby certify that this statement was taken down by me and that the deponent has acknowledged that he/she knows and understands the contents of this statement. This statement was duly sworn to before me and deponent's signature was placed thereon in my presence AT DURBAN ON THIS 23RD DAY OF NOVEMBER 2018 AT 09:30.

1.

.....

COMMISSIONER OF OATHS

MARIUS WIID

FULL NAMES

S.A.P.S : ORGANISED CRIME DURBAN

136 VICTORIA EMBANKMENT

DURBAN

ZONDO COMMISSION OF INQUIRY

20 November 2018

STATEMENT TO ZONDO COMMISSION OF ENQUIRY BY DUMISANI PATRICK MKHIZE

---

1. I am a 62 year old adult male with identity number 560808 5961 089, and a former policeman of 29 years. I retired from South African Police Service, SAPS on 31 August 2016 with a rank of the Lt Colonel and was Commander of Organised Crime Unit based at Richardsbay.
2. At the time of my retirement I was reporting to General Zikhali, who took over from General Johan Booysen as the KZN, Provincial Head of the Directorate of Priority Crime Investigations, ("the DPCI" or "the HAWKS"), when General Booysen was suspended.
3. During July, 6 2015, while I was on my way to Vryheid on an investigation assignment driving a state vehicle, I received a call from my deputy at the time, Major Mbatha. Major Mbatha informed me that General Ntlemeza required an urgent use of the 4x4 Double Cab which was road worthy, further saying that General Ntlemeza therefore required the very vehicle I was driving on official assignment business to Melmorth. He specifically informed that the car was demanded by General Ntlemeza immediately.
4. I informed Major Mbatha that this was not fair as I was on official trip and not on personal matters. I then asked Major Mbatha if that meant that I had to turn back and forego the assignment for which I was enroute to execute, to which he confirmed that indeed it meant that I should abandon the said official trip. Further, Major Mbatha told me that the car was required with immediate effect.
5. I was hurt to having to turn back from doing my work and that I could not go against the order to return. In the SAPS environment you do not question an instruction from your seniors, therefore I had to comply with the instruction.
6. Upon my return I drove straight to Richard's Hotel, as Major Mbatha had informed me that I had to drop-off the vehicle there to an official whose contact numbers Major Mbatha had given to me over the phone. When I arrived at Richad's Hotel I found Major Mbatha already waiting to pick me up after I had delivered the motor vehicle to Col Cwala. I called the said official, who introduced himself as a Col Cwala. I do recall that I required to see his appointment card before I handed the car keys. I then handed over the keys after I had seen the appointment card. This Col Cwala informed me that General Ntlemeza was busy inside the hotel meeting with the politicians. I did not see General Ntlemeza or talk to him.
7. Major Mbatha then drove me back to the office, however before leaving the car I

S PM

called General Booysen to inform him that I had handed over the car on demand by General Ntlemeza. I was avoiding liability for any eventuality that could befall the car whilst it was out of my hands. The car is fitted with Automatic Vehicle Location unit, which among other things records real-time vehicle location and speed of movement.

8. On the morning of July, 8 2016 I received a call from Col, Cwala which I had given the keys. He informed me that I they could no longer drop off the vehicle at the provincial office as initially planned, and that I had to collect the car at the King Shaka International Airport public parking lot. The Col Cwala further gave me the name of the female police constable who was going to hand back the car keys.

9. Upon arrival the King Shaka Airport I indeed called the number provided to me by the Colonel and the female office gave me the keys, further showing me were the car was parked. She advised that the petrol card was inside the car, including the parking ticket.

10. The car was filthy and entirely covered with mud. Inside the car was the petrol card and the parking ticket which I had to personally pay as no money was left for parking payment. I paid approximately R88.00, and also took the car for washing, for which I also paid from my own pocket.

11. I know and understand this statement I have no objection in making this statement I consider the statement binding on my conscience

EK SERTIFISEER DAT HIERDIE DOKUMENT 'N WARE AFDRUK (AFSKRIF) IS VAN DIE OORSPRONKLIKE DOKUMENT WAT AAN MY VIR WAARNEMING VOORGELE IS, EK SERTIFISEER VERDER DAT, VOLGENS MY WAARNEMINGS DAAR NIE 'N WYSIGING OF VERANDERING OP DIE OORSPRONKLIKE DOKUMENT AANGEBRING IS NIE.

I CERTIFY THAT THIS DOCUMENT IS A TRUE REPRODUCTION (COPY) OF THE ORIGINAL DOCUMENT WHICH WAS HANDED TO ME FOR AUTHENTICATION. I FURTHER CERTIFY THAT, FROM MY OBSERVATIONS, AN AMENDMENT OR A CHANGE WAS NOT MADE TO ORIGINAL DOCUMENT.

