IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 87643/2016

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SHAUN ABRAHAMS	Second Respondent
DR JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

APPLICANTS' HEADS OF ARGUMENT

INTRODUCTION

1. This is an application to review, set aside and declare unlawful, the President's failure to institute enquiries ("**the enquiries**") into the fitness and propriety of:

1.1 the second respondent ("**Mr Abrahams**") to hold the office of the National Director of Public Prosecutions ("**the NDPP**");

1.2 the third respondent ("**Dr Pretorius**") to hold the office of Special Director of Public Prosecutions ("**the Special Director**") and head of the Priority Crimes Litigation Unit ("**the PCLU**"); and

1.3 the fourth respondent ("**Mr Mzinyathi**") to hold the office of Director of Public Prosecutions ("**DPP**"),

as well as to suspend each Mr Abrahams, Dr Pretorius and Mr Mzinyathi from their respective offices pending those enquiries (collectively, "**the suspensions**").

2. The enquiries and the suspensions are necessary in light of a variety of indiscretions on the part of the second to fourth respondents, but particularly in respect of insupportable charges of fraud and theft ("**the charges**") brought by the National Prosecuting Authority ("**NPA**") and against incumbent Minister of Finance, Mr Pravin Gordhan MP ("**Min. Gordhan**"), as well as Mr Visvanathan "Ivan" Pillay ("**Mr Pillay**") and Mr George "Oupa" Magashula ("**Mr Magashula**"; collectively with Min. Gordhan and Mr Pillay, "**the accused**") on 11 October 2016.

3. The decision to issue the summons in respect of the Charges was ostensibly taken by Dr Pretorius, in consultation with Mr Mzinyathi.[1] Mr Abrahams personally announced the charges, indicated unequivocal support and confidence in the charges and lent the imprimatur of the office of the NDPP to the charges. This is despite the fact that the charges were deficient on the most fundamental of grounds. The charges were in fact so deficient that the NPA was forced to withdraw the charges not 20 days later at a press conference on 31 October 2016, admitting that there were no reasonable prospects of success of a prosecution of the charges as there was no evidence that basic elements of each of the crimes could be proved.[2]

4. Quite apart from infringing the rights of the accused, the decision to bring the charges against the sitting Minister of Finance in particular had disastrous consequences for the public, wiping R50 billion of the JSE almost instantly.[3] It also ignited widespread public outcry, which resulted in, among other demonstrations, riots in the streets of Pretoria. This outcry was so severe that it prompted the National Assembly's Portfolio Committee for Justice and Correctional Services to summon Mr Abrahams urgently before them on 4 November 2016 ("**the Committee meeting**").[4] At the Committee meeting, the Chairperson and members of that committee noted the widespread public outcry, the damage the decision to bring the charges had done to the public trust in the integrity

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1 Founding affidavit ("**FA**") at paras 35 - 36, at page 18.

2 FA at paras 79 - 82, at page 31 - 32.

3 FA at para 10, at page 10.

4 FA at para 97 - 98, at page 40.

of the NPA, and the apprehension of bias and ulterior purpose which arose from the bringing of such spurious charges against Min. Gordhan in particular.[5]

5. It is undeniable that the powers endowed to each of the second to fourth respondents are immense and have the potential to have a dramatic impact on the rights of individuals and of the public. In respect of the charges, the second to fourth respondents exercised their powers with disastrous and irreversible consequences to the Republic, only to withdraw the charges twenty days later, on the basis of a fundamental deficiency in the charges. The fundamental errors made by three of the NPAs most senior prosecutors in respect of the charges (and in respect of other matters), provide, at the very least, a *prima facie* case that the second to fourth respondents do not have the requisite conscientiousness and integrity to hold their respective offices – and that enquiries should therefore be instituted immediately into their fitness for office with their suspension pending the outcome thereof.

6. It should be noted that this *prima facie* case is one that should be answered by the second to fourth respondents <u>in the enquiries</u>. It appears that the President, after originally promising to make the decision in respect of the suspensions and enquiries on 21 November 2016[6] has since reneged on this undertaking and now intends to delay the initiation of the enquiries and suspensions on the

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5 *Id.*

6 FA at para 108, at page 44 - 45.

purported basis that a pre-enquiry enquiry must first be performed. It is all too convenient for the respondents that, after promising to make a decision by 21 November 2016, and now being faced with an application to be heard on 22 November 2016, the President pushes his decision out and then bases his main arguments in response on the lack of ripeness on the matter. The contrivance is palpable.

7. The fact of the matter is that the President has admitted that this is "*no doubt… a serious matter*"[7] and undertook to make a decision by 21 November 2016. He should not be allowed to side-step judicial oversight by reneging on his own assessment of a reasonable time to decide so as to argue technical points. Allowing the President to do so would then set a precedent permitting him, and other decision makers, to simply repeatedly push out a decision with additional procedural steps so as to avoid the review of their failures to decide by a court.

8. It is undeniable that the matter is one of utmost urgency and importance. Further, bearing in mind the seriousness of the implications against these senior office bearers, the objective nature of the enquiry into their fitness to hold office, the strength of the *prima facie* case against each of these office bearers, and the importance of the integrity of the office of NPA, it is crucial that enquiries in respect of the second to fourth respondents be initiated, and that they be suspended pending those enquiries immediately.

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[7] See annex "FA12" to the FA at page 132.

9. The proper time for the second to fourth respondents to make full representations is at an enquiry, after being suspended.

10. Bearing the above in mind, the President is empowered and, we submit, duty-bound to initiate the enquiries and the suspensions without any further undue delay. His failure to do so, and his continuing lethargy in fulfilling this duty necessitate the intervention of this court.

THE PRESIDENT'S POWER AND DUTY

The President's power

11. Section 12(6)(a) of the National Prosecuting Authority Act, 1998 ("**NPA Act**") provides as follows:

> "*The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office- (i) for misconduct; (ii) on account of continued ill-health; (iii) on account of incapacity to carry out his or her duties of office efficiently; or (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.*"

12. The provisions of section 12(6), among others, are made applicable also to directors of the NPA which, I submit, includes a Special Director and the DPP as directors, by virtue of section 14(3) of the NPA Act.

13. It is thus clear that the President is empowered to: (a) subject the second to fourth respondents to enquiries into their fitness and propriety to hold their offices; and (b) to suspend the second to fourth respondents pending the finalisation of such enquiries.

The President's obligation to act

14. I submit further that, although section 12(6)(a) of the NPA Act gives a power to the President, he is in fact obliged to act under section 12(6)(a) where there are reasons to do so. At common law, the conferral of powers is inevitably accompanied by an implied duty to exercise those powers.[8]

15. Accordingly, it is submitted that, when there is objectively a *prima facie* case that the second to fourth respondents are not fit for their offices, the President has an obligation, and not a discretion, to launch an enquiry into their fitness and propriety. Likewise, where there are sufficient reasons to suspend the second to fourth respondents pending the enquiries, the President must do so diligently and without delay.[9]

RIPENESS AND THE PRESIDENT'S FAILURE TO DECIDE

16. The high point of the respondents' argument in opposing this application is that it is not yet ripe for hearing, as the President has now constructed

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8 C Hoexter *Administrative Law in South Africa* (2nd Edition) at page 313; *Chotobhai v Union Government (Minister of Justice) and Registrar Asiatics* 1911 AD 13 in the judgment of Innes J at 31; *Lynch v Union Government (Minister of Justice)* 1929 AD 281 at 285; L Baxter *Administrative Law* (1984) at 429.

9 See *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) at [30]; quoted with approval in *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) ("***Simelane***").

a timeline whereby he will only be considering the representations of the NPA officers on 28 November 2016 (noticeably a date chosen after the hearing of this matter on 24 November), and has yet to take a decision whether to initiate the Enquiries, the matter is not ripe for hearing. It is alleged that there has been no failure or refusal to take a decision, but rather that the process which leads to the taking of a decision has been initiated, and thus the applicants, the administration of justice and the public, must wait for this process, however long it takes, to culminate in a decision before the applicants (or anyone else) may approach the Courts.

17. This is a regrettable line of reasoning designed to delay, and to avoid the President immediately discharging his duty by initiating an enquiry when the objective facts show that such an Enquiry is manifestly called for – and that the President has failed to institute such an Enquiry of his own accord, and also in response to the applicants' requests that he do so. By this construct the President is enabled to push out the making of his actual decision indefinitely and thereby to avoid judicial intervention and scrutiny of his conduct. By way of example, it would permit the President to call for further, or competing representations, in early December, so as to delay the actual decision-making further.

18. Of course, this is not what our law provides - if the President has failed to make a decision within a reasonable period of time, then there is a failure to make a decision, which is justiciable.

19. It is trite that the failure to make a decision as well as the refusal to make a decision is reviewable under our law.[10] A decision-maker cannot simply decline to act or fail to apply his or her mind to the question for decision,[11] nor may a decision-maker delay unduly.[12] This position has been expressly codified in the Promotion of Administrative Justice Act, 2000 which includes "*any failure to take a decision*" under the definition of administrative action in section 1 and lists a failure to take a decision as a ground of review under section 6(2)(g). Similar principle applies under the principle of legality. It is thus inconvertible that this is the correct position in law.

20. A court can thus order a decision-maker to exercise its powers or comply with its duties, express or implied.[13] A Court can also, in appropriate circumstances, substitute a decision or failure to make a decision with the decision that should have been made.

21. Accordingly, the "*ripeness*" argument does not even get off the ground and its premises are badly wrong in law. The President clearly does not need to have made a decision for the application to succeed (see also the discussion below re substitution).

22. It has always been possible to obtain a *mandamus* forcing a slow or reluctant decision-maker to take action or make a decision, and to do so

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10 *Noupoort Christian Care Centre v Minister of National Department of Social Development* 2005 (10) BCLR 1034 (T); *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 128 (per Chaskalson J)

11 *Littlewood v Minister of Home Affairs* 2006 (3) SA 474 (SCA) at para [16].

12 *Simelane* at [33] - [34].

