

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: CCT: 333/17 and CCT: 13/18

HIGH COURT CASE NOS: 62470/15 and 93043/15

CCT 333/17

In the matter between:

CORRUPTION WATCH NPC First Applicant

FREEDOM UNDER THE LAW NPC Second Applicant

**COUNCIL FOR THE ADVANCEMENT OF THE SOUTH
AFRICAN CONSTITUTION** Third Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES** Second Respondent

MXOLISI SANDILE OLIVER NXASANA Third Respondent

SHAUN ABRAHAMS Fourth Respondent

DIRECTOR-GENERAL OF JUSTICE Fifth Respondent

**CHIEF EXECUTIVE OFFICER OF THE NATIONAL
PROSECUTING AUTHORITY** Sixth Respondent

NATIONAL PROSECUTING AUTHORITY Seventh Respondent

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

CCT 13/18

In the matter between:

MXOLISI SANDILE OLIVER NXASANA Applicant

and

CORRUPTION WATCH NPC	First Respondent
FREEDOM UNDER LAW NPC	Second Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent
SHAUN ABRAHAMS	Sixth Respondent
DIRECTOR-GENERAL OF JUSTICE	Seventh Respondent
CHIEF EXECUTIVE OFFICER OF THE NATIONAL PROSECUTING AUTHORITY	Eighth Respondent
NATIONAL PROSECUTING AUTHORITY	Ninth Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Tenth Respondent

**CORRUPTION WATCH AND FREEDOM UNDER LAW'S WRITTEN
SUBMISSIONS**

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INTRODUCTION

1. The backdrop of this case is that the President has for many years been at risk of prosecution on multiple charges of racketeering, corruption, money laundering and fraud. The final decision on the fate of his prosecution will probably be taken by the National Director of Public Prosecutions (“NDPP”).
2. Mr Nxasana was appointed NDPP with effect from October 2013. The President however became disenchanted with him for reasons he has never credibly explained. He embarked on efforts to oust Mr Nxasana. He first tried to do so from about July 2014 by the stick of an inquiry into Mr Nxasana’s fitness to hold office. When that did not work, he tried the carrot of offering Mr Nxasana increasing amounts of public money to leave office. He eventually persuaded Mr Nxasana to go in return for an amount of R17 357 233. The President, the Minister of Justice and Mr Nxasana entered into a “*Settlement Agreement*”¹ in terms of which,
 - 2.1. the President recognised that Mr Nxasana “*is professionally competent, sufficiently experienced and conscientious and has the requisite integrity to hold a senior public position both in the public and private sector*”²; and

¹ Settlement Agreement 14 May 2015 vol 2 p 168

² P 170 clause 2

- 2.2. Mr Nxasana undertook to relinquish his post as NDPP from 1 June 2015 in return for the payment of an amount of R17,3m.³
3. Very soon after Mr Nxasana had left office, the President appointed Mr Abrahams in his stead on 18 June 2015. Mr Abrahams is still the incumbent NDPP.
4. Corruption Watch and Freedom under Law launched an application to review and set aside the Settlement Agreement, the payment to Mr Nxasana and the appointment of Mr Abrahams. They also asked for orders declaring that, because the President has a close personal interest in the matter, he is disqualified from appointing the NDPP.
5. A full bench of the High Court upheld the application in a judgment handed down on 8 December 2017.⁴ Its orders are set out in paragraph 128 of the judgment. They may be summarised as follows:

5.1. *The Settlement Agreement was invalid*

The Settlement Agreement and the payment of R17,3m are declared invalid and are set aside (orders 1 and 3). Mr Nxasana is ordered to repay the money (order 6).

³ P 170 clauses 3 and 4

⁴ Judgment vol 15 p 1390

5.2. *Mr Nxasana is not reinstated*

The termination of Mr Nxasana's appointment is declared invalid but the order of invalidity is suspended (orders 2 and 9). It means that he is not reinstated as NDPP.

5.3. *Mr Abrahams's appointment was invalid*

Mr Abrahams's appointment is declared invalid and is set aside (order 4). This order is suspended for 60 days to allow for the appointment of a new NDPP (order 9). It is declared that the decisions taken and as performed by Mr Abrahams as NDPP are not invalid merely because of the invalidity of his appointment (order 5).

5.4. *The President may not appoint the NDPP*

It is declared that, in terms of s 96(2)(b) of the Constitution, the incumbent President may not appoint, suspend or remove the NDPP (order 7). As long as he is in office, the Deputy President is responsible for the performance of these functions (order 8).

5.5. *Costs*

The unsuccessful respondents, the President, the Minister of Justice, Mr Abrahams and the NPA, must pay the applicants' costs.

6. The applicants applied to this court for confirmation of the High Court's orders in terms of s 172(2) of the Constitution. The orders invalidating the Settlement

Agreement and the appointment of Mr Abrahams are orders of constitutional invalidity of the conduct of the President and are thus subject to confirmation.

The remaining orders are incidental to and dependent on those orders.

7. Mr Nxasana and the President oppose confirmation of and appeal against some of the High Court's orders.
8. The only remaining issues of substance are the following:
 - 8.1. The applicants seek confirmation of the High Court's orders 1, 3 and 6. They declare unconstitutional and invalid and set aside the Settlement Agreement and the payment of R17,3m and order Mr Nxasana to repay the money. Nobody opposes the confirmation of these orders.
 - 8.2. The applicants also seek confirmation of the High Court's order 3 as far as it goes. It declares the termination of Mr Nxasana's appointment in terms of the Settlement Agreement to be unconstitutional and invalid. The applicants and Mr Nxasana however contend that the High Court should have reinstated Mr Nxasana by setting aside the termination of his appointment.
 - 8.3. The applicants ask for confirmation of the High Court's orders 4, 5 and 9 declaring Mr Abrahams's appointment to be unconstitutional and invalid and setting it aside. Mr Abrahams and the NPA oppose the confirmation of these orders and appeal against them.