HANDTEKENING / SIGNATURE

FORCE NUMBER 6301691-P RANK W/O

NAME IN PRINT

SOUTH AFRICAN POLICE SERVICE
COMMUNITY SERVICE CENTRE
23 NOV 2018
EMPANGENI
KWAZULU-NATAL

ANNEXURE "JWB28"

News

We got it wrong, and for that we apologise

14 October 2018 - 00:04 By BONGANI SIQOKO

Sunday Times Editor Bongani Siqoko.
Image: Masi Losi

We have spent the past few weeks reflecting on our reporting of allegations of police killings in Cato Manor in KwaZulu-Natal and the illegal deportation of Zimbabweans to face execution in their country - known as renditions. These stories were written by a team of senior journalists and published in this newspaper in 2011.

As reporters and editors we have an ethical and journalistic duty to interrogate suspicions of abuse of power, accusations of wrongdoing, and any other incidents that are in the public interest. We did just that in these stories, basing our decision on news value, professional judgment and the public's right to know.

We were in pursuit of nothing but the truth and we were not motivated by political, commercial or personal interests. We stood to gain nothing from reporting on these issues but merely fulfilled our constitutional obligation to inform you.

But we admit here today that something went wrong in the process of gathering the information and reporting the Cato Manor, Sars and Zimbabwean renditions stories. This is after we engaged constructively with all key parties involved in the stories.

What is clear is that we committed mistakes and allowed ourselves to be manipulated by those with ulterior motives.

I will first deal with our mistakes.

Take our headline on the first story about the Cato Manor unit as an example. It labelled the unit a death squad. We were not qualified to label it as such, and in our body of work we certainly presented the stories as allegations. Our headlines overstated the contents of the reports.

We had grounds to believe that the concerns raised by human rights activists and other sources that there were suspicious police killings in the area warranted investigation. Of the 45 deaths that occurred as a result of the actions of the Cato Manor unit, we considered 18 suspicious and we based our reporting on these.

But at the time of gathering the facts and reporting on these cases we were made aware that the courts had already ruled on at least six of the killings and found them to be justified. Even though we had this information, we failed to present it in a prominent way that would have resulted in a balanced and fair piece of journalism that reflected both sides. We have reported on the outcome of some of the killings, but the decisions regarding the rest are still pending.

We also created the impression that Gen Johan Booysen was operationally in charge of the unit and by association was directly and personally responsible for the killings. The unit was indeed under the ultimate command of Booysen, and we made this clear in our reports. However, the tenor of our reports suggested that there were no other commanders between him and the unit. We also never vigorously questioned the role and responsibility of the section and unit commanders who were operationally responsible for the unit.

Booysen has told us he was not directly involved in the operations of the Cato Manor unit. We have no reason not to accept his version. We should have made it clearer that he accepted responsibility for the unit in the capacity of provincial head.

While we were interrogating, investigating and reporting these stories, there was clearly a parallel political project aimed at undermining our democratic values and destroying state institutions, and removing individuals who were seen as obstacles to this project. We admit that our stories may have been used for this purpose. It is this project that also tarnished our reports on Sars.

There was ferocious infighting within state institutions, and warring factions were prepared to use state organs to settle scores. In the process, villains became heroes, and heroes fell as the tectonic loyalty plates shifted violently, as we have seen in the case of former Hawks head Anwa Dramat and Gen Shadrack Sibiya of the Gauteng Hawks, and Sars officials who became targets of this political project.

That we allowed our stories to be abused for this purpose, we apologise.

Were we aware of this parallel political project? The answer is no. But we should have joined the dots. We should have paused and asked more questions. This is our duty as journalists. Were we manipulated by our sources and some of those who were part of this parallel political project? Perhaps. Were we complicit in ensuring the achievement of their goal? No. But as a consequence, our stories might have given them grounds, reason and motive to achieve their objectives.

For that, we unreservedly fell. We failed SA. We deeply regret it.

This does not necessarily mean these forces could have been stopped had we not written these stories. Should we have ignored these stories upon uncovering a parallel political project? No. There was, and is, a middle path that we should have taken. We should have reported on these incidents but with caution and care, aware of the hidden hand, the manipulation and political machinations at play. We should have been more balanced in our reporting. We should have been fair and reflected all sides. We should have interrogated our sources more intensely.

As journalists we have our own verification tools and we should have used them better - after all, journalism is nothing more than the discipline of verification.

Had we been more rigorous in our approach, this could have at least changed the tenor of our articles, added a new dimension, provided us with a better perspective and helped us uncover this parallel political project. In that regard, again we failed you.