13 See for example *Laerskool Gaffie Maree v Member of the Executive Council for Education, Training, Arts and Culture, Northern Cape* 2003 (5) SA 367 (NC) at para 13

within a reasonable time. In *Cape Furniture Workers' Union v McGregor NO* the court held that *"where a statute requires an official to give a decision within a reasonable time, and he fails to do so, the Court will order him to carry out his duties, even where there has been no direct refusal on his part to do so."*[14] A person may institute a review where the delay in question is unreasonable, even where no time period has been prescribed in any statute.[15]

23. In this case the President's delay is to be assessed against the facts – which overwhelmingly call for immediate action against the NPA officials – and with regard to the signal duties that fall upon him as the ultimate defender of the Constitution. As the Constitutional Court put it earlier this year in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) at para 20:

> "*The President is the Head of State and Head of the national Executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. …. As does the maintenance of orderliness, peace, stability and*

[14] 1930 TPD 682 at 685-6.

[15] See *Noupoort Christian Care Centre v Minister of National Department of Social Development* 2005 (10) BCLR 1034 (T) ("***Noupoort***") and *Intertrade Two v MEC for Roads and Public Works, Eastern Cape* 2007 (6) SA 442 (Ck) at para 30 (Plasket J, revelas J and Kemp AJ concurring).

devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted".

UNREASONABLE DELAY BY THE PRESIDENT

The duty on the President to act with extreme urgency

24. The question to be asked, therefore, is not one of ripeness but of whether there has been unreasonable delay on the part of the President to take the decision in question. "*Whether an unreasonable delay occurred will depend on the facts of each case*".[16] It is submitted that the circumstances in the present case indicated the need for urgent, if not immediate action on the part of the President in light of the monumental public and national importance of the relevant issues. Compare the President's conduct, for example, with that of Parliament which summoned Mr Abrahams to explain the charges within a matter of days.

25. In particular, it is submitted that the potential harm to the NPA, and thus also to the public and indeed the constitutional order of the public, is too great for any rational decision maker in the position of the President to countenance even the shortest of delays.

26. In this respect, it is important to recall the kind of damage that was apparently done by the conduct of the second to fourth respondents in the past.

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[16] *Noupoort* at [31].

27. A member of the President's cabinet, indeed the Minister with the proverbial keys to the national treasury, was charged, very publically and with much fanfare, with serious offences which impugn, among other things, his integrity and shook the stability of the Republic's economy at its foundations. The currency weakened and a sum of R50 billion was wiped off of the JSE. This damage was wrought despite the fact that, not a month later, the NPA admitted that these offences were completely baseless and that there had never been sufficient evidence to found criminal intent. This is a blunder of monumental proportions, and one which demands enquiry. The President was silent.

28. The President should, and must, have been aware of the press conferences and the circumstances surrounding the pressing and withdrawal of the charges. The obligation under section 12(6) of the NPA Act is one that the President was required to fulfil *mero motu*, and in the absence of any representations from the applicants.

29. Between 31 October 2016 and 7 November 2016, national demonstrations, some of which led to riots, occurred (2 November 2016)[17] and Parliament had summoned Mr Abrahams to explain the charges (4 November 2016).[18] It is thus clear that conduct of the second to fourth respondents in respect of the charges had inflicted deep wounds into to public perceptions of the NPA and, indirectly, had created a threat to public safety. Parliament itself, in calling the

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[17] FA at para 10, pages 10 -11.

[18] FA at paras 97 - 99, pages 40 - 41.

Committee meeting on 4 November 2016, acknowledged the seriousness of the concerns around the conduct of the second to fourth respondents and the urgency of making enquiries in respect of these concerns. Yet the President remained, and continues to remain unmoved despite being called on explicitly by the applicants to act.

30. Despite all this, the President has taken no action despite being under a constitutional obligation to do so, his office claiming on 7 November 2016, disingenuously, that it was "*obliquely aware of media reports*" pertaining to issues.[19] This was a full week after the insupportable charges were dropped and almost a month after the charges were first brought against the accused.

31. Every day that they remain in office and are entitled to wield the powers of their office is a day that potentially irreparably prejudices the work of the NPA and jeopardises the Republic and further detracts from the perception of independence and competence of the NPA.

32. In light of these facts, there can be no debate that an Enquiry is called for immediately, together with a suspension. The applicants need not prove either incompetence or ulterior purpose here - indeed, that is the purpose of the Enquiries. It suffices that a cloud of uncertainty taints the NPA officers; the perception of their incompetence and/or lack of independence is sufficient to warrant urgent Enquiries and suspension.

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[19] See annex "FA12" to the FA at page 132.

33. This is particularly so when one has regard to the especial powers the NDPP enjoys, as well as his status as the *de facto* leader of the NPA. This is a high office which wields enormous power and is charged, as its core mandate, to oversee the NPA and all prosecutions (or decisions not to prosecute) by the NPA, as well as to determine prosecution policy. As the Constitutional Court explained of his office and his powers (in *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at paras 5 and 26 respectively):

> "*These powers and duties are extensive and their proper exercise and performance is crucial to the attainment of criminal justice in our country. And the attainment of an effective criminal justice system is in turn vital to our democracy. … The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice*."

34. The NPA is an institution of immense public import and central to the administration of justice. Incidental to this mandate is the concomitant requirement that any incumbent of such office not only be lawfully appointed and act lawfully (which is trite), but that the incumbent must also exhibit, and be seen to exhibit, the utmost independence, integrity and respect for the law. Any suspicion as to the NDPP's integrity or competence must immediately result in a temporary suspension, so as to preserve the integrity of the NPA for such period until such suspicions are disproved (or proved and a removal takes place).

35. Moreover, Dr Pretorius and Mr Mzinyathi, as Directors of Public Prosecutions, take decisions daily which affect the rights of numerous individuals, whether they be decisions in the conduct of the investigation, in preferring charges or in withdrawing them.

36. Every day that the NPA officers remain in office they may make, or fail to make, multiple decisions. These decisions include decisions to prosecute, or not to prosecute, on a daily basis. Given their performance in relation to the Charges, these officers are operating under a cloud of suspicion as to their motives, competence and independence. Every decision that they take, or fail to take, may now detract from at least the perception of the NPA's independence and competence, if not in fact being unlawful.

37. The applicants, and the Republic, may be in a position to (try to) remedy those positive decisions taken by the NPA officers, but will never know of those decisions not taken by the NPA officers. It is not required of the applicants to identify each and every decision taken, or not taken, by the NPA officers, during the period whilst an enquiry into their fitness and propriety for office is live. It is enough that the NPA officers take such decisions, and that they now do so in circumstances where every action of theirs calls into question prosecutorial independence.

38. Public confidence in a critical constitutional institution is being eroded at an alarming rate - the only means to stop the rot is immediately to suspend the NPA officers and conduct the Enquiries.

39. The applicants, and the Republic, cannot be afforded redress, let alone substantial redress, in due course. It would be of scant comfort to learn, some weeks or months in the future, that indeed the NPA officers are incompetent, or lack independence, but have, despite these issues being raised as far back as 1 November 2016, been taking decisions daily for a significant period of time. These decisions, as mentioned above, may not be capable of easy identification, much less reversal.

40. It is important to note that when dealing with cases that involve the exercise of a public power (or, it is submitted, the failure to exercise a public power) the interests of society as a whole must be taken into account when harm is assessed.[20] Therefore, it is important to take into account the interest that society as a whole has in upholding the Constitution and in receiving the benefit of an effective remedy where the Constitution has been breached. As held by Du Plessis J in *Pikoli v President of Republic of South Africa and Others* (in the context of an interim interdict):[21]

> "*The court must also bear in mind that not only the parties but society as a whole have an interest in upholding the Constitution and that relief in cases of constitutional breaches must vindicate the Constitution*".[22]

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[20] *Pikoli v President and Others* 2010 (1) SA 400 (GNP).
[21] *Ibid*, 404.
[22] *Ibid*, 404.

41. The Court in *Pikoli* in coming to its conclusion further noted that "*if a breach of the Constitution occurs, the public as a whole has an interest in an effective remedy*".[23]

42. The Gauteng Division of the High Court in Pretoria was called upon urgently to consider the harm that could flow from allowing an unlawful state of affairs to persist, in *Helen Suzman Foundation v Minister of Police and Others*.[24]

43. The issue in that matter was the re-instatement of the National Head of the Directorate for Priority Crime Investigation ("**the DPCI**"), Mr Dramat, who, the Court found, had been unlawfully removed – and who had been replaced unlawfully by Mr Berning Ntlemeza. The orders setting aside the decision to suspend Mr Dramat and declaring that the decision of the Minister to appoint Ntlemeza as Acting National Head of the DPCI is unlawful were appealed against, which would ordinarily have had the result of suspending the orders, and consequently also the re-instatement of Mr Dramat.

44. On application, however, the Court reasoned that given how crucial the position of National Head of the DPCI was to the criminal justice system, it could not permit Mr Dramat's suspension and Mr Ntlemeza's appointment to stand, even pending the appeal of the Court's order. The Court held that to allow the decisions to stand, even pending the appeal, would subject the DPCI to the intolerable, and real, risk of irreparable

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[23] *Ibid*, 409.
[24] [2015] ZAGPPHC 47 (6 February 2015).

harm. Leave to appeal against that ruling was dismissed by the Supreme Court of Appeal by way of its order dated 7 May 2015.

45. This was despite the fact that the order declaring Mr Dramat's suspension unlawful had itself been suspended. This is, we submit, analogous to the present matter where the applicant seeks an order suspending the second to fourth respondents on the basis that he occupies the most crucial position within the NPA (which is arguably an even more important organisation in the criminal justice system than the DPCI), and the applicant has demonstrated a clear case, or at the very least a very strong *prima facie* case, for why the President's failure to call the NDPP to account is irrational and unlawful.

46. It is evident that in allowing the second to fourth respondents to continue to occupy their current positions is not in the interest of good government and is not conducive to the interests of society.[25] The NPA is a constitutionally mandated organ which is indispensable to the protection of our constitutional democracy. The need to insulate the NPA from political and other interference is attributable in part to the fact that at the core of its mandate is the requirement to investigate and prosecute all crimes, including high-level and high-profile corruption and other crimes. Each day that the NDPP is allowed to occupy his respective office under this cloud of incompetence irreparably prejudices the work of the NPA and does damage to the public perception of, and confidence in, this constitutionally entrusted institution.