- 8.4. The President appeals against the High Court's orders 7 and 8. They declare that he is disqualified from appointing, suspending or removing the NDPP and that the Deputy President must perform these functions.
9. The Council for the Advancement of the South African Constitution also launched an application very similar to that of Corruption Watch and FUL. Its application however also attacked the constitutional validity of certain provisions of the National Prosecuting Authority Act 32 of 1998. The two applications were consolidated in the High Court. The High Court upheld CASAC's attack on the constitutional validity of certain provisions of the NPA Act and made the orders set out in paragraph 129 of its judgment. CASAC applies for confirmation of those orders.

THE BACKGROUND AND CONTEXT

The predicament of Mr Zuma

10. Since before he took office as President, Mr Zuma has been in jeopardy of criminal charges:⁵

10.1. In August 2003, the then NDPP, Mr Ngcuka, announced his intention to charge Mr Schabir Shaik on counts of corruption involving allegedly corrupt payments to Mr Zuma, but stated that he would not charge Mr Zuma.

10.2. In June 2005, Mr Shaik was convicted of corruption in relation to payments made to Mr Zuma.

10.3. On 20 June 2005, Mr Pikoli, the then NDPP indicted Mr Zuma on charges of corruption.

10.4. On 31 July 2006 the matter was called for trial on two corruption counts which mirrored two corruption counts on which Mr Shaik was convicted. When the NPA was not ready to proceed with the trial, the matter was struck from the roll.

10.5. In December 2007, Mr Mpshe who was now the Acting NDPP following the removal from office of Mr Pikoli, took a new decision to indict Mr Zuma on 18 main counts of racketeering, corruption, money laundering,

⁵ Founding Affidavit vol 1 pp 22-3 paras 44.1 – 44.9

tax evasion and fraud. The indictment was, for the most part, based on the same subject matter that was dealt with in the Shaik trial.

- 10.6. In September 2008, Nicholson J set aside the decision taken by Mr Mpshe on grounds that It was not an independent decision and was tainted by political Interference.
 - 10.7. In January 2009, the SCA overturned the judgment of Nicholson J, leaving the decision to charge Mr Zuma intact.
 - 10.8. On 6 April 2009, Mr Mpshe decided to withdraw the charges against Mr Zuma.
 - 10.9. Later in April 2009, the Democratic Party brought proceedings to review and set aside the decision of Mr Mpshe to withdraw the charges against Mr Zuma.
 - 10.10. On 29 April 2016, a full bench of the North Gauteng High Court reviewed and set aside the decision of Mr Mpshe to withdraw the charges against Mr Zuma.⁶ Mr Zuma's attempts to appeal that decision have now failed.
11. Mr Zuma will now be facing corruption charges unless the NDPP decides again to withdraw those charges. He plainly has a personal interest in the identity of the NDPP who will take that decision, and has had such an interest since before he took office as President.

⁶ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 (2) SACR 1 (GP)

The history of instability in the NPA

12. There has been ongoing instability in the office of the NDPP since September 2007.⁷
13. In September 2007, the then NDPP, Mr Vusi Pikoli was suspended from office after he had resisted pressure from the executive not to prosecute the National Commissioner of Police, Mr Jackie Selebi for corruption related offences.⁸
14. President Mbeki then established an inquiry under section 12(6)(a) of the NPA Act to inquire into allegations that Mr Pikoli was not a fit and proper person to hold office as the NDPP. That inquiry was chaired by the former Speaker of Parliament, Dr Ginwala. Dr Ginwala found that the allegations against Mr Pikoli were unsubstantiated and she recommended his reinstatement as NDPP.⁹
15. Notwithstanding the recommendation of Dr Ginwala, Mr Pikoli was purportedly removed from office by President Motlanthe. In *Pikoli v President of the RSA* 2010 (1) SA 400 (GNP), Mr Pikoli successfully interdicted the President from appointing any successor in the office of NDPP pending a review application that he brought to set aside his removal from office. Mr Pikoli's review application was ultimately settled in terms of an agreement which provided for a substantial settlement payment to Mr Pikoli.¹⁰

⁷ Founding Affidavit, p 17 para 27

⁸ Founding Affidavit, p 17 para 28

⁹ Founding Affidavit, p 17 para 29

¹⁰ Founding Affidavit, p 17 para 30

16. Following the settlement of Mr Pikoli's review proceedings, on 25 November 2009, the President purported to appoint Mr Menzi Simelane as NDPP. That appointment was ultimately set aside by this Court on 5 October 2012 in *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC).¹¹
17. For close to a year, the President made no appointment of a permanent NDPP. During 2013, the Council for the Advancement of the South African Constitution (CASAC) instituted an application in this Court to compel the President to make an appointment of a permanent NDPP. In his answering affidavit to that application, the President undertook to do so by the end of August 2013.¹²