We failed you by inadvertently allowing sinister forces, who were hellbent on destroying our institutions, to abuse our trust and use some of our stories to carry out their objectives. We unintentionally tainted our stories by narrowly focusing our reportage on incidents without reflecting a broader picture of the factional battles and political wrangling behind the scenes, within the ANC, in the government, state institutions and law enforcement agencies.

That could have allowed us to report on these incidents while reflecting on the implications and political consequences of our reports. That could have allowed us to understand that the truth was a casualty between warring factions battling for political power.

As we said two years ago, our systems, structure and processes led to our failure and we have no excuse but to acknowledge that and apologise.

Having apologised for such failures, this does not necessarily mean we will in future not report any stories that are tainted by a parallel political project. We will continue to carry out our duty to investigate, report the abuse of power and hold the powerful to account. But we promise extra vigilance, honesty, caution and exercise of care.

If this means that we must bring in external expertise to look at how, in the face of such powerful manipulators and peddlers of fake news, to navigate such a terrain in pursuit of the truth, we will.

Our journalists worked very hard on these stories despite their shortcomings. They won awards in professional competitions that were adjudicated by leaders in the industry. However, on reflection and given the circumstances and the manner in which our reports became entangled in the parallel political project, I believe it is only just and fitting for us to humbly reconsider our decision to accept such prestigious awards.

We felt a sense of pride when accepting recognition from our peers, but accepting such accolades will be a negation of a higher journalistic ideal. It is for this reason that we will be returning all the awards and the prize money.

Most read

1. New sex and race rows rock the DA News
2. Shauwn Mpisane cries foul following 'theft' during home raid News
3. How Guptas conspired to loot Eskom News
4. FW de Klerk dragged into son's battle with ex-wife News
5. That's my song, SA muso tells David Guetta News

Latest Videos

Whale found dead with 40kg of plastic in its stomach
Cyclone Idai devastates Zim, Malawi and Moz: what we know so far

ANNEXURE "JWB29"

BETRAYAL OF THE PROMISE: HOW SOUTH AFRICA IS BEING STOLEN

May 2017

State Capacity Research Project
Convenor: Mark Swilling

Authors
Professor Haroon Bhorat (Development Policy Research Unit, University of Cape Town),
Dr. Mbongiseni Buthelezi (Public Affairs Research Institute (PARI), University of the Witwatersrand),
Professor Ivor Chipkin (Public Affairs Research Institute (PARI), University of the Witwatersrand),
Sikhulekile Duma (Centre for Complex Systems in Transition, Stellenbosch University),
Lumkile Mondi (Department of Economics, University of the Witwatersrand),
Dr. Camaren Peter (Centre for Complex Systems in Transition, Stellenbosch University),
Professor Mzukisi Qobo (member of South African research Chair programme on African Diplomacy and Foreign Policy, University of Johannesburg),
Professor Mark Swilling (Centre for Complex Systems in Transition, Stellenbosch University),
Hannah Friedenstein (independent journalist - pseudonym)

CST Centre for Complex Systems in Transition

PARI Public Affairs Research Institute

DEVELOPMENT POLICY RESEARCH UNIT

SARChI SARChI Chair: African Diplomacy and Foreign Policy

UNIVERSITY OF JOHANNESBURG

UNIVERSITEIT STELLENBOSCH UNIVERSITY

Preface

The State Capacity Research Project is an interdisciplinary, inter-university research partnership that aims to contribute to the public debate about 'state capture' in South Africa. This issue has dominated public debate about the future of democratic governance in South Africa ever since then Public Protector Thuli Madonsela published her report entitled *State of Capture* in late 2016.[1] The report officially documented the way in which President Zuma and senior government officials have colluded with a shadow network of corrupt brokers.

Calls for Zuma to resign have intensified (including from within his own party) and the largest protest marches since the advent of democracy in 1994 have taken place in support of this demand. However, the academic community has contributed little to this discussion. To remedy this, the State Capacity Research Project was initiated to achieve two objectives:

1. Provide a conceptual framework that draws from the literature on the political economy of development, neopatrimonialism in Africa and democratic governance that can help to make sense of what we describe in our first chapter as a 'silent coup'.
2. Collate a vast quantity of published and unpublished empirical material on the extensive 'repurposing' of state institutions to redirect rents away from development and into the hands of an increasingly confident power elite that intentionally operates in extra-legal and anti-constitutional ways.

We agree with the intentions of the governing party's commitment to 'radical economic transformation', but in our view this is being used as an ideological smokescreen to mask the rent-seeking practices of the Zuma-centred power elite.