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[25] See *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC) at para [49].

47. In respect of the President's own prerogative powers, the Constitutional Court held that applicants for pardons were entitled to have their applications considered and decided upon "*rationally, in good faith, in accordance with the principle of legality and without delay*".[26]

48. It is however, accepted that, in order for there to have been delay, it must be demonstrated that there was in fact a duty to take a decision (and not just a choice).

49. In this regard, we have demonstrated that the President clearly had a duty to exercise his powers under the NPA Act, given the extremely important powers exercised by the second to fourth respondents in our constitutional democracy and the incompetent manner in which those powers were exercised. Furthermore, given the harm that has befallen (and continues to befall) the rule of law and the integrity of the NPA as a result of the second to fourth respondents' conduct, it is submitted that a "*reasonable*" time period within which the President should have acted to suspend the second to fourth respondents was almost immediate. He thus had a duty to exercise his powers under the NPA Act expeditiously, as soon as it became apparent that the charges may have been without foundation, which at the latest was on 31 October 2016.

50. It is submitted that to prevent further public harm, the President thus had, and continues to have, a duty to act expeditiously. This is particularly so in light of the NDPP's threat, on 31 October 2016, that further charges

[26] *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) at para [30].

against Min. Gordhan and the other accused are under investigation.[27] This threat has been reconfirmed by Mr Abrahams in his answering affidavit.[28] All this while, a a shadow of doubt hangs heavily over the propriety of any future decisions by Mr Abrahams, Dr Pretorius or Mr Mzinyathi to charge the accused, and while they remain both resolute that their past conduct was acceptable and unrepentant as to the harm that they have already caused the republic, the accused, and their offices. In any case, it is seemingly the incompetence and/or bias and ulterior motive on the part of the second to fourth respondents which resulted in the (insupportable) charges. These same individuals, or otherwise subordinate officials beholden to these individuals, remain empowered to launch further charges against Min. Gordhan and the other accused. Such a decision could again send the economy into a tailspin. If indeed such a decision is to be made, it must be made by individuals with the requisite competence and integrity (and who are not tainted by their past conduct in relation to the same accused), lest the disastrous consequences of the charges be repeated.

51. Bearing this in mind, the individuals against whom a *prima facie* case of gross incompetence and/or lack of integrity exists are threatening to repeat their mistakes, it is simply not acceptable for the President to delay the making of the decision bearing in mind the undeniable public interest in the matter.

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[27] FA at para 154, page 57.

[28] Second, Third and Fifth Respondents' AA at paras 34 to 35, page

52. There is also no justification for the President's delay. By the time of hearing of this matter, the President will have had 24 days since Mr Abrahams admitted that a prosecution of the charges had no prospects of success, 23 days since the applicants wrote to the President setting out a case for the suspensions and enquires;[29] 17 days since, on the President's version, which the applicants have denied, that letter was received;[30] 16 days since the founding affidavit in this application was served on the President with a more detailed justification of grounds for the suspensions and the enquiries. Bearing in mind: the undeniable threats to the public interest in this matter (which have been recognised by Parliament and which acted within days); the seriousness of the implications with respect to the fitness and propriety of three of the most senior office bearers in the NPA; the weight of evidence supporting these implications (which is publically available and, for the most part, common cause), the 16 days is far too long a time for the President to have waited to act. In the circumstances, there is absolutely no reason why the President could not have acted immediately on receipt of the applicant's letter of 1 November 2016 or, at the very least, by the time this application was heard. Indeed, even on the President's own version, he would make a decision by 21 November 2016. The only explicable reason for the delay, therefore, is that it is designed to stymie the hearing of this matter. For that reason alone the urgency of the hearing is confirmed and the need for this Court’s intervention underlined.

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29 Annex "FA11" to FA, pages 122 to131.

30 Annex "FA12" to FA, pages 132 to 133.

53. In *Vumazonke v MEC for Social Development, Eastern Cape and three similar cases*[31] ("***Vumazonke***"), the Court dealt with decisions on applications for disability grants. The decision maker sent letters to the applicants at the time that they submitted their applications. These letters indicated that their applications would be decided within three months. This time period came and past, however, and an application was launched to compel the decision maker. The court found that the delay was unreasonable *inter alia*, because the decision maker had undertaken to process the applications by a certain deadline. Any delay beyond that deadline was thus unreasonable.[32]

54. Accordingly, it is submitted that the President's failure to adhere to his own deadline to make a decision is evidence enough of the unreasonableness of his delay.

The President's (lack of) justification for the delay

55. It is further submitted that, in the present case, there was no need for further investigation and any rights to *audi* on the part of the second to fourth respondents, if any, could have and should have been exercised expeditiously. The nature of the decision to suspend and initiate enquiries under section 12(6)(a) of the NPA Act must be kept in mind in this regard: the second to fourth respondents will be provided ample opportunity to fully respond to any allegation made against them in the enquiry. It cannot be that the respondents must be afforded the full rights

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31 2005 (6) SA 229 (SE) at [39].

32 *Vumazonke* at [44].

of response they would receive in an enquiry, before such an enquiry may be made. In fact, the President is expressly divested of any power to make a call on the merits of the disciplinary proceedings and to discipline the second to fourth respondents in the absence of an independent enquiry into the conduct of the second to fourth respondents. As such, the President is not expected and may not pronounce on the merits at this stage.

56. It is thus submitted that the very nature of the suspensions and the enquiries confirm that a decision to institute them should be done expeditiously, if they are to be done with minimum preliminary representations at all.

57. It should further be borne in mind that the standard to initiate the suspensions and the enquiries is a much lower standard than to in fact remove the second to fourth respondents from their offices. If the standard was that there should be conclusive evidence, having considered full representations from the second to fourth respondents, this would render the enquiry redundant. It is clear, instead, that the standard required to initiate the enquiries and suspensions must be a *prima facie* or arguable case, and in respect of suspensions some apprehension that damage may be done to the institution if the second to fourth respondents are not suspended.

58. Be that as it may, it is submitted that the case for the enquiries and suspensions in the present instance is a particularly strong one, bearing

in mind the weight of publically available evidence, and the fact that the key facts are common cause.

59. The analysis of whether there is a *prima facie* case that the second to fourth respondents are not fit and proper persons must be made objectively. In this respect, though it was in respect of the appointment of the NDPP, rather than his suspension and the relevant enquiry, the Constitutional Court's reasoning in *Simelane* is instructive in relation to determinations of fitness and propriety. In that decision, the Court agreed with the Supreme Court of Appeal that the standard of the fitness and propriety is an objective one. In particular the Court held that:

> "*it is correct that the determination whether a candidate does fulfil the fit and proper requirement stipulated by the Act involves a value judgment. But it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the President. Value judgments are involved in virtually every decision any member of the Executive might make where objective requirements are stipulated. It is true that there may be differences of opinion in relation to whether or not objective criteria have been established or are present. <u>This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny</u>*."[33]

60. This standard makes the President's delay all the more inexplicable. This is not a matter where the President may apply his subjective discretion

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[33] Para [23]; see also broader discussion at [14] - [26].

and may take his time to mull or the facts and form a view. In the present case, there is either a *prima facie* case against the second to fourth respondents or there is not. This is an objective test based on the evidence, all of which is before the President, and which confirm emphatically that such an enquiry is required without delay.

61. The *audi* principle is a safeguard that signals respect for the dignity and worth of the participants and is likely to improve the quality and rationality of administrative decision-making and enhance its legitimacy.[34] It is submitted that, in respect of these basic tenets of the law and in light of all relevant considerations, the failure to suspend the second to fourth respondents, rather than a decision not to suspend second to fourth respondents is the irrational and unlawful course of action. Moreover, should the enquiry be ordered and second to fourth respondents suspended, this would not undermine the second to fourth respondents' dignity. The second to fourth respondents will in the course of the enquiry, be entitled to make submissions to his fitness for office as NDPP.

62. This should be sufficient in satisfying the second to fourth respondents' rights in this regard. It is trite that what constitutes procedural fairness is a highly variable concept and depends on the circumstances of each case: *audi* is contextual and relative.[35] Generally, it will be sufficient for

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[34] C Hoexter *Administrative Law in South Africa* (2nd Edition) at 363.

[35] See, for example, *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) paras [113]-[114]; and Chairman, Board on Tariffs and Change v Brenco Inc 2001 (4) SA 511 (SCA) at paras [13]-[14].

an aggrieved party to be given a chance to present evidence that supports his or her case and controvert the evidence against them.

63. In the case of multi-stage decision-making, the SCA in *Buffalo City Municipality v Gauss* held that a landowner was not entitled to be heard prior to being served with a preliminary notice of expropriation as the court could not see how "*temporary preservation of the* status quo *without a prior hearing operated unfairly against the owner*".[36] The owner also clearly had a right to be heard at a later stage in the expropriation process. In the context of administrative law, multi-staged processes must be viewed holistically so as to avoid putting form over substance.[37] In this regard, it is submitted that the NDPP and his colleagues will have adequate opportunity to make submissions to the President at the inquiry stage. The fact that they have not, as yet, made these submissions cannot operate to preclude their suspension.

64. In another recent judgment, the High Court, Pretoria held that a respondent in an application for removal from the roll of advocates "*cannot rely on failure to be afforded a proper hearing simply because an inquiry was not followed where oral evidence could be led and cross examination allowed. She had everything at her disposal to deal with the allegations against her and no form of prejudice can be claimed to have*

[36] 2006 (10) BCLR 1172 (SCA) at para [14].

[37] at para [137].

occurred".[38] As in this case, no prejudice is visited on the second to fourth respondents if they do not make submissions at this stage.

65. In any event, in respect of the principle of legality, it must also be noted that it has by no means been established that the *audi* principle would apply in terms of the President's powers under the NPA Act (at least not in the sense of requiring oral / written submissions):

65.1 in *Chonco,* the Court held that applicants were entitled to have their applications considered and decided upon "*rationally, in good faith, in accordance with the principle of legality and without delay*".[39] This did not extend to the right to make representations.

