IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NUMBERS: 333/17 and CCT 13/18
GPPHC CASE NUMBERS: 62470/2015 and 93043/2015

In the matter between:

CORRUPTION WATCH (RF) NPC	First Applicant
FREEDOM UNDER LAW (RF) NPC	Second Applicant
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Third Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MXOLISI SANDILE OLIVER NXASANA	Third Respondent
SHAUN ABRAHAMS	Fourth Respondent
DIRECTOR-GENERAL OF JUSTICE	Fifth Respondent
CHIEF EXECUTIVE OFFICER OF THE NPA	Sixth Respondent
NATIONAL PROSECUTING AUTHORITY	Seventh Respondent
THE DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Eighth Respondent

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HEADS OF ARGUMENT ON BEHALF OF THE FOURTH AND SEVENTH RESPONDENTS

Table of Contents

INTRODUCTION

1. The Applicants seek confirmation under Rule 16(4) of the Rules of the Constitutional Court of the judgment of the Gauteng Division of the High Court (*per* Mlambo JP, Ranchod *et* Van der Linde JJ) (the "***Court a quo"***), handed down on 8 December 2017;[1] the Fourth and Seventh Respondents oppose confirmation of parts of the Order *a quo*, and appeal against parts of the Order and judgment under Rule 16(2), read with 16(3) of the Constitutional Court Rules.

2. These heads are filed on behalf of the National Director of Public Prosecutions (the "NDPP") and the National Prosecuting Authority (the "NPA"),[2] in response to heads filed by: -

   2.1 Corruption Watch (RF) NPC and Freedom Under Law (RF) NPC (*a quo* No. 62470/15); and

   2.2 The Council for the Advancement of the South African Constitution (a quo No. 93043/15).[3]

3. Mr Mxolisi Nxasana *(**"Mr Nxasana"**)* (who has appealed against the decision of the Court *a quo* dismissing his application for condonation, and arguing that he

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1 Now reported at (2018) 1 All SA 471 (GP).

2 Adv. Abrahams and the NPA are referred to jointly as the "*NPA Parties*".

3 Corruption Watch and Freedom Under Law are jointly referred to as "*Corruption Watch*". The Council for the Advancement of the South African Constitution is referred to as "*CASAC*". The Applicants for confirmation are jointly referred to as the "*Applicants*".

ought to be reinstated), was appointed NDPP with effect from 1 October 2013. On 4 July 2014, acting in terms of section 12(6) of the National Prosecuting Authority Act No. 32 of 1998 (***"NPA Act"***), the President established an enquiry into Mr Nxasana's fitness to hold office[4]. On 11 August 2014 Mr Nxasana launched an application to compel the President to disclose particulars of the charges against him, and interdicting the President from suspending him before providing the particulars sought.[5] Ultimately, in May 2015, the President, the Minister of Justice and Mr Nxasana entered into a "*Settlement Agreement*"[6] in terms of which Mr Nxasana undertook to "relinquish" his post from 1 June 2015 in return for the payment of an amount of R17,3 million – an arrangement colloquially referred as a *golden handshake.*[7]

4. Dr Silas Ramaite SC (***"Dr Ramaite"***) – who was not joined as a party in this litigation, and of whose tenure the Applicants steadfastly take no account - was appointed as the Acting National Director of Public Prosecutions (***"ANDPP"***), when Mr Nxasana left office.[8] (It is important to note that a jurisdictional fact for the appointment of Acting NDPP is that the office be *vacant*.[9]) Dr Ramaite served

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4 Vol 2, R: 161.

5 Case No. 59160/14 (Gauteng Division), (Vol 2, R:195).

6 Settlement Agreement 14 May 2015 (Vol 2, R: 168).

7 Corruption Watch ("CW") Founding Affidavit ("FA"), para 16 (Vol 1, R: 13).

8 Shaun Kevin Abrahams ("SKA") Answering Affidavit ("AA"), para 26.2 (Vol 5, R: 493).

9 Section 11(2)(b) of the NPA Act.

as the ANDPP from 1 June 2015 until 18 June 2015 when Adv. Abrahams stepped into his shoes as the National Director.[10]

5. The Applicants sought, *inter alia*, to review and set aside the Settlement Agreement, the payment to Mr Nxasana, and the appointment of Adv. Abrahams. (Notably, the applications were not lodged on the basis of urgency, with the result that Adv. Abrahams will have been incumbent for nearly three years when these heads are filed.[11])

6. A full bench of the High Court granted the application in a judgment handed down on 8 December 2017.[12] Under the Order:

   6.1. The Settlement Agreement and the payment of R17,3 million were declared invalid and are set aside. Mr Nxasana was ordered to repay the money.

   6.2. The termination of Mr Nxasana's appointment was declared invalid.

   6.3. Adv. Abrahams's appointment was declared invalid and set aside. (This component of the Order was suspended for 60 days.)

   6.4. The incumbent President (as at the date of the Order) may not appoint, suspend or remove the NDPP; for so long as he remained in office, the

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10 Vol 5, R: 493 (SKA AA, para 26.2).

11 Vol 1, R: 1(CW Notice of Motion ("NoM")); Vol 10, R:896 (CASAC NoM).

12 Vol 15 (R: 1390).

Deputy President (now the President) is responsible for the performance of these functions.[13]

7. CASAC attacked the constitutional validity of certain provisions of the NPA Act. Confirmation of the Order granting same is sought. The NPA parties do not oppose this. The NPA parties in fact do not oppose confirmation of the Order set out in sub-paragraphs 1 – 7 of paragraph [129] of the judgment of the Court *a quo*.

8. They do oppose confirmation of the Order reviewing, declaring invalid and setting aside the appointment of Adv. Abrahams as NDPP.

ROADMAP OF ARGUMENT

9. The NPA Parties advance two principle arguments:

   9.1 First, Adv. Abrahams was validly appointed into a vacancy created at the end of Dr Ramaite's stint as Acting NDPP. (This argument forms **Part A** these heads). In that regard, it is submitted that:

[13] On 14 February 2018, Mr Zuma resigned as President of the Republic; the next day, Mr Ramaphosa was sworn-in as President. This development renders part of the Order moot.

9.1.1 The departure of Mr Nxasana as a matter of fact created a vacancy into which Dr Ramaite, and thereafter, Adv. Abrahams, were validly appointed.

9.1.2 Dr Ramaite's acting appointment and his subsequent departure remain valid until such time as set aside.

9.1.3 Under Supreme Court of Appeal authority binding on the Court *a quo*, an NDPP is not foreclosed from voluntarily departing from his office otherwise than under the procedures established in s 12 of the NPA Act. Mr Nxasana's resignation was a unilateral act which, as a matter of fact, created a vacancy - irrespective of what motivated either the President or Mr Nxasana.

9.1.4 It cannot be said that the departure of Mr Nxasana and the appointment of Adv. Abrahams created no vacancy, even if it be so that the departure was motivated by ulterior motives on the part of the President. There is no evidence that Adv. Abrahams was party to any such scheme.