¹¹ Founding Affidavit, p 18 para 31

¹² Founding Affidavit, p 18 para 32

MR NXASANA'S APPOINTMENT AND REMOVAL

18. On 30 August 2013, the President announced the appointment of Mr Nxasana as the NDPP, with effect from 1 October 2013 for a period of 10 years.¹³
19. Less than a month after Mr Nxasana's appointment he was confronted with a crisis relating to one of his deputies and two other senior members of the NPA:
- 19.1. On 23 September 2013, in *Freedom Under Law versus National Director of Public Prosecutions and Others*¹⁴ this Court (per Murphy J) made unfavourable credibility findings against Advocate Nomgcobo Jiba (Ms Jiba), the Deputy NDPP and a former Acting NDPP; Advocate Lawrence Mrwebi (Mr Mrwebi), a Special Director of Public Prosecutions and the Head of the Specialised Commercial Crimes Unit (SCCU) within the NPA, and Advocate Sibongile Mzinyathi, the Director of Public Prosecutions for North Gauteng (Mr Mzinyathi).¹⁵
- 19.2. On 1 April 2014, the judgment and findings of Murphy J were confirmed by the Supreme Court of Appeal (SCA) in *National Director of Public Prosecutions versus Freedom Under Law*.¹⁶
- 19.3. Following the decisions of the High Court and Supreme Court of Appeal, the NPA, through the office of the State Attorney, briefed senior

¹³ Founding Affidavit, p 18 para 32

¹⁴ 2014 (1) SA 254 (GNP)

¹⁵ Founding Affidavit, p 25 paras 47 - 47.1; Annexure CW14 vol 2 pp 174 – 177

¹⁶ 2014 (4) SA 298 (SCA); Founding Affidavit, p 26 para 47.2

counsel to furnish a legal opinion as to whether, among others, disciplinary steps ought to be taken against Advocates Jiba, Mrwebi and Mzinyathi.¹⁷

19.4. The opinion was furnished to the State Attorney on 7 July 2014. In the opinion, senior counsel concluded that the findings of Murphy J in the High Court, as confirmed by Brand JA in the Supreme Court of Appeal, constituted compelling justification for disciplinary proceedings against Advocates Jiba, Mrwebi and Mzinyathi.¹⁸ The opinion recommended that:

19.4.1. The President should, in terms of section 12(6)(a) of the NPA Act, consider provisionally suspending the mentioned senior NPA managers pending an inquiry into their fitness to hold the office;¹⁹

19.4.2. A criminal investigation for perjury be opened against all three members of the NPA; and²⁰

19.4.3. The findings against the three NPA members be submitted to the General Council of the Bar as a matter of urgency to consider whether an application should be brought against

¹⁷ Founding Affidavit, p 26 para 47.3

¹⁸ Founding Affidavit, p 26 para 47.4

¹⁹ Founding Affidavit, p 26 para 47.4.1

²⁰ Founding Affidavit, p 26 para 47.4.2

them in terms of section 7 of the Admission of Advocates Act.²¹

20. By the time that Mr Nxasana received the opinion recommending action against Advocates Jiba, Mrwebi and Mzinyathi, the President was already taking steps to remove Mr Nxasana from office less than a year after his appointment:

20.1. On 4 July 2014, the President wrote a letter to Mr Nxasana informing him that he had taken a decision to institute an inquiry in terms of section 12(6)(a) of the NPA Act into the fitness of Mr Nxasana to hold office.²²

20.2. On 30 July 2014 the President addressed a letter to Mr Nxasana inviting him to provide representations as to why he should not be suspended.²³

20.3. On 9 February 2015 the section 12(6)(a) inquiry threatened by the President was appointed.²⁴

20.4. On or about 14 May 2015, the President and the Minister concluded the settlement agreement with Mr Nxasana and he was removed from office.²⁵

²¹ Founding Affidavit, p 27 para 47.4.3. The Bar Council subsequently instituted proceedings against the three advocates and on 15 September 2016 the Full Bench of this Court struck them off the roll. See *General Council of the Bar of SA v Jiba and others* 2017 (1) SACR 47 (GP).

²² Founding Affidavit, p 19 para 34; annexure CW3 vol 2 p 113

²³ Founding Affidavit, p 19 para 35; annexure CW4 vol 2 p 114

²⁴ Founding Affidavit, p 20 para 38

THE PRESIDENT'S REASONS

21. On 28 October 2015, in the present application, President Zuma gave reasons under Rule 53(4) for his decision to enter into the settlement agreement with Mr Nxasana.²⁶ They are extremely vague.

21.1. The President says in paragraph 6 that Mr Nxasana “*made the request on those grounds*”. It is not apparent what Mr Nxasana requested or on what grounds he did so, but in the context of the reasons furnished by the President it must be inferred that the President claims that Mr Nxasana requested the President’s permission for him to resign.

21.2. The President also seems to suggest that Mr Nxasana made the request because of the discord within the NPA.

21.3. The President is extremely vague as to where and when this request was made. His reasons state merely that it was on some occasion in the 10-month period between 4 July 2014 and 9 May 2015.

22. President Zuma is only slightly less vague in his answering affidavit.²⁷

22.1. The answering affidavit confirms the inference to be drawn from the reasons, namely that Mr Nxasana requested to be relieved of his duties. Thus the President states:

²⁵ Founding Affidavit, p 21 para 42- 42.5; annexure CW12 vol 2 p 168 -171

²⁶ President’s Reasons vol 5 p 471

²⁷ President’s Answer vol 6 p 527 paras 5.3 to 5.15

“Nxasana made the request to me to vacate his office”²⁸

“It was plain to me that Nxasana was no longer willing to continue as the NDPP...”²⁹

“With Nxasana having made it crystal clear that he no longer wishes to continue as the NDPP...”³⁰