One of our aims is to change the popular discourse from a focus on corruption to a focus on the systemic nature of state capture as the political project of a well-organised network that strives to manage what we call the symbiotic relationship between the constitutional state and the shadow state. To this end, this is not only a collaboration between University research institutions, we also aim to collaborate with various stakeholders, social movements and organisations engaged in similar work. This is why we have collaborated with the South African Council of Churches (SACC), who mounted their own independent process called the Unburdening Panel. The results of this work by the SACC were merged with some of our research and presented by the Secretary-General of the SACC at a public meeting at Regina Mundi, Soweto, on 18 May 2017.[2] Although the SACC's Unburdening Panel and the State Capacity Research Project (SCRP) were totally independent processes using very different methodologies, the SACC concluded that the individual confidential testimonies they were receiving from Church members matched and confirmed the arguments developed by the SCRP using largely publicly available information. This triangulation of different bodies of evidence is of great significance.

The State Capacity Research Project is an academic research partnership between leading researchers from four Universities and their respective research teams: Prof. Haroon Bhorat from the Development Policy Research Unit, University of Cape Town; Prof. Ivor Chipkin from the Public Affairs Research Institute, University of the Witwatersrand; Prof. Mzukisi Qobo, part of the South African Research Chair Initiative – African Diplomacy and Foreign Policy, University of Johannesburg; Mr Lumkile Mondi, Department of Economics, University of the Witwatersrand; Professor Mark Swilling, Centre for Complex Systems in Transition, Stellenbosch University.

Our programme, with funding from the Open Society Foundation of South Africa, is as follows:

1. Produce this, our first report, by May 2017.
2. Release detailed case study reports of the state-owned enterprises that have been captured by the Zuma-centred power elite over the past decade.
3. Possibly by early 2018 produce a book manuscript and some journal articles.

In our view the South African case is just one quite typical example of a global trend in the growth of increasingly authoritarian, neopatrimonial regimes where a symbiotic relationship between the constitutional and shadow states is maintained, but with real power shifting increasingly into the networks that comprise the shadow state. Understanding the South African context and challenge, therefore, is an important contribution to our understanding of this global phenomenon. It is also our contribution to the broad struggle to save South African democracy and development practice from a power elite that pursues its own interests at the expense of South African society, in particular the poorest people who will suffer first and most from the consequences of what is in reality a de facto silent coup.

An advisory panel of international experts will act as a sounding board to ensure that we achieve a balance between academic rigour and doing what is required to make an impact on the public discourse. They will be expected to peruse reports and publications prior to publication, but not to attend meetings. Their comments and suggestions will be addressed in the most responsive and appropriate way.

1. Public Protector South Africa. 2016. *State of Capture*. [Online] Available: http://cdn.24.co.za/files/Cms/General/d/4666/3f63a8b78d2b495d88f10ed060997f76.pdf.
2. http://www.enca.com/south-africa/catch-it-live-south-african-council-of-churches-releases-corruption-report

Securing a Loyal Intelligence and Security Apparatus

December 2009
President Jacob Zuma appoints **Menzi Simelane** as Director of the South African National Prosecuting Authority (NPA).

December 2010
Nomgcobo Jiba, reportedly close to Zuma is promoted to Deputise the NPA.

April 2011
Head of Crime Intelligence (a unit within the SAPS) Richard Mdluli is arrested and charged on counts of fraud and corruption, as well as for his alleged involvement in the murder of his mistress' husband. He has been on suspension since then.

December 2011
Menzi Simelane is suspended following a Supreme Court of Appeal decision that his appointment is invalid.

June 2012
Jiba suspends and institutes charges against Major General Johan Booysen, former Head of the Hawks in KwaZulu-Natal, who was investigating corruption charges against reported presidential ally, **Thoshan Panday**. He is subsequently arrested and charged with 118 crimes, including racketeering, murder and attempted murder. The charges are later withdrawn, following a court order in his favour.

October 2013
Mxolisi Nxasana is appointed as NPA head. He clashes with Jiba and lays criminal charges of perjury, flowing from statements she made under oath in the course of the Booysen case.

May 2014
President Zuma appoints **Nathi Nhleko** as Minister of Police and **David Mahlobo** as State Security Minister

July 2014
President Zuma commences the process to remove Nxasana, after convening an enquiry to determine his fitness to hold office.

October 2014
News of the so-called SARS "rogue unit" breaks, implicating former Finance Minister Pravin Gordhan and former deputy SARS commissioner Ivan Pillay.

Tom Monyane has been appointed SARS commissioner the month before.

December 2014
Police Minister Nhleko suspends Hawks Head Anwar Dramat. At the time he was reportedly about to launch an investigation into Nkandla.

December 2014
Nhleko appoints Lieutenant General Mthandazo Ntlemeza as Acting Head of the Hawks (made permanent in Sept 2015)

January 2015
Ntlemeza suspends Major General Shadrack Sibiya, former Head of the Hawks in Gauteng. At the time he was investigating Mdluli.