9.1.5 The Applicants' argument that no vacancy is created when an NDPP leaves office pursuant to a "golden handshake" carries the unsustainable entailment that because Adv Pikoli, a former NDPP, similarly departed in 2009 and in exchange for a *golden handshake* settlement of some R7,5 million, his putative successors, Mokotedi Mpshe (acting), Menzi

Simelane, Nomgcobo Jiba (acting), Mr Nxasana himself, and Dr Ramaite (acting) must equally be deemed not validly to have been appointed.

9.2 Secondly, it is not *just and equitable* for Adv. Abrahams to be removed from his position. (This argument forms **Part B** of these heads In this regard, it is submitted:

9.2.1 To the extent that the Court finds that there was indeed no vacancy into which Adv. Abrahams could be appointed, the Court should exercise its remedial discretion to determine that he nonetheless remain in office.

9.2.2 Even assuming the office remained notionally occupied by Mr Nxasana, it would not constitute just and equitable relief to compel the *de facto* incumbent's departure, in light of the fact that:

9.2.2.1 Adv. Abrahams has been in office as NDPP for nearly three years.

9.2.2.2 the Applicants expressly disclaimed any allegation that he was blameworthy.

9.2.2.3 it was especially unfair to remove Adv. Abrahams in circumstances where the Applicants at no stage alleged that he was not fit and proper; on the contrary, they expressly stated that whether or not

his fit and proper was not relevant for their purposes. Thus Adv. Abrahams did not furnish details as to his background and the facts leading up to his appointment.

9.2.2.4 the recent ascendancy of Mr Ramaphosa to the Presidency removes whatever justification there may have been for the removal of Adv. Abrahams from office.

PART A: ADV. ABRAHAMS WAS APPOINTED INTO A VACANCY IN THE OFFICE OF NDPP

10. The President appoints the NDPP in terms of s 179(1)(a) of the Constitution.[14] In terms of s 12(1) of the NPA Act:

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

11. The Constitution tells us nothing about how the NDPP leaves office. But section 12(6) of the NPA Act does. It provides for the suspension and termination of a NDPP under certain circumstances. These have no application here.

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[14] See also NPA Act s. 10, to the same effect.

12. There is another exit in the NPA Act. That is s.12(8), which provides in relevant part:

> "(as) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office —
>
> (i) on account of continued ill-health; or
>
> (ii) for any other reason which the President deems sufficient.
>
> (b) The request in terms of paragraph (a) (ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case."

13. One of the core findings of the court *a quo* was that Mr Nxasana did not exit his post through either one of the only two statutory routes of departure.[15] Therefore his appointment was not lawfully terminated. The clear implication was that there was no vacancy into which Adv. Abrahams could be appointed.[16] It is respectfully submitted that the court *a quo* erred in making this finding.

14. Firstly, Mr Nxasana was prepared to leave if compensated fully for his remaining years of service (plus minus eight and a half years).[17] Secondly, it was not

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15 Judgment *a quo* para 104,R: 1382*;* Corruption Watch HoA para 43.

16 Judgment *a quo* para 106, R:1382. See also CW HoA para 48 ("[Nxasana's] termination was a pre-condition for the appointment of Adv. Abrahams. It follows that the appointment of Adv. Abrahams was equally unconstitutional and invalid.").

17 As noted above, Adv. Abrahams did not step into the shoes of Mr Nxasana, but those of Dr. Ramaite. For purposes of this part of our argument only, we follow the Applicants in assuming, counterfactually, that Adv. Abrahams immediately succeeded Mr Nxasana.

contended, nor found by the court *a quo*, that Mr Nxasana acted under duress. So far as CASAC is concerned, there is no dispute that Mr Nxasana resigned – in fact, CASAC uses that word to characterise Nxasana's conduct.[18] Mr Nxasana was willing to resign if he was paid enough money. Clearly, R17 million rand was sufficient incentive for him.

15. The fallacy in the Applicant's argument is that it fails to grasp that it is not necessary for an employer to "accept" a resignation tendered by an employee. Nor is the employer entitled to refuse to accept a resignation or decline to act on it.[19] Resignation is a unilateral act which, once given, cannot be withdrawn without the employer's consent. It need not be accepted to be effective.[20] A resignation is established by:

> 'A subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly and unambiguously evince that intention'.[21]

16. Wallis JA articulates this principle thus:

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18 Vol 10, R: 894 (CASAC FA, para 4.1); R: 898 (CASAC FA, para 19).

19 See Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd 1969 (1) SA 300 (T) at 302 F-G.

20 Stewart Wrightson (Pty) Ltd v Thorpe 1977 (2) SA 943 (A) at 953; Sihlali v SA Broadcasting Corporation Ltd (2010) 31 ILJ 1477 (LC) at para 11. See also Uthingo Management (Pty) Ltd v Shear NO & others (2009) 30 ILJ 2152 (LC) at paras 16-19.

21 Mafika v SA Broadcasting Corporation Ltd [2010] 5 BLLR 542 (LC), para 13.

> "The giving of notice is a unilateral act requiring no acceptance by the recipient for it to be effective. Consequently notice once given cannot be withdrawn except by agreement."[22]

17. In African National Congress v Municipal Manager, George Local Municipality & Others (2010) 31 ILJ 69 (SCA), a councillor had delivered a letter of resignation to the municipal manager. Although the municipal manager was aware of the contents of the letter, he did not open it. The following day the councillor informed the manager that he had changed his mind. The court applied the common law discussed above - to the effect that, being a unilateral legal act, a resignation did not need to be accepted by the intended recipient to be effective.[23]

18. If a resignation were to be valid only once it is accepted by an employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. As has been held: "This cannot be - it would reduce the employment relationship to a form of indentured labour."[24]

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22 Wallis, *Labour and Employment Law* Service 5 (1995) at para 33.

23 Para 11.

24 Sihlali v SA Broadcasting Corporation Ltd (2010) 31 ILJ 1477 (LC), para 11; Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2016) 37 ILJ 313 (CC) para 184 ("A situation where an employer could force an employee to continue to work for him against his will is difficult to reconcile with this country's current constitutional values.").

19. On a proper construction, Mr Nxasana's resignation thus became effective the moment it came to the attention of the President. The question of whether the President was empowered to accept Mr Nxasana's resignation, or whether he acted irrationally in so doing, simply does not arise; because no such acceptance was necessary to render his resignation operative.

20. It is conceded that the Settlement Agreement pursuant to which Mr Nxasana ostensibly left office was unlawful. But, as noted, because resignation is unilateral, the President's power to accept it is irrelevant. And, Mr Nxasana's conduct – packing up his desk and leaving the building – eloquently conveyed his intention to leave and not return.

21. Does section 12(8) of the NPA Act alter this default position? The right to unilaterally to resign (viz, not to be forced to work against one's will), is constitutionally entrenched.[25] If Parliament intended to take this right from the NDPP, one would have expected clear language in the NPA Act. There is none.