65.2 in *Albutt*, the Court held that representations from the victims, where pardons for wrong-doers were being considered, were required in light of the dispensation set forth by the President, in order that said dispensation be rationally connected to its purposes.[40]

65.3 the Constitutional Court in the *Democratic Alliance v President of the Republic of South Africa* affirmed that *Albutt* is authority for the proposition that, under legality, the process by which a decision is made must be rational and that it must be rationally related to the purpose for which the power is conferred.[41] The *Democratic*

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[38] *General Council of the Bar of South Africa v Jiba* (23576/2015) [2016] ZAGPPHC 833; [2016] 4 All SA 443 (GP) (15 September 2016) at para [29].

[39] *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) at para [30].

[40] *Albutt v Centre for the Study of Violence and* Reconciliation 2010 (3) SA 293 (CC) at para [68]-[69] and para [72].

[41] 2012 (12) BCLR 1297 (CC) at paras [33]-[36].

Alliance case is not authority for a general right to make representations in respect of the decisions of the President.

66. The threshold for procedural fairness in these circumstances, especially pending a formal inquiry, must accordingly be a low one, which relates only to the rationality of the decision. As we have already demonstrated, rationality firmly dictates that the second to fourth respondents be suspended. This is immediately apparent, without any need for representations. Furthermore, the second to fourth respondents will have a fulsome opportunity to make representations at a later stage.

67. It is the applicants' submission that the evidence before the President presents a foregone conclusion in that there is a strong *prima facie* case to be answered by the second to fourth respondents in an enquiry. There is no need for, and no right to *audi,* at this stage, in the circumstances, and it is not reasonable to justify the delay in making the suspensions on the basis of *audi*.

68. It is submitted that, on the basis of the evidence before the President, in light of the objective test to be applied to such evidence, and bearing in mind the continuing and potential damage to the NPA, the public and the Republic, the President is thus obliged to make a decision to initiate enquiries into the fitness and propriety of the second to fourth respondents, to suspend them pending the enquiries' outcome, and that his decisions to initiate and suspend are long overdue.

THE CORRECT INTERPRETATION OF S 12(6) OF THE NPA ACT

69. It appears common cause that section 12(6) affords the President the power to initiate enquiries into the fitness of members of the NPA to hold office, and that the President may suspend such members pending the outcome of such enquiry.

70. The corollary to this power is a duty to exercise the power when the facts of a matter necessitate the power's invocation. It is not open to the President, who is expressly and specifically identified by legislation to be the upper guardian of the NPA and the Constitution, to do nothing or drag his heels where urgent action is clearly required. Instead, he is called upon properly, responsibly and timeously to wield his power to call for enquiries into the conduct of those potentially unfit for office, and to safeguard the public and the NPA for the duration of these enquiries.

71. In order to exercise this power, the President (and seemingly the NPA officers) contends that *audi* is an essential element, which forestalls his ability lawfully or rationally to suspend the NPA officers (or perhaps even order enquiries into their fitness to hold office).

72. Section 12(6) of the NPA Act does not, however, require any *audi* rights being afforded to the NPA officers before a decision is taken to institute enquiries with or without a provisional suspension of the officers who are subject to the enquiry. Instead, the President is called upon, based on the facts before him, to determine whether an enquiry, with or without a suspension, is necessary. In discharging this obligation, the President must act lawfully and rationally.

73. The nature of this power is an executive power - as such, *audi* is not implicated at all; the decision is his sole *fiat*. There is no right on any affected party to make representations to inform the President's exercise of this power. But even if it is administrative in nature, it is not of such a final character that it requires the affording of *audi* rights to the second to fourth respondents.

74. The President adopts a schizophrenic approach to the characterisation of his s12(6) power - when dealing with *audi*, he asserts that *audi* is necessarily a precursor to the exercise of his s12(6) power as this power is administrative in nature (see paragraph 6.1.14 of the President's answering affidavit). In the same breath, however, the President asserts that "*I am advised that the Constitutional power to suspend an NDPP is a power in terms of section 84(2)(e) of the Constitution read with section 12(6) of the NPA Act. This power can only be exercised by the President. It is therefore an executive constitutional power*" (para 6.3.1). Although the conclusion - that the section 12(6) power is executive in nature -is correct, the reference to section 84(2)(e) of the Constitution is inapposite. This section relates to power of the President, acting other than as head of the National Executive, to make appointments required by the Constitution or legislation. It is not clear how it relates to a duty to initiate enquiries into the conduct of NPA members, and suspend them during such enquiries. This power of appointment reflected in section 84(2)(e), in any event, has been held to be subject to the principle of legality, and capable of justiciability before the Courts by way of a rationality enquiry.

75. Section 84(2)(f) may be more apposite, where the President is invested with the power to call commissions of inquiry. The NPA Act mirrors this by granting unto the President the sole power to institute enquiries into the fitness to hold office by NPA members.

76. Of course, the definition of administrative action expressly does not include executive actions.

77. In any event, section 12(6), properly interpreted, builds in no jurisdictional requirement of *audi* prior to the President exercising his powers under such section.

78. In the alternative to the above, if section 12(6) of the NPA Act is deemed to include an element of *audi*, then this element is limited to the question of suspension, and not whether an enquiry must be initiated. That is because at the enquiry, the accused will be afforded full *audi* rights to defend his or her conduct - this defence cannot be required as a necessary precursor to initiating the enquiry. This would result in a Presidential enquiry on the merits preceding the section 12(6) enquiry on the merits, which is not what the NPA Act envisages.

79. If *audi* is at all part of section 12(6) (which is denied), then *audi* can only speak to the issue of whether or not an individual should be suspended pending the outcome of an enquiry. It is entirely irrelevant for purposes of considering whether an enquiry must be initiated.

80. In any event, by the time the matter is heard by this Court, the NPA officials will have been afforded every opportunity to provide their

answers to the complaints contained in the applicants' founding affidavit. They have been provided that opportunity, and taken the opportunity, in filing their full answering affidavits. It is not clear what else they would say in their representations to the President – and obviously they would not be permitted to say anything different to the versions that they have now advanced before this Court.

FAILURE TO INSTITUTE ENQUIRIES

81. If the President has decided to initiate the enquiries into the NPA officers' fitness to hold office, then there is no dispute on this score - a decision has been made, and the applicants agree that the enquiries must be held, forthwith and concluded as a matter of urgency.

82. If the President has not, however, made a decision in this regard (and by all indications he has not, or has refused candidly to explain to the Court what his position is), then it is ripe for determination now.

83. The allegations levelled against the NPA officers are serious ones. They are accused of being – and on their own versions have been shown to be –either:

83.1 incompetent, failing to appreciate basic legal requirements and acting with reckless disregard to the interests of the accused and the Republic; or

83.2 motivated by ulterior purpose (assuming competence), and are accused of acting to advance their or other's unlawful interests.

84. It is, moreover, trite that the NPA officers' actions received global publicity (as they knew it would), resulted in calamitous financial consequences (as they accepted would be the result – witness the discussions between the third and fourth respondents about the potential impacts on the economy of the decision) and gave rise to speculation that the NPA officers had improperly been influenced and were pursuing a vendetta against, at least, Min. Gordhan.

85. It is further trite that the decision to prefer charges was taken in an environment where suspicions are rife that Mon. Gordhan and the Treasury are at battle with various third parties, and that there is a concerted effort by various parties to undermine, intimidate or remove Min. Gordhan from his office.

86. Finally, it cannot be disputed that the bulk of the press conference at which the Charges were announced was little more than a pronouncement, by the NDPP, as to the illegality of the SARS rogue unit and the unlawfulness of the actions by, *inter alios*, the accused. This was manifestly improper where, as the NDPP conceded, investigations were ongoing and no charges had been brought.

87. It cannot be ignored that the charges preferred by the NPA officers (or at least the third and fourth respondents) were then withdrawn, with it being made clear that these charges were never sustainable in law.

88. The sole enquiry for the President to make is whether, faced with all the above, and the facts identified above, any questions arise which warrant

an enquiry into the second to fourth respondents' fitness and propriety to hold office.

89. The threshold to trigger such an enquiry is, it is submitted, a low one. It cannot be that this threshold is not crossed, given the allegations of recklessness and / or incompetence and / or ulterior purpose, and where the bringing of admittedly unsustainable charges has irreparably damaged not only the Republic's reputation and economy, but also (including through the NDPP's reckless decision to meet at Luthuli House the day before the charges were made public) the perception of competence and / or independence of the NPA.

90. Moreover, given the contradictory versions mobilised by the NDPP, it cannot be that no further answers are required.

91. Accordingly, the only rational course of action is that which the Constitution and the NPA Act require: that an enquiry into the actions of the second to fourth respondents in respect of the charges be instituted immediately, to determine whether they remain (or ever were) fit and proper to hold their offices in the NPA.

92. It is not necessary for the applicants to prove a case that the NPA officers are, in fact, not fit and proper to hold their offices in the NPA before this Court. Indeed, neither the President nor this Court need decide this issue - that is the sole preserve of the Enquiry to be constituted.

93. What the applicants must demonstrate is that there exist factors which necessitate the calling of an enquiry. The calling of an enquiry is not an

infringement of any rights of the NPA officers - it will simply require them to defend their actions, in due course. Of course, an enquiry may be called without a suspension (although, as traversed below, this would be inappropriate in this case) - as such, there is no need for the affording of *audi* in this regard.

94. In any event, it is not for the NPA officers to defend their conduct prior to the calling of an enquiry - this would render the enquiry process potentially nugatory, as the President would first be required to form a view on the merits (as opposed to a view on the need for an enquiry) before the enquiry then formed a view on the self-same merits. This double-tiered enquiry is not what section 12(6) of the NPA Act envisages.

95. If the President has not taken a decision to initiate the Enquiries, then this Court is seized with all the relevant material to determine whether such Enquiries should be initiated. It even has before it the submissions on the merits by the NPA officers, defending their impugned conduct, should the Court believe *audi* to be relevant or these submissions to inform the need for an enquiry.

96. Accordingly, it is submitted that the only lawful course of action was for the President to institute the Enquiries; his failure to do so necessitates this Court ordering him to do so.