March 2015
Police Minister Nhleko suspends Robert McBride, Executive Director of the Independent Police Investigative Directorate (IPID).

May 2015
President Zuma "agrees" to let Nxasana resign. He is paid R17m – the balance of his ten-year contract. Civil society groups file a case to review the R17m golden handshake. In 2017 Nxasana says in his responding affidavit: "It was never my intention to make a request to leave the office, nor did I ever make such a request to the President ... The president's version in this regard is false."

In effect, this suggests President Zuma lied in his affidavit when he said Nxasana left on his own volition.

June 2015
Zuma appoints Advocate **Shaun Abrahams** NPA head.

September 2016
Jiba struck off the roll of South African advocates. She is placed on special leave.

March 2017
Hawks head Berning Ntlemeza loses his appeal and is ordered out of his position by the High Court based on his lack of integrity to hold such an office.

March 2017
Fikile Mbalula is appointed police minister


Menzi Simelane


Nomgcobo Jiba


Thoshan Panday


Mxolisi Nxasana


David Mahlobo


Nathi Nhleko


Tom Moyane


Mthandazo Ntlemeza


Shaun Abrahams


Fikile Mbalula

League of provincial barons and networks in parts of the state and police intelligence agencies.

Ballooning of the Senior Management Service Programme

The fragmentation of power across the State and its retreat into shadowy networks outside the formal architecture of government has been compounded by the ballooning of the public service in the Zuma period. Vinothan Naidoo has recently finished a methodologically innovative study of what he calls the 'machinery of government'.[45] Tracking the number of national government departments and entities from 1994 he finds, unsurprisingly, that there is growth and also fluctuation in the number of departments and entities in the Mandela period as the new administration experiments with different configurations. In 1999 the number of departments and entities peaks at 30 and then settles at just below that figure..

There was tremendous stability in the number of departments (below 30) and entities during the Mbeki era. The number of public entities proliferated growing from less than 100 in 1998 to more than 250 in 2008. This coincides with the influence of the new public management thinking on the organisation of the state and the move to introduce 'business principles' in the structuring of government to improve efficiency.

In 2009, two years after the Polokwane conference, and the year that Jacob Zuma is sworn in as President, the number of government departments and entities spikes sharply. New departments are established and several are split in two. The Department of Provincial and Local Government is divided into two departments – the Department of Cooperative Government and the Department of Traditional Affairs. Likewise, two separate administrations are hived off from the Department of Education – the Department of Basic Education and the Department of Higher Education and Training. The same happens to the Department of Environment and Tourism. Sometimes new departments are renamed and sometimes entirely new institutions are created – the Department of Performance, Monitoring and Evaluation, the Department of Women and the Economic Development Department. All in all, there were 15 'big bang organisational events' with Zuma's coming into power, as compared to 14 such events for the entire period since 1994. There has been a commensurate multiplication of ministers, deputy ministers, and director generals and the proliferation of government administrations.

"The rationale for expanding the number of national departments was officially based on a strategic assessment of policy and functional demands," notes Naidoo. He adds that "there is [...] reason to doubt the integrity of this view, based on heightened patronage pressures exerted on President Zuma following an acrimonious succession from Mbeki, coupled with questionable rationale behind the creation of some departments".[46]

In other words, it is far from clear that the ballooning of government departments was motivated by the desire to improve the effectiveness of government. Such a large growth of the government system, with a huge expansion in the Cabinet, has compounded already severe problems of coordination across government. It is accompanied, not surprisingly, with the growth of the shadow state and the move to find more manageable centres of control and management outside the State in more personalised networks - what we have called 'kitchen cabinets'.

What is more, the organisation of the state comes to be based less on functional criteria than on political ones, and has been accompanied by the politicisation of state administrations. Of central importance in this regard has been the Senior Management Service Programme. Established in 2001 to transform the civil service from a bureaucracy into one organised on the model of public management, it quickly became the preferred route of bringing the public service under political control. Never intended to be more than 3 000 people, by 2005 it employed more than 7 000 and may have swelled to more than 10 000 people today.[47] Work done by the Public Affairs Research Institute indicates that turbulence and dysfunctionality in government administration is often related to competition between different ANC, government and constitutional bodies competing for the right to appoint officials to key state positions.[48] In other words, the ballooning and politicisation of the state has come at the great expense of state functionality.

Investigations and prosecutions

As the Zuma administration radicalised, it became dependent on managing increasingly complex relations, many of them involving people engaged in unlawful activities. Zuma moved to establish control over key state institutions, especially those involved in criminal investigations and prosecution: SARS, the Hawks and the National Prosecuting Authority.