22. In fact, section 12(8)*(a)* is permissive – the President *may* permit the NDPP to vacate his office, on request, if the requirements in subsections (8)*(a)*(i), or (8)*(a)*(ii) and (8)*(b)*, are met. The financial consequences in subsection 8*(c)* follow. What section 12(8) thus does is that it permits certain financial consequences to follow certain types of resignation. What it does *not* do is

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[25] See section 13 of the Constitution of the Republic of South Africa, 1996.

prohibit other types of resignation that are part of the common law and protected in the Bill of Rights.

23. All this was recognised by the Supreme Court of Appeal in Strydom.[26] Here, the Court held that section 13(5) of the Magistrates Act[27] – textually identical[28] to

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[26] Government Employees' Pension Fund v Strydom 2001 (3) SA 856 (SCA).

[27] 90 of 1993.

[28] It reads as follows:

'(5)(a) the Minister may, at the request of a magistrate, allow such magistrate to vacate his or her office —

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

(iA) in order to effect a transfer and appointment as contemplated in s 15(1) of the Public Service Act, 1994 …; or

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

(b) Any request of a magistrate contemplated in para (a)(ii) shall be addressed to the Minister so that he or she receives it at least six calendar months before the date on which the magistrate wishes so to vacate his or her office, unless the Minister approves a shorter period in a specific case.

(c) If a magistrate

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

(ii) is allowed to vacate his or her office in terms of para (a)(ii), he or she shall be deemed —

section 12(8) of the NPA Act – did not prevent Magistrates from resigning outside of its terms, as there was no indication that Parliament had intended to remove the right of Magistrates not to work against their will. It merely provided for certain financial consequences to follow certain types of resignation.

24. The court *a quo* with respect erred in rejecting this common sense approach and in finding that the Act intends to remove the right of an NDPP not to work against his will. The Applicants argued that this intent can be found in section 12(5), which provides that the NDPP "shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8)". But this ignores the clear wording of section 12(5). It precludes "suspension" and "removal" unless it is in accordance with the relevant subsections. It does not stand in the way of *resignation* ("vacation", to use the Act's wording), which is what is at issue here.

25. The Applicants' second line of attack is that the NPA Act ushered in a new dawn of prosecutorial independence. It follows that we must interpret section 12(8) to prohibit resignation outside of its terms. But that does not follow. If anything, the

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(aa) to have been removed from office to promote efficiency for reasons other than his or her own unfitness or incapacity; or

(bb) to have been retired in accordance with s 16(4) of the Public Service Act, 1994, as the Minister may direct, and he or she shall be entitled to such pension benefits as he or she would have been entitled to under the Pensions Act applicable to him or her if he or she had been so removed from office or had been so retired, according to the direction of the Minister.'

applicants' interpretation *diminishes* independence. If an NDPP can only resign at the President's pleasure, this gives the President leverage over the NDPP: "*Do as I say today, and you may go with full benefits tomorrow*".

26. All of this was acknowledged in Strydom.[29] Farlam JA recognised that, with the Magistrates Act, "Parliament was concerned to grant to magistrates an independence and freedom from interference which they had not previously enjoyed"[30] and that, "[*i] if anything, to preclude the right to resign could be seen as a fetter on judicial independence*."[31]

27. The Applicants argued further that their interpretation preserves prosecutorial independence by precluding *golden handshakes*. But they conflate the latter with the resignation to which we have referred. Section 12(8) indeed bars the

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29 *Supra* at para 24.

30 *Ibid* para 20.

31 *Ibid* para 29. The High Court appears to suggest (see para 100-105), that Strydom could be distinguished on the basis that magisterial independence is of less moment than the NDPP's independence. With respect, that cannot be so; any judicial officer's independence is always of paramount importance, and the suggestion that the legislature. An interpretation that could countenance structural limitations on the independence of the thousands of Magistrates - who are responsible for the vast majority of trials in the country - is untenable. See *Van Rooyen and others v The State and others* (General Council of the Bar of South Africa intervening) 2002 (5) SA 246 (CC), Para 22 referring To "Constitutional protection of the core values of Judicial Independence accorded to *all Courts*")(*emphasis added*)

handsome reward pocketed by Nxasana (and which he has yet to repay). The NPA parties have never argued otherwise. This does not mean that a statutory preclusion of the option of common law resignation would enhance independence. Quite the contrary, as explained by Farlam JA.

28. The High Court suggested that, even if Nxasana had been permitted to resign outside of section 12(8), his resignation (unlike that of Strydom), had been procured by unlawful inducement, and that his resignation should be set aside for this reason[32]. But this logic renders the *reward* unlawful, not the *resignation*. Only the former should be set aside, not the latter. Otherwise, Mr Nxasana would benefit from his own unlawful conduct.

29. Thus, it is both that as a matter of law *and* as a matter of fact, there was a vacancy into which Dr Ramaite, and then Adv. Abrahams, could validly be appointed.

30. One might add that it is absurd to suggest that Mr Nxasana (who can be presumed to know what the NPA Act provides in this regard), and would well know that a successor would soon be installed in his place, can escape the consequences of his unlawful election by protesting that he jumped ship only for the money.[33]

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[32] Judgment *a quo* para 105.

[33] On top of the 17 million, Mr. Nxasana received his pension and a bonus (para 5 of the settlement agreement, R: 170). By contrast, the Court *a quo*'s order gives no indication of what compensation, if any, Adv. Abrahams is entitled to when he is terminated.

31. Mr Nxasana's opportunism in now seeking reinstatement is breath-taking. The Court *a quo* recognized that Nxasana knew that he was acting without lawful foundation.[34]Indeed, Nxasana's own attorney was well aware that the envisaged "arrangement" was not sanctioned by the NPA Act. In his letter dated 10 December 2015[35] Mr Mabunda acknowledged that the NPA Act, read with the Public Service Act "do not apply to this proposed settlement."[36]

32. And any suggestion that Nxasana departed under pressure is put to the rest by the words of his own attorney, who insisted that Nxasana was "not booted out", nor "not forced to resign," and characterised his decision as the "culmination of an agreement between him and the President."[37]

PART B: IT IS NOT JUST AND EQUITABLE TO REMOVE ADV. ABRAHAMS

33. If the NPA Parties prevail in their argument that Mr Nxasana's departure other than in terms of section 12(8) of the NPA Act was permissible, thus leaving a vacancy, *cadit quaestio*.

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34 Judgment *a quo* para 93.

35 Vol 7, R: 687.

36 *Ibid*, para 9.

37 Times Live, 'Outgoing NPA head's lawyer mum on settlement figure,' 2 June 2015 (Vol 11, R: 1006).

34. However, the NPA Parties submit that, if their first argument is rejected, Adv. Abrahams should nevertheless not be removed from office, because it would neither be a just nor equitable remedy in the circumstances. We argue in particular that:

    34.1. Separation of Powers considerations weigh against an order effectively removing Adv. Abrahams from office. (Part (a) *infra*.)