FAILURE TO SUSPEND

97. The power to suspend is a separate decision, where the President wields a different power.

98. The Enquiry will deal with the merits of the NPA officers' conduct. It will either confirm their unsuitability or ineligibility for office, or will vindicate their actions.

99. The aspect of suspension, however, deals with the interim regime - namely, what is to happen to the NPA officers pending the finalisation of the Enquiries.

100. The purpose of the power to suspend is to protect not only the Republic, but also the integrity of the NPA during the period in which an enquiry is live. The President must be, and is, empowered to exercise this power expeditiously, unilaterally and immediately where the facts of a matter warrant that this be done.

101. This is an important power, as it safeguards the NPA from being manned by individuals suspected of lacking the requisite competence, integrity or character. It also prevents such individuals doing further harm before their removal (or potentially being seen to do harm before their vindication), and protects against a host of unlawful decisions being made by such individuals before an enquiry is concluded.

102. It is, further, an important safeguard to protect the perception of independence of the NPA, where members, particularly those with immense decision-making power, are, or may appear to be, abusing said power for ulterior purpose or through incompetence.

103. In this matter, the President has clearly not taken any decision to suspend within a reasonable time; in fact, on his newly crafted time-line, this decision will only be taken in early December, at best.

104. This is clearly not a reasonable time for the taking of the decision, given, *inter alia*, the reasons identified above, and the fact that the President is aware that this Court is dealing with this litigation and had convened a Three-Judge Panel to hear the matter expeditiously on 24 November.

105. In addition, the President has been seized with all the relevant material to make a decision whether or not to suspend the NPA officers from 1 November 2016. To the extent necessary, he now has their further submissions, in affidavit form. There is thus no reason to push out his decision until after the hearing date of 24 November 2016, and certainly not after 28 November 2016.

106. The President has thus failed to take a decision to suspend.

107. Moreover, in the circumstances of this case, based on the information before the President, it is clear that the only lawful decision is that the President must suspend the NPA officers pending the Enquiries.

108. This can be the only rational exercise of the President's suspension powers under section 12(6) of the NPA Act, given that the NPA officers are accused of such glaring incompetence or ulterior purpose that they cannot remain in office or be permitted to wield any power within the NPA without further tainting the operation of the NPA, public confidence in this

important constitutional institution and / or the perception of the independence and competency of the NPA.

109. The test is not only whether the NPA officers are in fact exercising their power unlawfully; but also whether the public may reasonably perceive the exercise of their power to be unlawful. This clearly is the case here - as such, in order to protect at least the perception of independence of the NPA, an immediate suspension of the NPA officers is warranted.

110. Even if, as the President and the NPA officers contend, some element of *audi* is required before the decision to suspend must be taken, then this *audi* must be exercised within a reasonable period of time. Here the NPA officers have been afforded the opportunity, on oath, to explain why they should not be suspended (in response to the applicants' submission that they must be). These affidavits now serve before this Court and the President. There is no reason why the President requires further submissions, and certainly not submissions only by 28 November 2016.

111. The second to fourth respondents' affidavits mobilise no reasons which militate that the Enquiry proceed but that they not be suspended in the interim.

111.1 Mr Mzinyathi, essentially, argues that he must be afforded further *audi* in relation to this point, and that any suspension would impact upon his reputation. His reputation as a Director of Public Prosecutions ("DPP"), of course, cannot be of more import than the reputation of the NPA as a constitutional institution, whose independence, and the need for the perception of independence,

has been stressed by Courts throughout the land, including the Constitutional Court. Accordingly, the test proposed by Mr Mzinyathi, namely that the damage to his reputation must be weighed against the damage to the NPA and the Republic, can only have one winner. In the circumstances, where Mr Mzinyathi has taken a decision unsustainable in law which has caused severe harm to the reputation and economy of the Republic, the interests of justice dictate that the Republic be immunised from any further action by him as an NPA DPP. Mr Mzinyathi may well be suspended on full pay, and, should he be vindicated, his reputation will suffer no harm at all. Should Mr Mzinyathi not be suspended, however, the perception will remain that he may be incompetent or motivated by ulterior purpose; public confidence in, and the perception of independence of, the NPA will be diminished and a hue of suspicion will colour each and every decision he takes as DPP.

111.2 Any argument that Mr Mzinyathi's conditions of employment place him beyond the NPA Act and beyond the constitutionally afforded powers of the President is simply unsustainable. As a DPP of the NPA, he clearly is subject to all legislation dealing with such position - to suggest that he has, somehow, contracted out of the law is baseless.

111.3 Similarly, Mr Abrahams and Dr Pretorius mobilise no reasons which warrant against their suspension. Much time is devoted to bald denials of misconduct, or explanations of their understanding of

pension fund law, but these are, at best, aspects which fall to be addressed at the Enquiry, to explain whether they should remain in office. These factors do not speak to the issue of suspension at all.

111.4 The same reasons which motivated for a suspension in respect of Mr Mzinyathi apply with equal force here. The need for suspension is further heightened when one has regard to the especial powers the NDPP enjoys, as traversed above and in the founding affidavit.

112. The NPA officers also mobilise arguments that the conduct of one of them cannot be attributed to the others. The applicants do not seek to attribute conduct. It is clear that, on the most benevolent version to the NPA officers, Mr Mzinyathi and Dr Pretorius took the decision to prosecute. This decision was bad in law and, for the reasons traversed above and in the founding affidavit, demonstrates incompetence and/or lack of independence.

113. The NDPP bears ultimate responsibility for the actions of the NPA. At the very least, he lent his *imprimatur* to the bringing of the Charges. He further improperly expounded upon the unlawfulness of the SARS rogue unit, and has presented multiple and contradictory versions to the Public and Parliament in explaining the saga of events which led to the bringing and dropping of the charges, and has acted in a manner that is reckless as to the vital constitutional duty to ensure that his office (and the NPA more broadly) is not tainted by any suspicion of bias or impartiality.

114. For the reasons traversed above and in the founding affidavit, the NDPP's conduct demonstrates incompetence and/or lack of independence.

115. The exact role of each of the NPA officers will, no doubt, be more fully revealed at the Enquiries - there is, however, a prima facie case against each of them for their actions that warrants immediate suspension and the institution forthwith of the Enquiries. The belated attempt now to apportion blame amongst themselves, or distance themselves from decisions jointly presented to the world, does not behove their case.

116. Accordingly, even if *audi* is required under s12(6) in relation to the question of suspension, this *audi* has been exercised through the affidavits filed by the NPA officers and does not disturb the conclusion that these officers fall immediately to be suspended. As the President has not made this decision, such failure is unlawful, and the Court, seized with all the relevant material, is called upon to order the President to suspend the second to fourth respondents pending the outcome of the Enquiries.

COURT'S DISCRETION TO ORDER A SUBSEQUENT HEARING REGARDING SUSPENSION, IF NECESSARY

117. It is submitted that the enquiries must accordingly be instituted forthwith, and the second to fourth respondents immediately suspended.

118. If, however, this Court is minded to afford the second to fourth respondents (further) *audi* in relation to the suspension issue, and this

Court is further of the opinion that such *audi* has not yet properly been exercised, then the applicants contend that it is open to this Court to postpone any hearing on the narrow issue of suspension until after the representations have been received (by 28 November 2016).[42]

119. It is submitted that, as just and equitable relief, the Court may order the President to make a decision in relation to suspension by no later than 2 December 2016.

120. If his decision is not to suspend, then the present application can proceed to be heard on 12 December 2016, with the parties being allowed to supplement their papers as necessary before then.

121. The applicants stress that they do not believe the above regime to be necessary, as this Court is empowered to order the institution of the Enquiries now, with suspension of the second to fourth respondents pending the outcome of the Enquiries. The above regime caters only for a scenario where the Court is minded that the President is entitled to consider the second to fourth respondents' representations, pertaining only to the issue of suspension, on 28 November 2016 and thereafter to make a decision in regard to suspension.

[42] Applicants' replying affidavit, para 2, p 506-507.

GROUNDS INDICATING THE UNFITNESS AND IMPROPRIETY

Legal framework

122. Section 9 of the NPA Act sets out the requirements for the appointment of the NDPP and any Director. These requirements include, under section 9(1)(b) that the NDPP and any Director "*be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned*."

123. Under section 12(6)(a)(iv), the NDPP and/or any Director may be suspended, an enquiry into their fitness to hold office initiated, "*on account thereof that he or she is no longer a fit and proper person to hold the office concerned*".

124. This Court has previously made useful comments with respect to the fitness and propriety of lawyers and, in particular, prosecutors in the matter of *The General Council of the Bar v Nomcgobo Jiba and others*[43] ("***Jiba***"). As noted at paragraph [1] of that judgment, the requirement to be "*fit and proper*" is not one defined or described in legislation and "*it is left to the subjective interpretation of and application by seniors in the profession and ultimately the court*".

125. That being said, some qualities have been accepted by our courts as the bare minimum of fitness and propriety. The President, in his answering affidavit sought to limit the requirement of fitness and propriety to integrity and integrity alone. Though integrity is an important and multifaceted

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[43] [2016] ZAGPPHC 833 (15 September 2016).

aspect of fitness and propriety, it does not stand alone, and it is clear that there are a number of qualities which a lawyer, and indeed a prosecutor, should possess which does not necessarily speak directly to integrity. The Court in *Jiba* set out the following minimum qualities a lawyer should possess:[44]

> "*'Integrity- meaning impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain,*
>
> *- Dignity- practitioners should conduct themselves in a dignified manner and should also maintain the dignity of the court.*
>
> *- The possession of knowledge and technical skills,*
>
> *- A capacity for hard work,*
>
> *- Respect for legal order and*
>
> *- A sense of equality or fairness***"** (our emphasis)

126. Furthermore, the Court in *Jiba* noted that it was relevant to the "*fit and proper*" person requirement, in respect of prosecutors, to consider the directives of the Code of Conduct for Members of the National Prosecuting Authority ("**the Code of Conduct**"),[45] which was, itself, published by the then NDPP.[46] Relevant directives of the Code of Conduct include the following:

> "***A Professional Conduct***
> *Prosecutors must-*
> *…*
> *(c) protect the public interest;*

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[44] The court was quoting from Du Plessis, "The ideal legal practitioner" (from academic angle) 1981 De Rebus at 424-427.