In September 2014 Jacob Zuma appointed Tom Moyane as the new head of SARS. Nene was summarily informed by Zuma that Moyane would be the next SARS Commissioner. SARS was one of the major achievements of the ANC government, developing into a highly efficient revenue service, dramatically increasing tax compliance after 1998 and frequently delivering 'windfall' taxes to finance the growing welfare state. SARS had worked both to simplify tax paying procedures and to improve customer service while, simultaneously, building the agency's capacity to detect and pursue delinquent tax payers.[49] By 2014 the agency was beginning

45. Naidoo, V. 2017. *Tracking South Africa's expansionary state, 1994-2010: re-tooling the machinery of government.* Cape Town: Department of Political Science, University of Cape Town.
46. Naidoo, V. 2017. *Tracking South Africa's expansionary state, 1994-2010: re-tooling the machinery of government.* Cape Town: Department of Political Science, University of Cape Town. Pg:24
47. Chipkin, I. 2016. *State, Capture and Revolution.* Johannesburg: Public Affairs Research Institute. Pg:13.
48. Phadi, Mosa, Pearson, Joel and Lesffre, Thomas. (forthcoming in 2017). 'The Seeds of Perpetual Instability: The Case of Mogalakwena Local Municipality' in *Journal of Southern African Studies* (JSAS).
49. For a brief overview of the history of SARS, see Hausman, David. (2010). *Reworking the Revenue Service: Tax Collection in South Africa, 1999 – 2009,* Princeton University: Innovations for Successful Societies.

to run up against politically connected persons involved in a variety of illicit activities, some of them associates of the president and his family, as well as businessmen known to be financial contributors to the ANC.[50]

A dossier appeared in October 2014 alleging that senior investigators at SARS, located in the Special Projects Unit, constituted a 'rogue unit'. Among other things, it was said that they were illegally spying on the president. Poor journalistic standards at the *Sunday Times* saw these allegations printed in more than 30 articles in the newspaper between August 2014 and April 2016. The *Sunday Times* has since issued an apology.[51] It was also found guilty by the Press Ombudsman for "inaccurate, misleading and unfair" reporting.[52] These reports were, nonetheless, used by the new SARS Commissioner to launch an investigation into 'rogue' activities at SARS and to suspend the former (acting) commissioner Ivan Pillay, as well as most of the agency's investigative staff led by Johann Van Loggerenberg. In so doing numerous high-profile and politically sensitive cases have simply stagnated or never been closed.

Berning Ntlemeza was appointed the Acting Head of the Directorate of Priority Crime Investigation (the 'Hawks') in 2014, following the suspension of his predecessor Anwar Dramat. The circumstances around his appointment are complicated and need not detain us here other than to note certain similarities with the events at SARS. Likewise, senior Hawks officials, including General Booysen in KwaZulu-Natal and General Sibiya, head of the Hawks in Gauteng, were suspended following the appearance of 'dossiers' implicating them in wrongdoing. General Booysen was accused of running a 'hit squad' in Cato Manor – charges that have routinely been thrown out of court. Sibiya was accused of being implicated in the illegal rendition of Zimbabweans back to their country of origin. Both were involved in high-profile investigations, together with officials from SARS against people with links to the president and his family. Dramat was suspended on the same grounds as Sibiya. When the Independent Police Investigative Directorate, under Robert McBride, cleared Dramat of wrongdoing, McBride himself was illegally suspended by Police Minister Nathi Nhleko. The decision was later overturned in a landmark judgement by the Constitutional Court, which confirmed the independence of the directorate relative to the police and the police minister.[53] Dramat, in turn, decided to take early retirement for which he received R3 million. This left a vacuum that was filled by Berning Ntlemeza.

Ntlemeza was an extremely controversial choice. A High Court had already found him to be a liar and an unreliable witness, evidence that was simply ignored by Minister Nhleko and the president when they considered him for the position. These facts would later be the basis of a successful challenge to his appointment by the Helen Suzman Foundation and by Freedom Under Law, both civil society organisations focused on defending South Africa's Constitution.[54]

What stands out is that Ntlemeza wasted no time in pursuing criminal charges against the Minister of Finance, Pravin Gordhan (and the individuals implicated in the so-called SARS 'rogue' unit).

The charges seemed frivolous for a priority crime unit to pursue, namely that as Commissioner of SARS Gordhan committed fraud by unlawfully approving an early retirement payment to Ivan Pillay.[55] As it turns out the Hawks had either overlooked or withheld vital evidence that exonerated both the minister and Pillay. Ultimately the National Prosecuting Authority, despite a very public announcement to the contrary, declined to go to trial.[56] The prospect of a trial evaporated and, with it, the excuse to remove Gordhan from the finance portfolio.