    34.2. The Court *a quo* should not have removed Adv. Abrahams without hearing evidence that would bear upon his position. (Part (b) *infra*.)

    34.3. Such evidence would show that considerations of justice and fairness weigh against the removal of Adv. Abrahams. (Part (c) *infra*.)

    34.4. The adverse knock-on effects of removing Adv. Abrahams should have been accorded weight. (Part (d) *infra*.)

    34.5. The Court a quo erred to the extent it relied uncritically upon public perceptions in the exercise of its remedial discretion. (Part (e) *infra.*)

THE SCOPE OF REMEDIAL DISCRETION

35. Section 172(1) of the Constitution empowers a court to make any Order that is just and equitable following a declaration of constitutional invalidity of either a law or conduct.

36. The scope of the section-172(1)*(b)* power is broad. As this Court recently held:[38]

> "[This Court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any Order that is just and equitable."[39]

37. However, the Court's remedial discretion is not unlimited:

> "This Court is not at large to grant any relief under its power to grant appropriate relief."[40]

38. As noted by the authors of the leading constitutional text, unfettered remedial discretion poses institutional risks for the judiciary, whose legitimacy depends on the constraints of relevant legal materials.[41]

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38 Economic Freedom Fighters v Speaker of the National Assembly [2017] ZACC 47, para 210.

39 *Ibid* para 210.

40 Satchwell v President of the Republic of South Africa 2002 (6) SA 1 (CC), para 33

41 *CLOSA* 2nd Ed, Original Service 9-17. See also P. Birks, "*Three Kinds of Objection* to *Discretionary Remedialism*" (2000) 29 Western Australian Law Review ("The idea of strong [remedial] discretion is based on a positivistic sense that at some point the rules run out, and this gives the judge unconstrained freedom to make a decision by exercising discretion. Such a discretion seems anomalous in a legal regime committed to the rule of law and the protection of rights"); Jensen, *Singapore Journal of Legal Studies* [2003] 178-208 "The Rights and Wrongs of Discretionary Remedialism" ("Judicial decision-making should, as far as possible, be subjected to abstract rules that define categories

39. Case law underscores the point. In Black Sash Trust,[42] this Court extended an unlawful contract between the South African Social Security Agency ('SASSA') and Cash Paymaster Services (Pty) Ltd ("CPS") in Order to ensure the payment of social grants. In the course of the judgment, echoing the sentiments above, Froneman J offered the following caution:

> "It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the Order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances."[43]

40. *In casu,* one foundation for the Court's conclusion that Adv. Abrahams must go was that, to permit him to stay would allow the President to achieve through

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of similar cases. This proposition is taken to be the cornerstone of legal rationality. Rule-based decision making is the only means whereby we may be reasonably sure that decision-makers, who are situated in different places and times and who differ from one another in terms of their experiences and prejudices, will decide similar cases in a similar way. Deciding remedy questions by recourse to what is supposed to be a unique combination of factors, which are drawn from an agreed list of factors, does not offer the same assurance of consistency because, at the very least, the question of the relative weight of factors is left to individual decision-makers.").

[42] Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening) 2017 (3) SA 335 (CC).

[43] *Ibid*, para 51.

unlawful means that which he "*had wished to attain all along*."[44] It would procure for the President a position;

> "Even better than what he had wanted all along: being rid of Mr Nxasana, at a price much lower than Mr Nxasana's demand, *and with Adv Abrahams in the saddle*." (Emphasis added) [45]

41. The NPA parties do not quarrel with the finding that the President wished to see Mr Nxasana leave office. But there was no allegation – let alone any evidence - that the President entered the impugned agreement with Mr Nxasana with a mind to installing someone more amenable.[46] By the same token, there is no evidence that the President believed that Adv. Abrahams would shield him from being prosecuted. Not venturing to advance such allegations straightforwardly, the Applicants hint that this *must* have been so

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44 Judgment *a quo*, para 95.

45 *Ibid*, para 86.

46 Cf. CASAC HoA, para 81. In point of fact, the Applicants did not allege that it was because the President believed that Nxasana would charge him, that he sought to oust Nxasana. CASAC contends that there was a "widespread belief that the reason the President and the Minister wanted Nxasana removed from office was because of his justifiable attempts to have Advocates Jiba and Mrwebi suspended, disciplined and struck from the role. (FA para 82) (R: 914); that the enquiry against Nxasana was launched "to protect those Nxasana sought to have suspended" (FA para 120.3); and that the initial suspension was a politically motivated attempt to "silence" Nxasana and impede the work that he had been doing as the NDPP." (FA para 110). (Vol 10, R: 929-930).

- or at least that this would be the public perception. But, as set forth below, speculative inference and uniformed public opinion can never form a proper basis for remedy.

42. Absent factual allegations to support "general, and essentially inferential assertions," such allegations are "worthless.[47] The Applicants want the Court to take what amounts to judicial notice of allegations regarding the President's intent.[48] But intent is a question of fact that falls to be shown inferentially from facts on record.[49] The necessary factual foundations are absent here. The President's intention in appointing Adv. Abrahams to protect him from prosecution is hinted at by CASAC,[50] but neither alleged nor proven.

43. Declining to find that the President knew that his conduct was unlawful, the Court *a quo* correctly observed that this "would be an inferential conclusion on affidavit concerning the President's state of mind".[51] It is submitted the

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47 Deetlefs and Another v Volkskas Ltd. (84/87) [1988] ZASCA 52 (20 May 1988), para 11.

48 R v Tager 1944 AD 339, pg 343 ("The doctrine of judicial notice is rightly confined within very narrow limits"). It is trite that a Court is obliged to advise an accused of facts proposed to be judicially noticed, to enable accused to controvert same, or to address the court thereon. S v Heilig 1999 (1) SACR 379 (W)

49 Magmoed v Janse Van Rensburg and Others 1993 (1) SACR 67 (A) (SCA) at 96 F-G (existence of intention is a "secondary" fact drawn by inference from proven facts in evidence.)

50 CASAC HoA, Para 81.

51 Judgment *a quo* at para 91.

Court should have been no less reluctant to draw inferences as to the intent and motives of the President in removing Mr Nxasana and replacing him with Adv. Abrahams.[52]

44. The chain of reasoning leading to the conclusion that the constitutionally entrenched independence of the NPA was compromised by the continued incumbency of Adv. Abrahams was thus flawed from the outset.

45. There was no objective reason nor any basis whatsoever for anyone to believe that Adv. Abrahams would be inclined to sympathise with Mr Zuma - and hence no reason that a reasonable and informed member of the public would consider that his appointment compromised the independence of the NPA.[53]

46. It seems that one consideration that animated the Court *a quo* in taking the extraordinary step of removing Adv. Abrahams was the baseless assumption that, so long as President Zuma remained in place, he would protect Adv. Abrahams, as a kind of *quid pro quo* for allegedly shielding Mr Zuma from prosecution. There was no evidence to this effect. But in any event, the ground has shifted. Mr Zuma no longer occupies the Union Buildings. It is open to President Ramaphosa to take steps under s 12(6) of the NPA Act against Adv. Abrahams should he deem that he is not fit and proper to hold the office of NDPP.