[45] Under section 22(6) of the National Prosecuting Authority Act 1998 *Government Gazette* 33907, notice number 1257, 29 December 2010.

[46] *Jiba* at [15].

(d) strive to be and to be seen to be consistent, independent and impartial;
(e) conduct themselves professionally, with courtesy and respect to all and in accordance with the law and the recognised standards and ethics of their profession;
(f) strive to be well-informed and to keep abreast of relevant legal developments…

B Independence

The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be free from political, public and judicial interference.

C Impartiality

Prosecutors should perform their duties without fear, favour or prejudice. In particular, they should-
…
(c) take into consideration the public interest as distinct from media or partisan interests and concerns, however vociferously these may be presented;
(d) avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence and impartiality;
…
(g) take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether these enquiries are to the advantage or disadvantage of the alleged offender;

D Role in administration of justice

1 Prosecutors should perform their duties fairly, consistently and expeditiously and-

(a) perform their duties fearlessly and vigorously in accordance with the highest standards of the legal profession;
(b) where legally authorised to participate or assist in the investigation of crime, they should do so objectively, impartially and professionally, also insisting that the investigating agencies respect legal precepts and fundamental human rights;
(c) give due consideration to declining to prosecute, discontinuing criminal proceedings conditionally or unconditionally or diverting criminal cases from the formal justice system, particularly those involving young persons, with due respect for the rights of suspects and victims, where such action is appropriate;
(d) in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence; and
(e) throughout the course of the proceedings the case should be firmly but fairly and objectively prosecuted.
2 Prosecutors should, furthermore-
…
(b) refrain from making inappropriate media statements and other public communications or comments about criminal cases which are still pending or cases in which the time for appeal has not expired;
…
(f) safeguard the rights of accused persons, in line with the law and applicable international instruments as required in a fair trial;
(g) as soon as is reasonably possible, disclose to the accused person relevant prejudicial and beneficial information, in accordance with the law or the requirements of a fair trial…" (our emphasis)

127. The Court in *Jiba* also considered conduct, on the part of the then acting NDPP and a Special Director, of bringing the legal profession and the

NPA itself into disrepute as conduct indicating that an individual ceased to be fit and proper.[47]

128. All of this must be borne in mind when the fitness and propriety of any member of the NPA to hold office is considered, and must particularly be borne in mind when having regard to the "*experience, conscientiousness and integrity*" of that office bearer. The word conscientiousness is the noun form of the adjective "*conscientious*", which is defined in the *Merriam-Webster* dictionary as follows:

> "*1. governed by or conforming to the dictates of conscience*…
>
> *2. Meticulous, careful*"

129. Accordingly, though it is clear that integrity is an important consideration with respect to the requirement of a "*fit and proper*" person, it does not stand alone. The competence of an individual to hold the office of prosecutor is clearly of great import and relevance. Indeed, the Code of Conduct requires "*the highest standards of the legal profession*" of prosecutors, which standards include *inter alia* requisite knowledge and technical skills. It is submitted that this standard is even higher for the NDPP as chief prosecutor, head of the NPA and overseer of all the prosecutors below him. Similarly, Directors of the NPA should have a commensurately higher standard to meet than their subordinates. This is not a low bar for the NDPP or Directors, and is highly nuanced and multifaceted. With respect, it is submitted that the President's attempt, in

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[47] *Jiba* at [170].

his version, to simplify, narrow and lower the bar for the fitness of propriety of the NDPP and the Directors must be rejected.

130. Instead, it is submitted that the NDPP, the Special Director and the DPP must be held to the "*highest standards of the legal profession*" with respect to, *inter alia*, all of the above considerations and, in general, to conscientiousness, including competence, and integrity.

131. A further vital consideration is that of perception. The objective nature of the test is whether the officials concerned have, through their conduct, undermined their offices by creating the apprehension that they are incompetent and/or lacking in independence. The following conclusions by Wepener J in *United Democratic Movement and Others v Tlakula and Another* (EC 05/14) [2014] ZAEC 5; 2015 (5) BCLR 597 (Elect Ct)) (18 June 2014) are particularly illustrative (at paras 153 to 159):

> *"[153] In my view, the conduct of the respondent, which is of the nature described herein, risks the impairing of public confidence in the integrity and impartiality of the Commission.*
>
> *[154] … The respondent compromised the integrity and independence of the Commission in violation of a requirement that such integrity and impartiality must be above suspicion and beyond question. This view finds its basis in* New National Party of South Africa v Government of the Republic of South Africa and Others*:*

> ‘independent institutions are an important structural component of our constitutional democracy. The Constitution obliges such institutions to be impartial and to perform their functions without fear, favour or prejudice. Other organs of state are obliged to assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness. It is clear that both constitutional obligations should be scrupulously observed.’

[155] *In* Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 *the Constitutional Court pronounced this principle as follows*:

> ‘They perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution.’

[156] *The constitutional independence of the judiciary is subject to the same doctrine, and indeed it was with the purpose of securing public confidence in the courts that this doctrine was developed. The doctrine was explained in* Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) *and I am of the view that the principles enunciated apply with equal force to an institution like the Commission. The Constitutional Court concluded as follows*:

‘That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted. The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen* where Le Dain J held that:

> “Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.”

The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts.

. . . I agree that an objective test properly contextualised is an appropriate test for the determination of the issues raised in the present case. The perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information. . . . Bearing

> in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts.'(footnotes omitted)

[157] *These considerations apply particularly strongly where the head of an institution is concerned*. *In* Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others*, the Constitutional Court held, in striking down the statutory power of the President to extend the tenure of the Chief Justice, that such powe*r 'violates the principle of judicial independence', *because it* 'may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference.'

[158] *The reasonable public perception of independence is of no less importance in respect of public institutions other than the Public Protector, the Auditor-General and the judiciary. Thus, in*

Glenister v President of the Republic of South Africa and Others*, concerning the independence of the Directorate of Priority Crime Investigation and particularly its head, the Constitutional Court held as follows*:

> 'This Court has indicated that "the appearance or perception of independence plays an important role" in evaluating whether independence in fact exists. . . . By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy – protecting features is important to determining whether it has the requisite degree of independence. 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.'

[159] *In my view, the respondent compromised the independence and integrity of the Commission to such an extent that her actions complained of constitute misconduct within the*

meaning of the Electoral Commission Act. It is conduct which renders her unsuitable for the office of a commissioner and destructive of the very values of the Commission."

132. In our respectful submission, those considerations must apply *a fortiori* to the NDPP, the head of the NPA, and the third and fourth respondents.

133. It is very important to bear in mind that the applicants do not need to prove that the second to fourth respondents are in fact not fit or proper to hold their respective offices. This question must be determined at the enquiry.

134. It is not for the President (or this Court) to run a quasi-enquiry, considering the merits and defensibility of the NPA officers' actions, based on their representations, before deciding that an enquiry, with or without a suspension, should proceed.

135. This would not only do violence to the independence of the NPA, but would impermissibly usurp the functions of the Enquiry.

136. Instead, at this stage, it must simply be shown that there are grounds for an enquiry to be initiated; that being a *prima facie* case that the second to fourth respondents are not fit and proper to hold their respective offices.

Rigidity and closing of the mind

137. As outlined above, the President has indicated in his answering affidavit that the accusations of, *inter alia*, incompetence, misconduct and/or ulterior purposes levelled by the applicants against the second to fourth

respondents are of no substance and are not relevant to any enquiry concerning their respective fitness and propriety to hold office.

138. It is obvious from the case law and the fifth respondent's own Code of Conduct that the "*fit and proper*" standard and the standard for misconduct are relatively broad and encompassing ones, which involve a fulsome consideration of a person's qualities and conduct, in light of the circumstances. This standard cannot be limited unduly, or else its very purpose for inclusion in the legislation would be defeated. The President's submissions are thus not only incorrect in law, they exhibit an unlawful rigidity and foreclosing of the mind in respect of the enquiry and suspension decisions. They are also indicative of a failure by the President to consider relevant factors and a complete misconstruing of the nature of his powers.[48]

139. This is both a ground of review in respect of his refusal or failure to suspend and institute the disciplinary enquiries; and a clear reason why this matter should not be referred back to him for further consideration and this Court should simply substitute the decision.

Mr Abrahams

140. The following facts are evidence of Mr Abrahams' lack of conscientiousness:

[48] *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A).

140.1 Mr Abrahams did not "*give due consideration to declining to prosecute*"[49] and instead continued with a prosecution despite the absence of the requisite evidence[50] when the charges were brought to his attention, both before the 11 October press conference, and by the Applicants in their 14 October letter, and when he failed to exercise his powers under section 22(2)(c) of the NPA Act to review those charges;[51]

140.2 Mr Abrahams does not have the knowledge and technical skills[52] required of a lawyer, particularly a lawyer specialising in criminal law, and particularly a senior prosecutor and head of the NPA, and also has not kept abreast of relevant legal developments[53] in that:

140.2.1 assuming Mr Abrahams was fully apprised of the facts as at 11 October 2016, he nevertheless stridently and publically defended and justified the charges at the 11 October press conference, despite the very obvious lack of substance of the charges, and despite the fact that there was absolutely no evidence of, *inter alia*, the requisite criminal intent. In light of these trite and old requirements for criminal liability, the following is submitted;[54]

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49 The Code of Conduct D1(c).