In all these proceedings, there is the shadow of South Africa's intelligence services. In 2014, Jane Duncan described how "conveniently leaked intelligence reports, or documents that are claimed to be intelligence reports, have been used to smear those that are considered threats to the current political establishment".[57] She saw this as part of "the creeping use of security services to suppress social and political dissent" in what she called a developing "national security state".[58] Indeed, the first report of a 'rogue unit' appeared in an article by Jacques Pauw describing an illegal intelligence unit that had sought to discredit Glynnis Breytenbach. "According to a recording in the possession of the City Press," the article noted:

Members of the Special Operations Unit concocted a story that Breytenbach was a former agent of Israeli intelligence agency Mossad. They then leaked the information to the media to discredit her. The information was repeated by her National Prosecuting Authority bosses when motivating why she should be charged with corruption.[59]

Curiously, Pauw's piece appeared on the same day that the *Sunday Times* ran with its own story of a 'rogue unit' – this time at SARS. There is an uncanny similarity between details, raising the prospect that the original story had been 'spun' to displace attention from

50. Van Loggerenberg, J. & Lackay, A. 2016. *Rogue: The Inside Story of SARS's Elite Crime-busting Unit*, Johannesburg and Cape Town: Jonathan Ball Publishers.
51. Timeslive.co.za. 2016. *SARS and the Sunday Times: our response.* [Online] Available: http://www.timeslive.co.za/sundaytimes/opinion/2016/04/03/SARS-and-the-Sunday-Times-our-response1.
52. Thamm, M. 2015. *Press Ombudsman's rulings against Sunday Times vindicate Pillay and van Loggerenberg.* [Online] Available: https://www.dailymaverick.co.za/article/2015-12-16-press-ombudsmans-rulings-against-sunday-times-vindicate-sars-officials/.
53. South Africa Constitutional Court. 2016. *McBride v Minister of Police and Another (CCT255/15).* [Online] Available: www.saflii.org/za/cases/ZACC/2016/30.html.
54. Mg.co.za. 2017. *Court sets aside appointment of Berning Ntlemeza.* [Online] Available: mg.co.za/article/2017-03-17-breaking-court-sets-aside-appointment-of-berning-ntlemeza.
55. Despite the long investigation, it seems that there is still insufficient evidence on the basis of which to which would support any charges being lodged in relation to the 'rogue unit' allegations.
56. Since 2010 the National Prosecuting Authority has been the site of major contestation regarding its leadership and the cases it has chosen to prosecute or not. Much of this was related to Zuma's own criminal charges arising from the notorious arms deal. Some, however, may have been related to cases of illegality stemming from procurement violations and/or illegality from radical economic transformation.
57. Duncan, Jane. 2014. The Rise of the Securocrats. The Case of South Africa. Johannesburg: Jacana Media. Pg:3.
58. Duncan, Jane. 2014. The Rise of the Securocrats. The Case of South Africa. Johannesburg: Jacana Media. Pg:32.
59. Pauw, Jacques. 14 August 2014. 'How Spy Unit Nailed Mdluli Foes' in City Press. see http://www.pressreader.com/south-africa/citypress/20140810/281638188364837

the State Security Agency.
Pauw's story was especially credible given the context. In 2008, then Minister of Intelligence, Ronnie Kasrils had commissioned an investigation into the various services. The concern at the time was that "politicians and intelligence officers can abuse [their] powers to infringe rights without good cause, interfere in lawful politics and favour or prejudice a political party or leader, thereby subverting democracy".[60] The report by Joe Matthews, former National Assembly speaker Frene Ginwala and Laurie Nathan found severe shortcomings in The National Strategic Intelligence Act (1994), which created opportunities for abuse by defining the notion of 'national security' too broadly.

The report found that there were no rules regulating counterintelligence work making it easy for "interference in politics and infringing rights without sufficient cause"[61] to occur. In a finding that surely calls into question the rationale of the Hawk's own 'Crimes Against the State' unit, Mathews, Ginwala and Nathan noted that "in a democracy it is wholly inappropriate for an intelligence service to make judgements on whether lawful activities are threats to the constitutional order". [62]

The Minister of Intelligence after Kasrils, Siyabonga Cwele, sought to suppress this report. Its recommendations were certainly not implemented. By 2014 Piet Coetzer, Stef Terblanche and Garth Cilliers, writing for the *Intelligence Bulletin*, were describing the State Security Agency as in 'disarray'.[63] This is the context in which the various intelligence-like dossiers discussed above started to appear.