22.2. It also suggests that Mr Nxasana asked to leave because he was the cause of all the discord in the NPA:

“Nxasana made the request to me to vacate his office. Nxasana made it plain that the discord in the NPA largely rested on the senior management not sharing his strategic views and the disciplinary steps or criminal charges which he intended taking against certain of the senior managers. This posited intractable disputes paralysing the proper functioning of the NPA.”³¹

22.3. The President again does not say when Mr Nxasana asked to leave and when he agreed to the request. He strongly suggests however that the negotiations on the terms of Mr Nxasana’s departure only followed thereafter.³² He says that,

²⁸ President’s Answer p 527 para 5.7

²⁹ President’s Answer p 528 para 5.9

³⁰ President’s Answer p 528 para 5.12

³¹ President’s Answer p 527 para 5.7

³² President’s Answer p 528 paras 5.10 and 5.11

“It was plain to me that Nxasana was no longer willing to continue as the NDPP and the only outstanding issue remained the financial aspects relating to his vacating his office.”³³

the subject-matter of the negotiations, was *“the financial terms with which he (Mr Nxasana) would be agreeable to leave office having made the request to do so”*.³⁴

23. The President’s version must accordingly be that Mr Nxasana asked to leave but only if the financial package offered to him was acceptable to him. As we show below, that was incompatible with s 12(8) of the NPA Act.
24. The President makes no attempt to explain his decision to depart from the requirements of s 12(8) of the NPA Act and to pay Mr Nxasana R17,3 million in severance pay as opposed to the small amount to which Mr Nxasana would have been entitled under s 12(8).

³³ President’s Answer p 528 para 5.9

³⁴ President’s Answer p 528 para 5.10

THE DOCUMENTS NOT DISCLOSED

The incomplete Rule 53 record

25. The Applicants instituted their application in August 2015. In terms of Rule 53(1)(b) of the Uniform Rules of Court, the President was required to file the record of his decision and his reasons within 15 days of service of the application. The President failed to do so.
26. On 30 September 2015 the Applicants served a notice in terms of Rule 30A on all the Respondents (“Rule 30A notice”). The First and Eighth Respondents made undertakings to file the record by 9 October 2015 but failed to make good on their own undertaking.³⁵ On 23 October 2015 the Applicants instituted an application to compel the delivery of the record. The President then filed documents purporting to comprise the record of his decision on 28 October 2015.³⁶
27. In the course of meetings between the Applicants and Mr Nxasana held in January and March 2016 it became clear that the President and the Minister had not disclosed the full record of documents as required by Rule 53(1)(b) of this Honourable Court. In particular, the documents that had been filed as the Rule 53 Record omitted important correspondence between the legal

³⁵ Applicants’ Further Supplementary Affidavit, vol 7 p 630 paras 14 -15; annexure MH14 vol 7 p 663

³⁶ Applicant’s Further Supplementary Affidavit, p 630 paras 15-16

representatives of Mr Nxasana and the President, and several earlier drafts of the settlement agreement.

28. In light of the apparent failure to file a complete record, the Applicants brought a new Rule 30A application for the production of the documents which had not yet been disclosed by the President and the Minister.³⁷ The application in terms of Rule 30A was served on the office of the State Attorney on 23 March 2016. No notice of intention to oppose was received in respect of this application.³⁸
29. After a failed attempt to have the Rule 30A matter heard earlier by this Court, it was set down for hearing on the unopposed roll for 5 September 2016.³⁹
30. On 23 August 2016 the Respondents filed their answering affidavit and attached the previously undisclosed documents. It was agreed that the matter be removed from the roll on the basis that the Respondents would pay for any wasted costs occasioned thereby.⁴⁰

The facts revealed by the undisclosed documents

31. The documents that were subsequently disclosed by Mr Nxasana contradict the President's justification of the settlement agreement. As pointed out above, the President's reasons suggested that Mr Nxasana had initiated his removal from

³⁷ Applicants' Further Supplementary Affidavit, p 632 para 25

³⁸ Applicants' Further Supplementary Affidavit, p 633 - 634 para 26

³⁹ Applicants' Further Supplementary Affidavit, pp 633 - 634 paras 28 -35; annexures MH18 – MH20 pp 683 - 690; annexures SR1-SR17 pp 685 - 700

⁴⁰ Applicants' Further Supplementary Affidavit, pp 633 - 634 paras 32 - 34

office by requesting to be allowed to vacate his office. The initially undisclosed documents showed that this was not the case. They revealed that:

- 31.1. Mr Nxasana had insisted that he had no intention of resigning from his position as NDPP because he considered himself a fit and proper person;
- 31.2. Mr Nxasana repeatedly expressed a preference for the allegations against him to be addressed through the s 12 inquiry;
- 31.3. Mr Nxasana, at an early stage in the dispute, made it clear that he would not consider resigning unless he was paid out the full salary for his outstanding term of office; and
- 31.4. The representatives of the President repeatedly attempted to persuade Mr Nxasana to resign in return for lesser amounts but ultimately agreed to pay him the full amount of R17.3 million.