50 The Code of Conduct D1(d).

51 See, *inter alia*, paras 67, 75, 83, 85; 88, 96.1 of the FA.

52 Jiba at [3].

53 The Code of Conduct at A(f).

54 See para 66 of the FA.

140.2.2 to the extent that Mr Abrahams did give due consideration to declining to prosecute and nevertheless allowed the charges to proceed without reviewing them despite the obvious absence of the requisite evidence, Mr Abrahams did not have the requisite competence, knowledge, skill and mastery of the relevant law to recognise that there was not requisite evidence to proceed with the charges and/or that the vital requirement of criminal intent was missing;

140.2.3 Mr Abrahams misunderstands his powers of review, incorrectly alleging that he has not *mero motu* powers to review;[55]

140.2.4 Mr Abrahams continued to defend the charges in answer;

140.2.5 Mr Abrahams fundamentally misunderstands basic principles of administrative law in his answer;

140.2.6 when summoned to a committee meeting of Parliament, Mr Abrahams, bizarrely and seemingly without any understanding of the relevant law, in particular the fundamental right of an accused to be presumed innocent until proven guilty, objected to the presence of Ms Glynnis Breytenbach MP ("**Ms**

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[55] See para 89 of the FA; much like the President's obligation in respect of the suspensions and enquiries, Mr Abraham's power to review under section 22(2)(c) of the NPA Act comes with a duty to exercise that duty in the appropriate circumstances. There is also nothing in the NPA Act, or the Constitution which suggests that the NDPP may not exercise the power under section 22(2)(c) of the NPA Act *mero motu*. On the contrary, the NPA Act suggests he may do precisely this and, when he does so, he must thereafter consult the relevant persons and not the other way around.

Breytenbach") on the basis that she was an accused in a criminal matter;[56]

140.3 Mr Abrahams was grossly negligent and did not "*take[n] into account all relevant circumstances and ensure[d] that reasonable enquiries are made about evidence.*"[57] in that:

140.3.1 Assuming Mr Abrahams was not fully apprised of the facts, despite having a duty to be so apprised, as at 11 October 2016, he nevertheless stridently and publically defended and justified the charges at the 11 October press conference; [58]

140.3.2 Mr Abrahams did not make appropriate enquiries into the 3 000 similar other instances of early retirement as to whether these instances had been criminally prosecuted;[59]

140.4 Mr Abrahams failed to "*protect the public interest*"[60] in that, despite the significant consequences to the public of charging a sitting Minister of Finance, he proceeded with gross negligence as discussed above.

141. The following facts indicate Mr Abrahams' lack of integrity:

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56 See para 99 of the FA.

57 The Code of Conduct at C(g).

58 See para 66 and 89 of the FA.

59 See para 67 of the FA.

60 The Code of Conduct A(c).

141.1 assuming Mr Abrahams did not believe that the charges were good in law, and knew that he had the power to review them, but allowed the charges to proceeded in any case, he did so with an ulterior motive;

141.2 he was not "*consistent, independent and impartial*",[61] and did not avoid activities which "*may be perceived to prejudice [his] independence and impartiality*"[62], and also did not approach the prosecution of the accused "*fairly and objectively*"[63] and also did not have an requisite "*sense of equality and fairness*"[64] in that he did not make appropriate enquiries into the 3 000 similar other instances of early retirement as to whether these instances had been criminally prosecuted;[65]

141.3 Mr Abrahams did not "*refrain from making inappropriate media statements and other public communications or comments about criminal cases which are still pending*"[66], failed to exhibit the necessary "*sense of equality or fairness*" and acted with "*antipathy*"[67] when:

141.3.1 he spent time during both the 11 and 31 October Press conferences to discuss ongoing investigations into the 'rogue'

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61 The Code of Conduct A(d).

62 The Code of Conduct C(d).

63 The Code of Conduct D1(e).

64 *Jiba* at [3].

65 See para 67 of the FA.

66 The Code of Conduct D2(b)

67 *Jiba* at [3].

unit investigation.[68] Mr Abrahams also did not seem to appreciate the inappropriateness of such actions – and still refuses to acknowledge the inappropriateness thereof;[69]

141.3.2 he objected to Ms Breytenbach in the committee on the basis that she was an accused in a criminal matter, and despite having no compunction attending a meeting at Luthuli House with President Zuma, in respect of whom 783 serious charges have been reinstated;[70]

141.3.3 in stark contrast to his approach to the charges (being unsupported by evidence), he withdrew the charges against Ms Jiba, despite an array of demonstrably false representations recorded in damning court judgments; [71]

141.4 Mr Abrahams failed to safeguard the rights of the accused[72] and did not, as soon as reasonably possible, disclose to the accused person relevant prejudicial and beneficial information[73] in that the charges were brought against the accused before informing the accused, despite an undertaking by the NPA to interact with the accused before the decision to prosecute was taken. The failure to adhere to

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68 See paras 58 to 64 of the FA.

69 See para 96.6 of the FA.

70 See para 99 of the FA.

71 See para 110 - 116 of the FA, subject to the contents of the SA.

72 The Code of Conduct D2(f).

73 The Code of Conduct D2(g).

this undertaking also suggest that Mr Abrahams does not have the requisite honest or a sense of equality and fairness[74];[75]

141.5 Mr Abrahams acted with prejudice, partiality[76] and without the requisite fairness and objectivity[77] and without respect for legal order[78] in that, when receiving the applicant's 14 October letter, and knowing that there was no evidence of the requisite criminal intent on the docket at the time the charges were brought (or indeed at any time), instead of reviewing and setting aside the charges immediately under section 22(2)(c) of the NPA Act, Mr Abrahams instead, unlawfully, proceeded to attempt to procure additional evidence to make good for this deficiency.[79] It should be noted, that Mr Abrahams has himself claimed that the Symington memorandum was utterly dispositive of the question of intent, making further evidence unnecessary;[80]

141.6 Mr Abrahams failed to safeguard the rights of the accused[81] in that, just before dropping the charges against the accused, he defamed the accused and attempted to cast a cloud of suspicion over the

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74 *Jiba* at [3].

75 See para 68 of the FA.

76 The Code of Conduct A(d) and C(c).

77 The Code of Conduct D1(e).

78 *Jiba* at [3].

79 See para 76 - 78 of the FA.

80 See para 82 of the FA.

81 The Code of Conduct D2(f).

accused, despite knowing that the charges against them were insupportable;[82]

141.7 Mr Abrahams failed to "*be free from political… interference*", irregularly took into consideration "*partisan interests*", and engaged in "*political or other activities which may prejudice*" or alternatively may "*perceived to prejudice their independence and impartiality*" by:

141.7.1 attending a meeting at the ANC's headquarters at Luthuli House, the date before announcing the charges at the 11 October press conference;[83]

141.7.2 making objecting to the presence of an opposition MP, Ms Breytenbach, at a Parliamentary committee meeting despite having no basis to do so, and despite having no compunction attending a meeting at Luthuli House with President Zuma, in respect of whom 783 serious charges have been reinstated;[84]

142. It is furthermore undeniable, that Mr Abrahams' conduct, together with the conduct of Dr Pretorius and Mr Mzinyathi, but particularly in respect of Mr Abrahams as the head of the NPA and the primary spokesperson for the NPA on the charges, has brought the NPA into disrepute. So much so, that Parliament saw fit to urgently call Mr Abrahams in to account for the conduct to the nation. On this ground alone Mr

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82 See para 81 of the FA.

83 See para 93 - 94 of the FA.

84 See para 99 of the FA.

Abrahams should be considered on a *prima facie* basis, at the very least, to not be a fit and proper person.

143. Accordingly, it is submitted that there is a long litany of grounds, based on undeniable evidence indicating that Mr Abrahams is clearly not a fit and proper person to hold the highest office in the NPA. In any case, the clear case of a lack of fitness and propriety is not necessary for the institution of the suspension, and an enquiry into the fitness to hold office of, Mr Abrahams: there need only be a *prima facie* case. It is submitted that there can be no better example of strong *prima facie* case than there is in respect of Mr Abrahams.

Dr Pretorius and Mr Mzinyathi

144. The following facts are evidence of Dr Pretorius's and Mr Mzinyathi's lack of conscientiousness:

144.1 assuming Dr Pretorius and Mr Mzinyathi truly believed that the charges were good in law, they did not "*give due consideration to declining to prosecute*"[85] and instead continued with a prosecution despite the absence of the requisite evidence[86] of the most basic legal requirement for a successful prosecution of fraud or theft: the fraudulent or furtive intention;[87]

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85 The Code of Conduct D1(c).

86 The Code of Conduct D1(d).

87 See para 127 of the FA. .

144.2 Dr Pretorius and Mr Mzinyathi failed to "*protect the public interest*"[88] in that, despite the significant consequences to the public of charging a sitting Minister of Finance, they proceeded with gross negligence as discussed above.

144.3 Dr Pretorius and Mr Mzinyathi do not have the knowledge and technical skills[89] required of a lawyer, particularly a lawyer specialising in criminal law, and particularly a senior prosecutor and head of the NPA,[90] in that they proceeded with the charges despite the very obvious lack of substance of the charges, and despite the fact that there was absolutely no evidence of, *inter alia*, the requisite criminal intent. It is submitted that these trite and old requirements for criminal liability were simply ignored;[91]

145. The following facts are evidence of Dr Pretorius and Mr Mzinyathi's lack of integrity:

145.1 assuming Dr Pretorius and Mr Mzyinyathi did not believe that the charges were good in law, but proceeded with the charges in any case, they did so with an ulterior motive;

145.2 Dr Pretorius and Mr Mzinyathi failed to "*protect the public interest*"[92] in that, despite the significant consequences to the public of

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88 The Code of Conduct A(c).

89 Jiba at [3].

90 The Code of Conduct at A(f).

91 See para 66 of the FA.

92 The Code of Conduct A(c).

charging a sitting Minister of Finance, they proceeded with ulterior purpose as discussed above.

146. It is furthermore undeniable, that, together with Mr Abrahams' conduct, the conduct of Dr Pretorius and Mr Mzinyathi has brought the NPA into disrepute. So much so, that Parliament saw fit to urgently call Mr Abrahams in to account for the conduct to the nation.

147. Accordingly, it is submitted that, though the list of transgressions by Dr Pretorius and Mr Mzinyathi is shorter (due entirely to the fact that Mr Abrahams kept the limelight for himself), their involvement in the charges (particularly as the ostensible original decision makers to bring the chargers) is a serious indictment of their fitness and propriety. It is submitted that there is more than a strong *prima facie* case that Mr Mzinyathi and Dr Pretorius are not fit and proper persons.