The formal link to the State Security Agency is suggested by the story of Mandisa Mokwena. She had been recruited into the senior management of SARS from the National Intelligence Agency. Ivan Pillay subsequently charged her with fraud, though the case has never come to court. She subsequently returned to the intelligence fraternity. Mokwena was likely one of the authors of the infamous 'Spiderweb report' alleging a conspiracy by Gordhan, Pillay and van Loggerenberg, among others, to marginalise black staff at the agency. In a further twist, Mandisa Mokwena is married to Barnard Mokwena, the former human resources manager at Lonmin, who played a central role in driving a labour dispute at the mine into the worst massacre of the post-apartheid period. It later emerged that he too was an intelligence operative.[64]

The role that the National Prosecuting Authority plays in enforcing the law (particularly in respect to holding public servants to account for fraud or corruption) cannot be understated. Since Shaun Abraham's appointment as National Director of Public Prosecutions in June 2015, there are several questionable decisions and actions that have been made, over and above the frivolous charges laid against Gordhan. These include the charges laid against Robert McBride, which were taken to court and then also dropped due to insufficient evidence and the withdrawing of charges of perjury against the Deputy National Director of Public Prosecutions Nomgcobo Jiba who is currently still on 'special leave' after being struck off the roll of advocates in September 2016.[65] The charges of perjury were laid in relation to statements that Jiba made under oath about the initiation of criminal charges against General Booysen. As highlighted in an amaBhungane article:[66]

Jiba was roundly criticised by judges in three separate cases during her tenure as acting prosecutions head – all of them politically sensitive – leading to accusations that she was protecting President Jacob Zuma or his allies.

In the most recent controversy, Abraham's predecessor, Mxolisi Nxasana, filed an affidavit in response to a case filed by civil society organisations that related to the review of his R17 million pay-out on leaving the National Prosecuting Authority. It was Nxasana who instituted the charges against Jiba, following which the president initiated an inquiry into Nxasana's fitness to hold office. In his affidavit, Nxasana directly contradicts the affidavit previously filed by President Zuma that stated that Nxasana wanted to leave of his own volition. Nxasana said under oath that "It was never my intention to make a request to leave the office, nor did I ever make such a request to the President" and that "The president's version in this regard is false."[67]

Taken together, the events at SARS, the Hawks and the National Prosecuting Authority suggest that as the Zuma administration radicalised resorting increasingly to extra-legal means to pursue radical economic transformation it was driven to 'capture' and weaken key state institutions. The political project of the Zuma-centre power elite has come at a very heavy price for the capability, integrity and stability of the South African state.

Conclusion

This chapter has traced the emergence of the notion of radical economic transformation, arguing that it privileges the use of the state procurement system to advance a form of BEE that is not dependent on the established and white-owned and -managed companies. We have seen how these ideas were incubated in the Black Management Forum and the DTI.

We have argued that after 2011 this project radicalises and becomes increasingly sceptical that economic transformation can be achieved within the framework of the law and Constitution.

60. Ministerial Review Commission on Intelligence. 2008. *Intelligence in a constitutional democracy.* [Online] Available: cdn.mg.co.za/uploads/final-report-september-2008-615.pdf. Pg:10.
61. Ministerial Review Commission on Intelligence. 2008. *Intelligence in a constitutional democracy.* [Online] Available: cdn.mg.co.za/uploads/final-report-september-2008-615.pdf. Pg:16.
62. Ministerial Review Commission on Intelligence. 2008. *Intelligence in a constitutional democracy.* [Online] Available: cdn.mg.co.za/uploads/final-report-september-2008-615.pdf. Pg:134.
63. The Intelligence Bulletin. 2014. *Political abuse has State Security Agency in disarray.* [Online] Available: http://www.theintelligencebulletin.co.za/articles/security-watch-1812.html.
64. Marinovich, G. 2016. *Murder at Small Koppie. The Real Story of the Marikana Massacre.* Cape Town: Penguin Books. Pgs:56-58.
65. Van Wyk, P. 2016. *NPA's Nomgcobo Jiba and Lawrence Mrwebi struck off the roll of advocates.* [Online] Available: https://mg.co.za/article/2016-09-15-npas-nomgcobo-jiba-and-lawrence-mrwebi-struck-from-the-roll-for-advocates.
66. Sole, S. 2016. *Willie's shock gambit ups the stakes at NPA.* [Online] Available: amabhungane.co.za/article/2015-02-05-willies-shock-gambit-ups-the-stakes-at-npa.
67. Thamm, M. 2017. *Zuma committed perjury, former NPA head Nxasana claims in affidavit.* [Online] Available: https://www.dailymaverick.co.za/article/2017-04-13-zuma-committed-perjury-former-npa-head-nxasana-claims-in-affidavit/#.WQofKhN9600.