The true chronology of events

32. Having regard to the documents that the President belatedly disclosed, the relevant chronology of events was the following:

32.1. The President gave notice to Mr Nxasana on 4 July 2014 of his intention to institute an inquiry into his fitness for office in terms of s 12(6)(a)(iv) of the NPA Act.⁴¹

32.2. The President gave notice to Mr Nxasana on 30 July 2014 that he proposed to suspend him.⁴²

32.3. Mr Nxasana made representations to the President on his proposed suspension on 1 August 2014.⁴³

32.4. The President declined to give Mr Nxasana further particulars of the charges against him on 8 August 2014.⁴⁴

32.5. Mr Nxasana launched an application on 11 August 2014 to compel the President to provide him with particulars of the charges against him.⁴⁵

32.6. The media reported on 17 October 2014 that the President and Mr Nxasana were in negotiations on a golden handshake for Mr Nxasana's departure from office.⁴⁶

⁴¹ President's Letter 4 July 2014 vol 2 p 113

⁴² President's Letter 30 July 2014 p 114

⁴³ Nxasana Letter 1 August 2014 p 140

⁴⁴ President's Letter 8 August 2014 p 151

⁴⁵ Nxasana Application 11 August 2014 p 118

32.7. Mr Nxasana's attorney, Mr Mabunda, addressed a letter to the President's legal adviser, Mr Hulley, on 3 November 2014.⁴⁷ This letter was one of the belatedly disclosed documents. It appears from the letter that the President had proposed mediation in an attempt to resolve the charges against Mr Nxasana. He now agreed to mediation.

32.8. Mr Mabunda addressed a comprehensive letter to the presidency on 10 December 2014.⁴⁸ This letter too is one of the belatedly disclosed documents. The letter appears to have been prompted by a meeting between Mr Mabunda (and possibly Mr Nxasana) with a legal adviser in the presidency, Ms Bonisiwe Makhene. The letter made the following points:

32.8.1. Ms Makhene had presented a settlement proposal to Mr Mabunda. Mr Mabunda responded by asking for "*the NDPP's total unexpired term package in line with the annexure to the presentation*".⁴⁹ We have never seen the presentation or the annexure to it. It seems significant, however, that it was the presidency who put forward a settlement proposal.

32.8.2. Mr Mabunda recorded,

⁴⁶ Mail & Guardian Report 17 October 2014 p 155

⁴⁷ Mabunda Letter 3 November 2014 vol 7 p 685

⁴⁸ Mabunda Letter 10 December 2014 p 687

⁴⁹ p 687 para 1.1

“That it has never been the NDPP’s intention to resign from his position since he considers himself to be a fit and proper person to hold this position.”

This assertion is never challenged and is not explained in the Respondents’ affidavits.

32.8.3. The letter records that the proposed settlement *“was triggered by the discussions which the NDPP had with the President following the latter’s announcement of his decision to hold an inquiry into the NDPP’s fitness to hold office”*.⁵⁰

32.8.4. Mr Mabunda also recorded that,

“We are advised that during the discussions the NDPP had with the President, the NDPP made it very clear that he will only consider stepping down from office if he is fully compensated for the remainder of his entire contract as head of the National Prosecuting Authority”.⁵¹

*“We reiterate that there is no factual or legal basis for our client to step down from his position.”*⁵²

“In the circumstances, our client will only consider the option of leaving office, as the President would want him

⁵⁰ p 688 para 4

⁵¹ p 688 para 7

⁵² p 688 para 8

*to, if he is fully compensated for the remainder of his contract.*⁵³

These paragraphs seem to make it clear that Mr Nxasana never asked to resign. The President must have asked him to resign to which he responded that he would only consider doing so if he was paid out for the full remaining term of his contract. He was emphatic that there was “*no factual or legal basis for our client to step down*”.

- 32.9. The President has never disputed the accuracy of this letter.⁵⁴ It is incompatible with his version that, at about that time, Mr Nxasana asked him for permission to leave office.
- 32.10. The following day, 11 December 2014, Mr Mabunda sent particulars of Mr Nxasana’s pension benefits and accrued leave to the presidency.⁵⁵ This document also was not disclosed by the President in his original Rule 53 Record.
- 32.11. Ms Makhene responded to Mr Mabunda’s letter on 12 December 2014⁵⁶ in a letter which, too, did not form part of the original Rule 53 Record. She did not dispute the accuracy of the letter. On the contrary, he concluded by saying that it was apparent that “*the parties are*

⁵³ p 689 para 10

⁵⁴ Zuma Supplementary Answer vol 8 p 731 para 17

⁵⁵ Mabunda Letter 11 December 2014 vol 7 p 690

⁵⁶ Makhene Letter 12 December 2014 p 692

incapable of resolving the matter alone” and that they should consequently revert to an earlier suggestion that they engage in mediation. But, on the President’s version, there was never anything to mediate or resolve by settlement.

32.12. Mr Mabunda replied to Ms Makhene on 15 January 2015.⁵⁷ This letter also was not disclosed by the President in his original Rule 53 Record. Mr Mabunda noted that he had been in discussion with Mr Hulley as legal adviser to the President. He said that they should prepare the terms of reference of a proposed mediation. He added by repeating that,

*“We further wish to record that our client has at no stage initiated the discussions regarding settlement proposal.”*⁵⁸

This assertion seems to be incompatible with the President’s version. However, it was never challenged.

32.13. Ms Makhene responded on 23 January 2015⁵⁹ in another letter that did not form part of the original Rule 53 Record. She said that, because the parties had not made sufficient progress in their settlement negotiations, the President had decided to proceed with the inquiry. This position was wholly incompatible with the President’s version that,

⁵⁷ Mabunda Letter 15 January 2015 p 693

⁵⁸ p 694 para 7

⁵⁹ Makhene Letter 23 January 2015 vol 8 p 695

by that time, he and Mr Nxasana had agreed in principle that the latter would go and that only his compensation remained to be determined.

32.14. Mr Mabunda noted the President's decision on 26 January 2015.⁶⁰ Again, this letter was not disclosed in the original Rule 53 Record.