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52 *Ibid* at para 115.

53 The hazards of relying on public perception and public opinion are canvassed further below.

That would be the constitutionally sanctioned manner to deal with any alleged past or present misconduct by Adv. Abrahams.

47. We bear in mind that the primary purpose of the section 172(1)*(b)* is to vindicate the rule of law.[54] This means, *inter alia*, that in, Kriegler J's words, the Court must "attempt to synchronise the real world with the ideal construct of a constitutional world".[55] The implicit argument of Corruption Watch was that, to the extent, that Mr Nxasana must be deemed never to have left office because the Settlement Agreement was unlawful, the constitutional breach could be repaired only by restoring the *status quo ante*.[56]

48. But, as recognised by CASAC, that is unthinkable, since it would in effect reinstate in office a person who had accepted what amounted to a bribe to leave office.[57]

49. By similar token, removing Adv. Abrahams from office does nothing to restore the *status quo*. Instead, the effect is to arbitrarily displace an innocent individual.

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54 AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency 2014 (4) SA 179 (CC) (AllPay II) para 29, citing Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) para 29.

55 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 94.

56 Notably, Corruption Watch argues in this Court that declining to reinstate Nxasana is inconsistent with the separation of powers. CW HoA para 47.3

57 CASAC HoA at para 76.

FACTORS RELEVANT TO THE EXERCISE OF REMEDIAL DISCRETION

a) Separation of Powers

50. A core aspect of the rule of law is the separaion of powers. This involves "restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature".[58] (Such deference is no less owed to the Executive). It has been held:

> "When considering a just and equitable remedy one should be careful not to violate the principle of the separation of powers."[59]

51. Removing Adv. Abrahams does not vindicate the rule of law. Rather, it subverts the rule of law.

52. The Chief Justice underscored the importance of the separation of powers principle as follows:

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[58] National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) para 66. See United Democratic Movement v Speaker of the National Assembly [2017] ZACC 21, para 63 (considerations of separation of powers "demand an ever-abiding consciousness of the constitutionally-sanctioned division of labour among the arms [of government] and refrain[ing] from impermissible intrusions.")

[59] See also SANTS Private Higher Education Institution v The Chairperson of the Higher Education Quality Committee of the Council on Higher Education (51588/2015) [2015] ZAGPPHC 791 (20 October 2015), para 33.

> "Ours is a constitutional democracy, not a judiciocracy. And in consonance with the principle of separation of powers, the national legislative authority of the Republic is vested in Parliament whereas the judicial and the executive authority of the Republic repose in the Judiciary and the Executive respectively. Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned operational space of the others, save where the encroachment is unavoidable and constitutionally permissible."[60]

53. Recognition of separation of powers principles has prompted two courts to exercise remedial caution in two cases ensuing from a similar factual matrix.

54. Firstly, the Western Cape High Court acknowledged that it was not at liberty to usurp the President's powers and order a suspension and the holding of an enquiry into senior NPA members, including Ms Jiba. Dolamo J wrote: "I am constrained by the separation of powers doctrine which precludes me from wading in and announcing my preferences."[61]

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60 Electronic Media Network Limited & Others v ETV & Others 2017 (9) BCLR 1108 (CC). The Chief Justice cautioned that the rationality test is "not a uniquely designed master key", and must be applied with "due regard to the imperative of separation of powers," "sensitively and cautiously." (Para 6.)

61 Democratic Alliance v President of the Republic of South Africa and Others 2016 (3) All SA 537 (WCC) at para 97.

55. Secondly, in the more recent case, Freedom Under Law[62], a Full Bench of the Gauteng Division declined to immediately direct the President to suspend and hold inquiries against senior prosecutors. In its decision handed down on 21 December 2017, the Court suspended its Order that the President must invoke s 12(6) of the NPA Act, pending the outcome of the appeal proceedings in which the GCB's application to remove senior prosecutors was resolved. Wright J went further, holding that it should be left to the President to decide whether s 12(6) enquiries should be held and if so, whether suspensions should be in place pending the enquiries.[63]

b) Dearth of Evidence on Record Supporting the Exercise of Remedial Discretion

56. Another principle relevant to the exercise of the remedial discussion is that a remedy should be based on evidence on record.

57. The ongoing SASSA saga illustrates the principle. In AllPay I,[64] the Court had found that SASSA unlawfully awarded a tender for the provision of social grants to Cash Paymaster Services. It declared the tender invalid - as it was obliged to do under section 172(1)*(a)* of the Constitution. The Court then considered remedy. Simply setting aside the contract risked interrupting payments to grant

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62 Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others (89849/2015) [2017] ZAGPPHC 791 (21 December 2017)

63 *Ibid* at para 75.

64 AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency 2014 (1) SA 604 (CC) (AllPay I).

beneficiaries. Yet permitting the balance of the contract to continue would be to sanction unlawfulness. The Court resolved the problem by calling for additional evidence and argument[65]. Subsequently, in Black Sash Trust,[66] it emerged that the Minister of Social Development and SASSA had disregarded this Court's remedial Order in AllPay II.[67] This Court was urged to mulct the Minister personally with costs. It declined to do so, holding that it had insufficient information to decide the issue, and instead calling for additional evidence and argument.[68]

58. If the Court *a quo* was minded to displace Adv. Abrahams from office – an order no less harsh than mulcting an individual for costs – it should first have called for evidence regarding the motives of the President, the alleged complicity of Adv.

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65 AllPay I at para 96 ("It would be inappropriate to make a decision on a just and equitable remedy in the absence of further information and argument on these issues. Our order will thus contain directions requiring further submissions and a hearing on the issues of a just and equitable remedy before a final decision is made.").

66 Black Sash Trust v Minister of Social Development and Others 2017 (3) SA 335 (CC) (17 March 2017).

67 AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer Social Security Agency and Others 2014 (4) SA 179 (CC).

68 Black Sash Trust above in 42 paras 72–75. See also Kham v Electoral Commission 2016 (2) SA 338 (CC), para 113 (declining to set aside by-elections as unlawful before obtaining evidence on whether setting aside the elections might generate practical problems.)

Abrahams, the effect of removal upon him personally, and other institutional considerations, and knock-on effects.