SEPARATION OF POWERS

148. The respondents have made the argument that any direction by the Court to the President to initiate the enquiries and the suspension would violate the separation of powers doctrine. With respect, this argument betrays a misunderstanding of the separation of powers doctrine and, indeed, this doctrine in fact countenances precisely just such an intervention in precisely these circumstances.

149. The doctrine of separation of powers is certainly part of South African constitutional law. This does not have the effect that the courts can in no circumstances grant review and set aside, or even substitute the decision

of the President where the exercise of public power by a member of the executive is concerned. It has been accepted by the Constitutional Court that the exercise of all public power is subject to the Constitution and as such in appropriate cases the court can and must grant relief to ensure that harm to the constitutional order and the public is prevented.[93]

150. The initiation of the enquiries and the suspensions in respect of public officials in light of evidence that they are not fit and proper to hold office does not throw up any concerns regarding the proper place and constitutional station of the Courts. It does not involve any matters of high policy- or any policy considerations at all for that matter. The decisions of the first respondent are not polycentric in nature as to place them outside the realm of a Court's expertise. They are subject to judicial oversight.[94] The decision to institute the enquiries and suspensions against the second to fourth respondents is not within the first respondent's unfettered discretion. The NPA Act clearly requires the first respondent to exercise his discretion to institute disciplinary proceedings and to suspend the parties that are the subject of such disciplinary proceedings under certain specific circumstances pursuant to objectively justifiable and verifiable criteria. This would include objectively considering the fitness and propriety criteria set forth in the legislation.[95] It is beyond doubt, as held in *Laerskool Gaffie Maree v Member of the Executive Council for Education, Training, Arts and*

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[93] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) (20 September 2012)*, supra, at para [64].

[94] *Ibid* at para [16]. *Democratic Alliance v President of the Republic South Africa* (note 5) para [41] to [44].

Ibid, para [20] to [26], which confirms that fitness and propriety are objective jurisdictional facts.

Culture, Northern Cape,[96] that it is pre-eminently within the realm of the Court's power to order that public officials exercise their powers to comply with their duties.[97]

151. This Court has both the constitutional and institutional competence to adjudicate this matter. In fact, powers to discipline and to remove/suspend persons fall squarely in the adjudicative realm of courts. Given the nature of the proceedings and the legal nature of the findings against them, this Court is well placed to consider the competing considerations involved in a decision to institute disciplinary steps against them, and to suspend them in advance thereof. The Courts are also constitutionally obliged to act to vindicate the public interest, particularly when persons of such enormous political and constitutional influence are implicated.

152. The Constitutional Court in *Glenister v President of the Republic of South Africa*[98] specifically noted that:

> "*[i]n our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so…–It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure*

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96 2003 (5) SA 367 (NC).
97 *Ibid* at para [13].
98 2009 (1) SA 287 (CC).

that the exercise of power by other branches of government occurs within constitutional bounds".[99]

153. In *Pikoli v President and Others* the Court granted an interdict preventing the President (who is the fifth respondent in this matter) from appointing a new NDPP while the review of his decision to remove Pikoli was underway. Du Plessis J in that case found that "*I cannot agree, however, that interdicting the President from exercising that power would amount to a breach of the separation of powers. The very power to appoint a new NDPP is the subject matter of court proceedings and, apart from the considerations set out above, the law affords the court the discretion to issue the interim interdict*".[100]

154. Even, however, in cases where the facts involve multi-faceted high-end policy and economic decisions (which this is not), the Constitutional Court has recognised the potential for interim relief, but has required a higher threshold for the grant of such relief:

> "*in matters where the functions and powers of the executive or the legislature are susceptible to being restrained [the Courts] must be consciously sensitive to the impact on the constitutionally ordained separation of powers of any order they might be inclined to consider making restraining the use of executive or legislative power. Where, on such an assessment, the impact of the*

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[99] *Ibid* at para [33].
[100] supra, 408-9.

restraining order (what the Constitutional Court labelled for convenience as 'balance of power harm') looks to be significant, a court will incline against making the order unless a strong case for the relief has been made out, and only in the clearest of cases".[101]

155. Even on that more stringent test, the applicant has made out a clear and largely unanswerable case for, at the very least, an enquiry. There is simply no basis in law or fact for the first respondent to have ignored the conduct of the second to fourth respondents in respect of the charges. Where the second to fourth respondents' continuation in office may have far reaching consequences not only on the rights of individuals that would be affected by the outcome of the decisions made by the second to fourth respondents, but also on the integrity and legitimacy of an important constitutional body such as the NPA, it is incumbent on a Court to intervene. In any event, any interference with executive responsibilities would be on account of the President's failure to do his duty already (and his efforts to avoid scrutiny by this Court through the construct of allowing submissions from the NPA officials at a date conveniently beyond 24 November). Had the President done his duty timeously then there would have been no need for any interference with his executive responsibilities. But given his wanton failure to act, it is now incumbent on the courts – as the ultimate guardians of the Constitution and the rule of law – to intervene. Even so, that intervention will be minimal and

[101] *City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74 (21 May 2013) at para [75].

would happen in circumstances where the first respondent has, despite demand, failed to exercise his statutory functions.[102]

156. This is thus the "*clearest of cases*".

SUBSTITUTION OF THE PRESIDENT'S FAILURE TO DECIDE BY THIS COURT

157. The Constitutional Court recently restated the principles regarding substitution in *Trencon*.[103] When considering whether to order substitution, a court must begin by asking itself (a) whether it is in as good a position as the administrator to make a decision and (b) whether the decision of the administrator is a foregone conclusion. These factors should be considered cumulatively. Thereafter, a court should consider other factors such as delay, bias or the incompetence of the administrator. The overriding consideration is whether substitution would be just and equitable.[104]

158. The decision to suspend the NDPP has its provenance in facts which are within the public knowledge and ultimately turns on his fitness to hold office as well as the harm which his incumbency does to the NPA and the rule of law. No polycentric of policy considerations are involved. The Constitutional Court, in the *Democratic Alliance* case, clearly held that it was well-placed to consider the rationality of the appointment of the

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[102] *ibid* at para [75].

[103] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC).

[104] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) at para [47].

NDPP's predecessor, Mr Simelane. The Court also held that there was "*no merit in the contention by the Minister that Mr Simelane should stay in office and the matter should be referred back to the President for reconsideration*".[105] We submit that similar considerations should apply in this case, in which the Court is well-versed in the surrounding circumstances which have brought the NDPP and the NPA into disrepute and all pertinent factors are before this Honourable Court. The suspension of the NPA officers is clearly required by the Constitution and the rule of law.

159. For the same reasons, we submit that, on any rational consideration of the relevant facts, the suspension of the second to fourth respondents is a foregone conclusion: it is the only legally competent outcome. There is thus no rational reason for the President to delay the inevitable, and any request for more time to "consider" relevant factors is untenable.

160. The President has already delayed in respect of his failure to make the necessary and rational decision to exercise his powers to suspend the NDPP. This gives rise to a reasonable apprehension of bias in favour of the NDPP, in circumstances where the NDPP clearly appears to have breached his constitutional mandate. Objectively, this warrants a full and immediate inquiry - and yet the President has chosen to be dilatory.

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[105] 2012 (12) BCLR 1297 (CC) at para [92].

URGENCY

161. The applicants submit that they and the public would not be able to receive redress if the application is only to be heard in due course or, indeed, if they were to wait for the President to make his already much belated decisions in respect of the suspensions and the enquiries.

162. The matter concerns the highest echelons of law enforcement in South Africa and is a matter of paramount public importance. Having regard to the dozens of critical decisions that are made by the second to fourth respondents on a daily basis, any impropriety tainting those positions must be dealt with as soon as possible. In this regard, the respondents do not have an untrammelled entitlement to be vested with such power without proper accountability and trust in their propriety and ability. All decisions taken by them, whilst the clouds of impropriety and inability swirl around them, would likely be susceptible to judicial review. This is obviously intolerable given the importance of the criminal justice system in South Africa, and the second to fourth respondents' critical stations within that system.

163. If there is potential for even one case handled by the second to fourth respondents to be affected by the kind of misconduct seen in respect of the charges, and to the extent relevant in respect of the Jiba matter, this in itself justifies their exclusion from high-end statutory responsibility, until and unless they are exonerated through the disciplinary process.

164. It must be remembered that this is not an instance of review of a decision that has been taken, but review of a failure to take a decision. What

makes this application urgent is the failure of the first respondent to institute disciplinary proceedings against the second to fourth respondents and to suspend them pending the conclusion of such proceedings.

165. The NPA Act does not require the first respondent to take this decision before a specific date, or within a specified period of time. As discussed at 50 above, there is a significant risk that the second to fourth respondents, or their subordinates, may again lay charges against Min. Gordhan and the other accused. The President has given no rational reason for his delay thus far. He originally indicated that he would only need until 21 November 2016 to make his decision in respect of the suspensions and enquiries.[106]

166. When the applicants launched their application to be set down on 22 November 2016, and inviting the President to make his decision before that date,[107] the President then proceeded to give the second to fourth respondents until 28 November 2016 to make representations, pushing the date of the decision out even further. It is clear that the President does not, or will not, appreciate the urgency with which his decision must be made.

COSTS

167. The applicants have pursued these proceedings with the objective of ensuring compliance with the rule of law and fundamental constitutional

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[106] Annex "FA12" to FA, pages 132 to 133.

[107] Annex "FA13" to FA, pages 134 to144.

principles. The applicants submit that, should they be substantially successful in this application, they are entitled to a costs order in their favour against the respondents jointly and severally – including the costs of two counsel.

168. If unsuccessful, then on the accepted constitutional basis no costs should be awarded against the applicants, it being clear that the application has not been brought vexatiously or frivolously,[108] and has been advanced in the public interest in vindication of the rule of law and the proper administration of justice.

CONCLUSION

169. Accordingly, the applicants ask this Honourable Court to set aside the President's failure alternatively refusal to initiate the enquiries and the suspensions and that the President be directed to initiate the enquiries and the suspensions without any further delay.

DAVID UNTERHALTER SC

MAX DU PLESSIS

Chambers, Sandton and Durban

18 November 2016

[108] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).