32.15. The President promulgated his appointment of Advocate Cassim to enquire into Mr Nxasana's fitness for office on 9 February 2015.⁶¹

32.16. Mr Cassim directed the Minister on 26 February 2015 to file his submissions by 27 March 2015.⁶²

32.17. During March 2015 Mr Mabunda and Mr Hulley finalised the settlement agreement. It seems that, by that stage, all the terms had been agreed except the amount of the golden handshake. From a series of documents, none of which was disclosed in the original Rule 53 Record, it appears that Mr Nxasana held out for full compensation equal to his salary for the remainder of his term of appointment. Mr Hulley (and the President) ultimately agreed:

32.17.1. Mr Hulley sent a draft agreement to Mr Nxasana on 4 March 2015.⁶³ It proposed compensation in an amount of R10,5m in paragraph 4.

⁶⁰ Mabunda Letter 26 January 2015 p 696

⁶¹ Government Notice 9 February 2015 vol 1 p 161

⁶² Cassim Ruling 1 April 2015 vol 8 p 717 at p 719 para 5.1

⁶³ Hulley email 4 March 2015 p 707; Draft settlement agreement p 708.

32.17.2. Mr Hulley again sent a draft to Mr Nxasana on 26 March 2015.⁶⁴ It again proposed compensation in an amount of R10,5m.

32.17.3. Mr Hulley sent a further draft to Mr Nxasana on 27 March 2015.⁶⁵ This time, paragraph 4 of the draft agreement left the amount of the compensation blank. Mr Hulley said to Mr Nxasana in the email that “*Await final amount from you*”. This seems to have been a capitulation to Mr Nxasana’s insistence on full compensation for the remaining term of his appointment.

32.18. The Minister failed to meet the deadline for his submissions to the Cassim inquiry. Mr Cassim ruled on 1 April 2015 that the Minister must do his best to file his submissions by 20 April 2015.⁶⁶

32.19. In his response to a parliamentary question on 10 April 2015, the Minister acknowledged that he had received the Yacoob report in February 2015.⁶⁷

32.20. Mr Nxasana signed the final settlement agreement on 9 May 2015 and the Minister signed it on his own behalf and on behalf of the President on 14 May 2015.⁶⁸

⁶⁴ Hulley email 26 March 2015 p 707; Draft agreement p 708.

⁶⁵ Hulley email 27 March 2015 p 712; Draft agreement p 713.

⁶⁶ Cassim Ruling 1 April 2015 p 717 at p 722 para 12.2

⁶⁷ Minister’s Note 10 April 2015 p 513

33. The signed settlement agreement has the following significant features:

33.1. The entire agreement proclaims itself to be a settlement of the disputes between the parties arising from the President's proposed inquiry into Mr Nxasana's fitness. It is a settlement of that dispute from beginning to end. There is no suggestion that the purpose of the agreement is to record the terms on which Mr Nxasana had requested to leave office and the President had agreed to permit him to do so. The essential nature of the agreement is thus incompatible with the President's case that it merely recorded the terms of Mr Nxasana's request and the President's consent given in terms of s 12(8).

33.2. Paragraphs 1 and 2 vindicate Mr Nxasana. The President did not merely abandon the accusations against him. He recognised, on the contrary, that Mr Nxasana "*is professionally competent, sufficiently experienced and conscientious and has the requisite integrity to hold a senior public position*".

33.3. The President and the Minister agreed to pay Mr Nxasana an amount of R17,3m, that is, the full outstanding salary for the remainder of his term.⁶⁹ There is no justification or explanation for this amount.

33.4. When one reads together, the President's acknowledgment of Mr Nxasana's fitness for office and the President's unexplained

⁶⁸ Settlement Agreement 14 May 2015 vol 2 p 168

⁶⁹ P 169 para 4

undertaking to pay him an amount of R17,3m for leaving office, the only sensible inference is that Mr Nxasana was being paid to leave office despite the fact that there was no justification for it.

- 33.5. The fact that the parties negotiated a settlement at all and that, in those negotiations, Mr Nxasana clearly had the upper hand, are both wholly irreconcilable with the President's version. Despite this contradiction, however, the President deals with it in a most perfunctory fashion.⁷⁰ He makes no attempt to reconcile his version with this evidence which seems wholly incompatible with it. His failure to do so denudes his version of all credibility.
- 33.6. The NPA's 2015 annual report included a report by Mr Nxasana as NDPP dated 29 May 2015 (because he only left office on 1 June 2015).⁷¹ Mr Nxasana did not in any way suggest in the report that he was to blame for the turmoil in the NPA and that the solution was for him to leave, as the President would have it.
34. Payment of an amount of R10 240 767.47 which is the balance remaining after the deduction of R7 357 233.00 for income tax on the amount of R17 357 233.00 was made to Mr Nxasana on 15 June 2015.⁷²

⁷⁰ Zuma Further Answer vol 8 p 731 paras 18 to 21

⁷¹ NPA Report 29 May 2015 vol 2 p 174

⁷² Applicants' Further Supplementary Affidavit, vol 5 pp 467 - 468 paras 10 - 10.6

35. On 18 June 2015, the President announced the appointment of Mr Abrahams as NDPP to take the position purportedly vacated by the removal of Mr Nxasana.⁷³

⁷³ Applicants' Founding Affidavit, vol 1 p 22 para 43

THE SETTLEMENT AGREEMENT WAS INVALID

The independence of the NPA

36. The Constitution guarantees the independence of the NPA.⁷⁴ The constitutional guarantee of the independence is reinforced by the NPA Act⁷⁵ and has repeatedly been emphasized by the courts:⁷⁶
37. The purpose of the constitutional guarantee of the independence of the NPA is two-fold:
- 37.1. to shield the NPA from political influence in the discharge of its prosecuting duties;⁷⁷ and
- 37.2. to protect public faith in the NPA.
38. Because public faith relates to issues of perception, the constitutional guarantee of independence is violated when acts or laws create the appearance of a violation of the independence of the NPA.⁷⁸

⁷⁴ Section 179(4) of the Constitution.