59. Whereas, in SASSA, this Court elicited further information from the parties to guide its remedial discretion, in Bengwenyama Minerals,[69] it refused to grant "just and equitable" relief because the record as it stood did not justify it. The court of first instance had refused to set aside a prospecting right that had been unlawfully awarded because it held, *inter alia*, that the right would make no practical difference to the relevant community, and setting aside the award would diminish the viability of the contemplating mining project. But this Court held that neither consideration was borne out by the record as presented, and hence set aside the award of the prospecting right.[70]

60. To return to the matter *in casu*, it was especially unfair to remove Adv. Abrahams in circumstances where the Applicants did not allege that he was not fit and proper. On the contrary, they expressly stated that whether or not he is fit or proper was *not* on the table.[71] On this basis, Adv. Abrahams said the following in his answering affidavit:

> "In view of the fact that the applicants do not challenge my fitness and propriety to hold the office of the NDPP, it is not necessary for me to

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69 Bengwenyana Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC).

70 *Ibid* paras 86 – 87.

71 Vol 1, R: 41 (CW FA, para 85); Vol 8, R: 745 (CW Replying Affidavit ("RA"), para 18); Vol 14, R: 1257 (CASAC RA, para 12.1).

> furnish details as to my background, the interview process and the facts leading up to my appointment."[72]

61. Had the question of Adv. Abraham's fitness and propriety to hold the office of NDPP been placed in issue, he could have addressed, *inter alia*, the dysfunctionality of the office of the NDPP when he was appointed, steps taken by him to restore stability to the NPA, co-operation with members within the NPA, positive performance indicators regarding the prosecution of crime and success rate, and the steps he took concerning Ms Jiba and Mr Mrwebi after they were struck from the roll, by putting them on special leave. (It is only the President who can suspend and remove a DNDPP).[73]

62. It is antithetical to the rule of law to punish a party based on allegations he was never called upon to address.[74]

63. The aforementioned Kirland[75] case makes the point. The acting Director-General of Health in the Eastern Cape had approved Kirland's application to build a private hospital. His successor then purported to withdraw the approval. Kirland challenged the latter decision. The MEC responded by asking that the initial approval be set aside on the grounds that it was unlawful. He had not, however, made a formal application for this relief. A majority of this Court refused even to

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72 Vol 5, R: 486 (SKA AA, para 13.2).

73 NPA Act, s. 12 (5); Vol 16, R: 1487 – 1489 (SKA AA, Para 51 to 55).

74 R: 484 (SKA AA, para 8); Vol 12, R: 1096 (SKA AA, para 8).

75 MEC For Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC).

consider setting aside the approval. Absent formal application, Kirland was not on notice that it even needed to respond to the argument in favour of the more drastic remedy of setting aside the initial approval. In Cameron J's words:

> "[I]t would be very unfair indeed to hold Kirland's feet to the fire of a dispute it did not then even realise existed. It had no interest in defending, or any need to defend, an approval impugned on grounds it did not know existed.'[76]

64. Another instructive example is provided by a 2009 case concerning Mr Zuma.[77] He had taken on review two decisions to indict him. He based his review solely on the NDPP's failure to invite him to make representations. Overturning the decision of Nicholson J to set aside the indictments, Harms JA held that, because Mr Zuma had not raised the merits of the decisions as a ground of review, Nicholson J should not have relied on his evidence relating to the merits. That was because the NDPP could not be expected to have responded on the merits. Harms JA observed that the judgment of Nicholson J was marked by:

> "A failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions."[78]

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[76] *Ibid* para 80. Also see Minister of Safety v Jongwa 2013 (3) SA 455 (ECG) at para 29, (noting that respondents were called upon only to answer only the specific allegations put forward by the applicant and none other).

[77] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA).

[78] *Ibid* para 15.

65. Much the same can be said of the decision *a quo* in this matter.

c) <u>Justice and Fairness Considerations</u>

66. While the primary purpose of the s 172(1)*(b)* power is to vindicate the rule of law, it must also ensure justice and fairness.[79] The remedial power is not aimed at punishing the person who violated the Constitution -- although it might have a deterrent effect.[80]

67. CASAC admitted that the relief sought with respect to Adv. Abrahams may impact unfairly upon him.[81] That concession was well made, given that it is repeatedly stated on affidavit that he is not alleged to be unfit or improper.[82] CASAC says in its heads before this Court that Adv. Abrahams has "done no direct wrong".[83] CASAC now suggests, that Adv. Abrahams was blameworthy in accepting the position knowing of the fact that Mr Nxasana had been bought out.[84] Yet it is uncontested that Adv. Abrahams had nothing to do with the negotiations that led to Mr Nxasana's departure. In fact, he expressly relied upon the fact that he was not privy to the settlement negotiations, as a basis for not

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79 <u>Steenkamp</u> *supra* (fn 54) at para 29.

80 <u>Fose</u> *supra* (fn 55).

81 CASAC HoA *a quo*, para 98.

82 R: 752 (Corruption Watch RA, para 18).

83 CASAC HoA, para 79.

84 CASAC HoA, para 82.

answering those parts of the founding affidavits on the subject, to hold against him conduct he was not called upon to defend amounts to an ambush.[85]

68. Moreover, it was widely known by all concerned – including Mr Nxasana – that Adv. Pikoli had likewise received a generous "golden handshake" upon departing office, pursuant to an agreement acknowledged by CASAC to be "strikingly similar" to the Settlement Agreement that is the subject of the present application.[86] In fact, under CASAC's reasoning - that a NDPP's departure pursuant to a golden handshake is *ipso facto* invalid – Adv. Pikoli did not leave office at all. The startling implication is that all of his successors in the position, including Mr Nxasana himself, did not lawfully occupy their offices. The chaotic implications of such a conclusion need only be imagined.

69. Corruption Watch states, in its founding affidavit, that the applicants do not suggest that Adv. Abrahams is not a fit and proper person to be appointed to the office of the NDPP.[87] And in its replying affidavit, Corruption Watch observes that the applicants have not questioned Abraham's fitness for office since "fitness is not a relevant issue in this application." [88] As for CASAC, it affirms in its replying

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85 Vol 5, R: 484 (SKA AA Para 8); Vol 12, R: 1096 (SKA AA, Para 8).

86 Vol 10, R: 901 (CASAC FA, para 35).

87 Vol 1, R: 41 (FA, para 65).

88 Vol 8, R: 745 (FA para 18).

affidavit that it "does not seek the removal of Adv. Abrahams on the basis that he is not a fit and proper person."[89]

70. The Applicants cite a recent judgment of the High Court setting aside the President's decision not to suspend Ms Jiba, a senior prosecutor. In Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others[90] a full bench found that Adv. Abrahams' conduct in defending Ms Jiba "*raises serious questions of credibility*",[91] was "*bizarre in the extreme*",[92] and was "*disingenuous and lacks integrity*".[93]

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89 Vol 14, R: 1257 (FA para 12.1). It must be pointed out that this observation, is contradicted when, in the same paragraph, it is contended: "While this is not directly in issue in these proceedings, there are serious reasons to doubt Adv. Abrahams' fitness for the office he currently holds." [Vol 14, RA Para 48, R: 1271]. However, this self-refuting sentiment has no merit: First, it is not given as the basis for the Court's determination that Adv. Abrahams should be removed from office. Second, the fact that CASAC suggests a just and equitable remedy would be to allow Adv. Abrahams to continue as Acting NDPP (Vol 5, RA para 18.1.2, R: 450) is entirely inconsistent with any suggestion to the contrary.