⁷⁵ See the preamble to the NPA Act, section 32(1)(a) and section 32(2).

⁷⁶ See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)* at para 146, *Nkabinde and Another v Judicial Service Commission and Others* 2016 (4) SA 1 (SCA) at paras 89 – 92, *DA v President of the RSA* 2013 (1) SA 248 (CC) at para 24, *DA v President of the RSA* 2012 (1) SA 417 (SCA) at para 107, *Pikoli v President of the RSA* 2010 (1) SA 400 (GNP)

⁷⁷ See *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 118.

⁷⁸ See *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 207

39. Issues relating to the appointment and removal of the NDPP implicate the independence of the NPA directly because in the absence of adequate safeguards, the power of appointment and removal could be used to compromise the independence of the NDPP.⁷⁹

Section 12 of the NPA Act

40. Because of the constitutional guarantee of the independence of the NPA, the removal of the NDPP from office is a matter which is regulated in close detail by the NPA Act. Section 12 of the NPA Act states the following in relevant parts:

“12. Term of office of National Director and Deputy National Directors.

(5) The National Director...shall not be suspended or removed from office except in accordance with the provisions of subsections (6),(7) and (8).

(6)(a) The President may provisionally suspend the National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office –

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

⁷⁹ See for example *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 119 and 133 (Ngcobo CJ minority judgment) and 182, 213 and 217-227 (Moseneke DCJ and Cameron J majority judgment); *Helen Suzman Foundation v President of the RSA* 2015 (2) SA 1 (CC) at paras 77-91; *DA v President of the RSA* 2013 (1) SA 248 (CC) at paras 24-25; *McBride v Minister of Police and Another* 2016 (2) SACR 585 (CC) at para 38

- (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.*
- (b) The removal of the National Director..., the reason therefor and the representations of the national Director...(if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.*
- (c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director...so removed, is recommended.*
- (d) The President shall restore the National Director...to his or her office if Parliament so resolves.*
- (e) The National Director...provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.*
- (7) The President may also remove the National Director...from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6)(a), is presented to the President.*
- (8)(a) The President may allow the national Director...at his or her request, to vacate his or her office –*
- (i) on account of continued ill-health; or*
- (ii) for any other reason which the President deems sufficient.*
- (b) The request in terms of paragraph (a)(ii) shall be addressed to the President at least six calendar months prior to the date on which he or*

she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.

(c) If the National Director...-

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

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

41. Sections 12(6) and (7) deal with the removal of an NDPP who is no longer fit and proper to hold office as NDPP. The President initiated proceedings against Mr Nxasana for his removal on this ground. However, he abandoned this process, expressly confirmed the fitness of Mr Nxasana to hold office and now claims merely to have permitted Mr Nxasana to resign in terms of s 12(8).

42. Section 12(8) allows the President to permit the NDPP to resign at his request. But the NDPP may only resign and the President may only permit him to resign as follows:

42.1. The NDPP must request the President to allow him to resign.

42.2. The NDPP must motivate his request.

- 42.3. The President must consider the NDPP's motivation and may only allow him to resign if he regards it as sufficient reason to do so.
- 42.4. The NDPP may then resign on the terms specified in s 12(8)(c). He is entitled to a pension and no more.
43. The NDPP may not resign and the President may not permit him to resign on any basis other than in accordance with s 12(8).⁸⁰ It means, amongst other things, that the President may not entice the NDPP to resign by offering him more compensation than that permitted by s 12(8)(c). That is so for the following reasons:
- 43.1. Section 12(5) says expressly that the NDPP may not be suspended or removed from office otherwise than in accordance with ss 12(6), (7) and (8).
- 43.2. The obvious purpose of s 12(8) is to permit but strictly regulate the NDPP's voluntary resignation from office. It must truly be voluntary and for good reason and in particular not for any financial reward.

⁸⁰ The decision in *Government Employees Pension Fund v Strydom* 2001 (3) SA 856 (SCA) relied upon by the respondents is clearly distinguishable on the grounds set out in paragraphs 100 to 105 of the High Court judgment. In any event, we respectfully submit that the court in *Government Employees Pension Fund v Strydom* 2001 (3) SA 856 (SCA) erred by holding that section 13(5) of the Magistrates Act 90 of 1993 did not exhaustively provide for the circumstances in which a Magistrate may resign his or her office. Considerations of judicial independence dictate that section 13(5) should be treated as exhaustive in much the same way as considerations of prosecutorial independence dictate that section 12(8) should be treated as exhaustive in the present case.

- 43.3. Section 12(8) would be rendered pointless if it were permissible for the NDPP and the President to design their own resignation package, including a hefty golden handshake, beyond the scope of s 12(8).
- 43.4. It is contrary to the concept of prosecutorial independence to permit the President to rid himself of a troublesome NDPP by enticing him out of office by an obscene reward funded by public money.

The settlement was unlawful

44. It is no longer disputed that the settlement agreement and the termination of Mr Nxasana's appointment were inconsistent with section 12(8) and invalid.
45. The removal of Mr Nxasana from office by means of the settlement agreement violated the independence related requirements of section 12(8) in two respects:
- 45.1. First, as set out above, there was no request from Mr Nxasana to vacate office. On the contrary, Mr Nxasana repeatedly emphasized to the President that he did not want to vacate his office and it was the President who was initiating negotiations for Mr Nxasana to leave office.
- 45.2. Second, the payment to induce Mr Nxasana to vacate office was far in excess of that permitted (and prescribed) by section 12(8) and violated the constitutional guarantee of prosecutorial independence.