90 [2017] ZAGPPHC 791.

91 *Ibid* at para 55.

92 *Ibid* at para 57.

93 *Ibid* at para 58.

71. What the Applicants omit is that, concurring in part, Wright J wrote that he could make no adverse credibility finding against Adv. Abrahams."[94] Wright J went on to acknowledge that Adv. Abrahams may have been acting rationally by not pursuing the prosecution of Ms Jiba.[95] A court should be slow to rely upon adverse judicial findings, where those adversely commented upon had put up explanations. Wright J remarked that Ms Jiba's comments regarding her conduct in the matter before Gorven J could not on the papers be dismissed out of hand."[96]

72. Similarly, in the GCB matter[97] Legodi J (sitting with Hughes J), found that adverse judicial comments about Ms Jiba in another matter was no basis to strike her from the roll. Regarding the remarks of the Judges who criticised Ms Jiba's handling of the matter. Legodi J (like Dolamo J before him) held that, taking into

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94 Para 43.

95 Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others (89849/2015) [2017] ZAGPPHC 791 (21 December 2017). An application for Leave to Appeal has been filed.

96 Ibid, para 50. Notably, CASAC admits that this Court cannot sit, in effect , as a Court of appeal on matters in which adverse comments have been made about Adv. Abrahams. See CASAC HoA para 85 ("This Court does not need to decide the correctness of the High Court's findings.") Yet CASAC maintains that such comments must be taken into account because "the public perception is obvious." Id.

97 General Council of the Bar v Jiba and Others, 2017 (2) SA 122 (GP) (the "GCB matter")..

account Ms Jiba's explanations for her conduct in litigation, the President did not act irrationally in not invoking section 12(6) of the NPA Act against her.[98]

d) <u>Retroactivity and Adverse Knock-on Effects</u>

73. When it comes to remedy, courts are loath to unscramble the proverbial egg. This is so in the private law setting, in which it has been held that, where "both parties have performed in accordance the provisions of an agreement, albeit unenforceable, the purpose of the transaction has been achieved and . . . there is therefore no reason to interfere with the existing state of affairs.[99]

74. The principle finds application in public law as well.[100] The decision in <u>Speaker of the National Assembly v Makwetu & others</u> 2001 (3) BCLR 302 (C) is a case in point. The Speaker was advised by the Pan African Congress party structures that Mr Clarence Makwetu, MP, had been expelled from the party, and requested

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98 <u>GCB</u> supra at par 52. ("The criticism by Gorven J should be seen in the context of what Ms Jiba now has to say in these proceedings")

99 <u>Legator McKenna Inc and Another v Shea and Others,</u> 2010 (1) SA 35 (SCA), para 28.

100 See <u>Judicial Service Commission and another v Cape Bar Council and Another</u> 2013 (1) SA 170 (SCA) (in matter where a Bar Council had challenged the JSC's decision not to fill certain vacancies on the Cape Bench, on the basis that the JSC had not been properly constituted when it took the decision, the Court held: "Anyone who seeks the setting-aside of Judge Henney's appointment would have to persuade the court, not only that the recommendation of the JSC was invalid, but also that the dire consequences of the setting-aside of his appointment, more than a year after the event, would be justified");

the applicant to withdraw Makwetu's membership of the National Assembly. That was done a few days later, Makwetu's successor was sworn in. Subsequently, Makwetu brought an application to have his expulsion from the party set aside. Under a deed of settlement made an order of court, the decisions to expel Makwetu, and to terminate his membership of the National Assembly was withdrawn. The settlement agreement also recorded that Makwetu had agreed to resign from Parliament. The Court ruled against Makwetu's claim for his benefits as an MP for the period between his initial removal and the "resignation" recorded in the settlement. When Makwetu had ceased to be a member of his political party, the party's allotted proportional representation seat had become vacant - which vacancy was filled the moment his successor was sworn in. There was hence no seat from which Makwetu could "resign" *post facto*, as he purported to do under the deed of settlement.[101]

75. That the discretionary power to grant a just and equitable order must take into account the adverse of retroactive impact was acknowledged by Froneman J as follows:

> "Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside."[102]

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[101] At 308D—E.

[102] Bengwenyama at par 84

76. In the same spirit, courts have in reviews of state tenders exercised a discretion not to set aside a decision, even if unlawful *ab initio*.[103] Likewise, in a case concerning promotion of employees in a provincial department,[104] the MEC brought an application in the Labour Court to have the promotions set aside because the selection process had been compromised. The Constitutional Court reversed the LAC's decision to set aside the promotions: "The requirement to consider the consequences of declaring the decision unlawful is mediated by a court's remedial powers to grant a "just and equitable" order in terms of s 172(1)(b) of the Constitution. Further:

> "If the full relief is granted in the MEC's favour, Mr Khumalo will lose his position. Mr Khumalo has gone on with his life, continued in his employment, presumably adapted his expenses accordingly. …The MEC states candidly that the facts do not disclose any wrongdoing by Mr Khumalo. Even if Mr Khumalo's promotion is found to have been unlawful, on the facts he bears no responsibility for it but for having the boldness to apply for a position for which he possibly did not qualify."[105]

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103 Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others [2005] 4 All SA 487 (SCA) ("While the court a quo correctly found that the award of each of the three tenders was invalid when made, it appears not to have appreciated that it had a discretion to decline to set aside those awards. It follows that in my view the court a quo erred in making the order it did and this court is free to set aside that order.")

104 Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal 2014 (5) SA 579 (CC)

105 Ibid at para 55.

77. It hardly seems necessary to emphasise the parallel between that case and the situation of Adv. Abrahams, who was not said by the Applicants to be anything but fit and proper, and has now occupied the post of NDPP for nearly three years.

78. On that note, the question may fairly be asked why the Applicants did not pursue this matter on an urgent basis in August of 2015. The *golden handshake was* known to the Applicants by no later than 15 June 2015.[106] On their version, the upshot was that an imposer (so to speak), was purporting to execute the functions of NDPP. If that were so it would undoubtedly have justified the matter being treated as urgent, rather than enrolled in the ordinary course. It is submitted that this factor should weigh in the determination of remedy.

e) A Court Should Not Rely Uncritically upon "Public Perception" in the Exercise of its Remedial Discretion

79. The Applicants rely heavily upon case authority under which this court has held that the appearance or perception of independence plays a role in evaluating whether institutional independence exists. In Glenister II the Court explained that:

> "Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."[107]

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106 Vol 2, R: 188.

107 Glenister II at para 207.

80. But a reasonably informed and reasonable member of the public will not on the basis of *post facto* speculation conclude that Adv. Abrahams was appointed to do the President's bidding. The hypothetical individual would be aware that it was not the President alone, but the President together with the rest of the Cabinet, that appointed Adv. Abrahams.[108] And a reasonable and informed member of the public would take into account both sides of the story – including the account of Adv. Abrahams, which the Applicants' affidavits did not call upon him to present *a quo.*

81. It is true that there has been a great deal of adverse media coverage regarding Adv. Abrahams as well as other parties to this litigation. It is submitted however that a court can only consider material facts on the record. It should have mind to the words of the Chief Justice, albeit in dissent, when he wrote that the Court is "required to always display the critical boldness to go against overwhelmingly popular and forceful opinion."[109] Also relevant is the Chief Justice's reminder that the personified figure of "*Lady Justice*" must be "blind and deaf to images of and reports on the good reputation or notoriety of personalities". The more general point is that public opinion is to be accorded little weight if not reasonable or properly informed.[110] As observed in this Court:

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[108] Constitution section 179(1)(a); NPA Act section 10.

[109] Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47 (29 December 2017) at para 235

[110] See S v Makwanyane and Another 1995 (3) SA 391 (CC), para 88 (*per* Chaskalson P) ("If public opinion were to be decisive there would be no need for constitutional

> "We cannot simply overthrow the existing law - because a particular case evokes sympathy or because of the disgraceful conduct of a party. Notoriously, hard cases make bad law." [111]

PART C: UNFAIR FINDINGS *A QUO*

82. Much of what is argued above regarding the proper exercise of remedial discretion is intended to respond to what (it is respectfully submitted), were unjust and inequitable aspects of the judgment and order below. It remains only to name three particular points of criticism of Adv. Abrahams that were manifestly ill-founded.

83. First, it was unfair to criticise Adv. Abrahams for associating himself with the position of the President in litigation.[112] In point of fact, Adv. Abrahams did *not* associate himself with the President's position in several key respects. The fact that there was an overlap between some of the arguments advanced on behalf of Adv. Abrahams by the President, does not amount to illicit "association" with the President's position. These were legal arguments which Adv. Abrahams was

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adjudication); *per* Didcott J, para 187, ("public opinion deserves no further homage if the premise underlying . . . it is fallacious or unfounded').

111 Makate v Vodacom 2016 (4) SA 121 (CC), para 160 (per Wallis AJ, Cameron , Madlanga *et* Van der Westhuizen JJ, concurring).

112 Judgment *a quo* para 97. In relation to the conduct of Adv. Abrahams in the matter of Zuma v Democratic Alliance and Others 2018 (1) SA 200 (SCA), see Vol 16, R: 1492-1494, (SKA AA, para 64).

entitled to raise. Had he abided, he would in effect be supporting the Applicants' substantive application insofar as they concerned him.

84. Second whilst Adv. Abrahams is alleged to have used "disconcerting language" in his affidavits,[113] the Court a quo failed to recognise that this is hardly uncharacteristic of usages that are commonplace in High Courts across the country in affidavits.[114] It was especially inequitable to take Adv. Abrahams to task for observations that appeared in similar terms in his successful opposition to the abovementioned application brought by the Democratic Alliance to compel the President to invoke s. 12(6) of the NPA Act against Ms Jiba.[115] In his judgment dismissing the application, Dolamo J quoted, without adverse comment, the assertion on affidavit of Adv. Abrahams that the call for Ms Jiba's removal from within the NPA, emanated from persons who had "long been at loggerheads" with Ms Jiba.[116] Yet the Court *a quo* chastised him for the very

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113 Judgment *a quo* para 98.

114 See Cultura 2000 and Another v Government of the Republic of Namibia and Others 1993 (2) SA 12 (NM), 29 (respondents had used "harsh and critical tones" in affidavits, expressing their "indignation and disdain," but such language could not be described as "scandalous or vexatious"); Bailes v Highveld 7 Properties (Pty) Ltd and Others 1998 (4) SA 42 (N) (although affidavits, as well as argument put forward by counsel, were both "spirited and animated", such "robust antagonism in the courts is not unknown.")

115 In Democratic Alliance v President of the Republic of South Africa and Others [2016] 3 All SA 537 (WCC), Dolamo J found that the decision of the President to await the outcome of the GCB application was not irrational.

116 Para 45.

same language.[117] And to chide Adv. Abrahams for using commonplace adjectives like "*absurd*" and "*unmeritorious*"[118] in his answering affidavit is, we submit, no less unfair.

85. Finally, it is respectfully submitted that the Court *a quo* erred in finding that Adv. Abrahams failed to act appropriately in response to High Court decisions in which Ms Jiba's conduct had been criticised.[119] As Deputy National Director Ms Jiba, is appointed by the President directly.[120] The NDPP has no power to take steps against him or her. Only the President is vested with this power, under section 12(6) of the NPA Act.

86. In point of fact, after consideration of the judgments, enquiries, opinions and documents filed in the GCB application, Adv. Abrahams advised the President, through the Minister, to await the finalisation of the GCB application before the President made a final decision on whether the officers should be suspended and an enquiry held into their fitness for office.[121]

87. It is difficult to see how Adv. Abrahams can be faulted for that when, as noted above, two courts similarly found that, all things considered, to await the outcome

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117 Judgment *a quo* para 45.

118 Judgment a quo para 98.

119 Judgment a quo para 99.

120 NPA Act section 11(1).

121 Vol 16, Pg 1487 - 1489, par 51 – 55.

of the GCB matter, under which the senior prosecutors accused of misconduct in litigation might in any event be removed, was the better course.

PART D: COSTS

88. The Court erred in ordering costs against the NPA Parties, in light of the fact that:

88.1. The Applicants uniformly stated that the application was not based upon a contention that Adv. Abrahams was not fit and proper.

88.2. There was no allegation that Adv. Abrahams was in any way involved or implicated with the Settlement Agreement found by the court to be unlawful.

88.3. it was stated in heads of argument filed on behalf of the NPA Parties that they were not persisting in their opposition to the challenge of unconstitutionality of parts of s 12(4) and 12(6) of the NPA Act.

CONCLUSION

89. In the premises it is submitted that the appeal should be upheld and that an order should be granted in the following terms:

1. The settlement agreement ("the Settlement") between the President of the Republic of South Africa ("the President"), the Minister of Justice and Constitutional Development ("the Minister") and Mxolisi Nxasana

("Mr Nxasana") dated 14 May 2015 is reviewed, declared invalid and set aside.

2. The decision to authorise payment to Mr Nxasana of an amount of R17 357 233 in terms of the Settlement is reviewed, declared invalid and set aside.

3. Mr Nxasana is ordered to repay the State all the money he has received pursuant to Clause 4 of the Settlement.

4. The appointment of Adv. Shaun Kevin Abrahams as the National Director of Public Prosecutions on 18 June 2015 made in terms of section 179(1)(a) of the Constitution of the Republic of South Africa, 1996 read together with Section 10 of the National Prosecuting Authority Act 32 of 1998 is declared valid.

5. No order as to costs.

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23 February 2018