THE REINSTATEMENT OF MR NXASANA

46. The High Court should have reinstated Mr Nxasana. That was the natural consequence of the conclusion that the termination of his appointment was unconstitutional and invalid.
47. The reinstatement of Mr Nxasana is the centrepiece of Mr Nxasana's appeal and we accordingly leave it to him to address it fully. For the purposes of these heads of argument we make only the following submissions of principle:
 - 47.1. To decline to reinstate Mr Nxasana would be subversive of the constitutional scheme of prosecutorial independence and the purpose of section 12 of the NPA Act. It would allow the President to achieve that which the Constitution and section 12 prohibited him from doing, namely the removal of Mr Nxasana in a manner inconsistent with the constitutional requirements of prosecutorial independence.
 - 47.2. There is nothing in the conduct of Mr Nxasana that suggests that he is not fit and proper to be reinstated as NDPP. He resisted extraordinary pressure brought upon him by the President to vacate his office. He has tendered the return of the settlement payment and consistently requested to be reinstated to his office.
 - 47.3. In any event, it is inconsistent with the scheme of the Constitution and section 12 of the NPA Act and the separation of powers between Parliament and the judiciary to decline to reinstate Mr Nxasana on the

basis of conclusions relating to his fitness for office which are reached in proceedings where no charges of unfitness were put to him and he did not have an opportunity to defend himself. The Constitution and section 12 require the reinstatement of Mr Nxasana. If there are allegations of his unfitness to hold office as NPA flowing from his ultimate capitulation to the President's attempts to remove him, these should be addressed through the procedures of section 12.

MR ABRAHAMS'S APPOINTMENT WAS INVALID

48. The termination of Mr Nxasana's appointment in terms of the Settlement Agreement was unconstitutional and invalid. This termination was a precondition for the appointment of Mr Abrahams. It follows that the appointment of Mr Abrahams was equally unconstitutional and invalid. The only remaining question is whether the court should exercise its remedial discretion by allowing Mr Abrahams to remain in office. But there are compelling reasons not to do so.
49. The default rule is that an abuse of power which is unconstitutional and invalid should be set aside. The court departs from this rule only if there is good reason to do so.
50. The primary consideration in the exercise of the court's remedial discretion, is to vindicate the Constitution. In this case, the President abused his powers to rid himself of Mr Nxasana and to appoint Mr Abrahams in his stead. Whether Mr Abrahams was complicit in this abuse or a mere pawn in it, is neither here nor there. The Constitution will not be vindicated for as long as the President is allowed to have his way by keeping Mr Nxasana out and Mr Abrahams in the office of NDPP. The vindication of the Constitution accordingly makes it necessary to remove Mr Abrahams from office.
51. Mr Abrahams pleads that he was innocent of any wrongdoing. But that is irrelevant. Even if one assumes that Mr Abrahams was a mere pawn in the

President's abuse of power, Mr Abrahams became the beneficiary of that abuse. He would not have been appointed NDPP but for the President's abuse of power. There is no reason in law or equity to suggest that he should be allowed to keep his tainted windfall because it would be unfair to deprive him of its spoils.

THE PRESIDENT IS DISQUALIFIED FROM APPOINTING THE NDPP

52. Mr Zuma is in jeopardy of prosecution on corruption charges. In such circumstances, Mr Zuma has a clear personal interest in the identity of the NDPP and cannot be involved in decisions affecting the appointment, suspension or removal of the NDPP.

53. Any such involvement

53.1. would create a manifest appearance of bias and would be unlawful;⁸¹

53.2. would be inconsistent with section 96(2)(b) of the Constitution:

53.2.1. in terms of s 96(2)(b), the President and the other members of the cabinet may not “*expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests*”;

53.2.2. the President would inevitably be exposed to such a risk if he were to appoint the NDPP;

53.3. would also violate the constitutional guarantee of the independence of the NPA because any such decision by Mr Zuma, who is an interested party, would appear to the public to be a decision that was influenced

⁸¹ SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC); Turnbull-Jackson v Hibiscus Coast Municipality 2014 (6) SA 592 (CC) at para 30.

by considerations relating to the likelihood of the particular NDPP deciding to prosecute Mr Zuma.⁸²

54. Mr Zuma's disqualification from the appointment of the NDPP renders him "*unable to fulfil*" that function of the President within the meaning of s 90(1) of the Constitution. The Constitution itself thus ordains that the Deputy President should perform this function.
55. The only basis upon which the President appeals against this order, is that it yields the incongruous result that he is not deemed to be the President for purposes of the appointment of the NDPP but is the President for all other purposes. There is no substance to this contention. Mr Zuma is the President for all purposes but he is unable to perform this one presidential function. That is why the resultant *lacuna* is filled by s 90(1)(a).

⁸² *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 207

CONCLUSIONS

56. For the reasons set out above, Corruption Watch and FUL seek an order in the following terms:

- 56.1. Upholding the application for confirmation with costs, including the costs of two counsel;
- 56.2. Confirming the ancillary and costs orders made by the High Court in paragraphs 3, 5, 6, 7, 8 and 10, but not 9 of the High Court order;
- 56.3. Dismissing the appeals of the President and Mr Abrahams with costs, including the costs of two counsel.

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