IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: *87643/16*

On the roll, 24 November 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

HEADS OF ARGUMENT OF SECOND, THIRD AND FIFTH RESPONDENTS

INTRODUCTION

> "Courts do not run the country, nor were they intended to govern the country. Courts exists to police the constitutional boundaries, as I have sketched them. Where the constitutional boundaries are breached or transgressed, courts have a clear and express role. And must then act without fear or favour.
>
> There is a danger in South Africa … of the politicisation of the judiciary, drawing the judiciary into every political dispute as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication.
>
> An overreach of the powers of judges — their intrusion into issues which are beyond their competence or intended jurisdiction — which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state deal with these matters, can only result in jeopardy for our constitutional democracy."

1. These words of Davis J, in Mazibuko NO v Sisulu and Others NO,[1] have been echoed by Moseneke DCJ, in a speech deploring the too-frequent resort of the courts in political matters. He observed that "courts are not and should not be a substitute for the obligation to move our society to the spaces envisaged in the Constitution."[2]

---

[1] 2013 (4) SA 243 (WCC) at 256E – 256I.

[2] *Reflections on South African Constitutional Democracy*, UNISA conference, 20 Years of South African Democracy, 12 November 2014. In an address last week, the retired DCJ reiterated his sentiments, labelling the too-ready resort to court in political matters as *lawfare*, and warning that the excessive politicisation of the

2. This application is borne out of fiercely political tussles of precisely the character referred to by these two jurists. The applicants say that political factionalism and in-fighting has animated prosecutorial and presidential decisions that demand the urgent intervention of the judiciary. But this kind of litigation diverts resources and attention from the political *fora* in which disputes, such as those raised in this application, should properly be resolved, and at the same time risks de-legitimising the judiciary.

3. These heads of argument are submitted on behalf of the second, third, and fifth respondents in opposition to an application to set aside the decision of the first respondent not to institute an enquiry and suspend the respondents, under section 12(6)(a) of the National Prosecuting Authority Act (the "**NPA Act**"). The applicants also seek orders directing the President to institute an enquiry and suspend the respondents.[3]

4. It is submitted that the application should be dismissed for the following reasons:

---

courts could over time tarnish their standing and effectiveness. See "Courts risks being Over Politicized, Moseneke warns". Helen Suzman Lecture, Johannesburg www.ann7.com/courts-risk-being-over-politicised-moseneke 18 November 2016.

[3] The second, third and fourth respondents are referred herein as the *respondents*. Where the first and fifth respondents are referred to separately, they are designated respectively as the *President* and the *NPA*. The second respondent is referred to either as *Abrahams* or the *NDPP*.

4.1. *First*, the matter is not urgent; the impugned decision of the President has yet to be made, and the applicants offer no showing of any harm (let alone irreparable harm), pending the decision.

4.2. *Second*, the application is for that reason premature, and not ripe for hearing.

4.3. *Third,* the contentions that a decision *has* been made - by virtue of the failure of the President to make a decision - is meritless. As a matter of law, a failure to take a decision may in itself be deemed to constitute a decision, only once a “reasonable” time has lapsed since the demand.

4.4. *Fourth,* the respondents are entitled to be heard by the President before he takes a decision. The effect of the orders sought would be to compel the President to violate the respondents’ rights to be heard, *both* as to an enquiry, and as to suspension.

4.5. *Fifth*, the orders sought violate the principle of separation of powers, whereunder the President is vested with a broad discretion in his determination pursuant under section 12(6) of the NPA, subject only to the principle of legality.

4.6. *Sixth*, there exists no objective basis for the President to take steps against the respondents. As not meaningfully contested in the replying affidavit, the decision of the third respondent to prefer charges was warranted on the basis of the evidence available at the time; sufficient material existed to show at least a *prima facie* case against Minister Gordhan ("the *Minister*"), Ivan Pillay ("*Pillay*") and Oupa Magashula ("*Magashula*").

4.7. *Seventh*, even to the extent that the court finds the President's decisions to be irrational, the court should not substitute its decision for his, because so to do would violate the principle of separation of powers.

5. The applicants simply cannot satisfy their burden to show that the President's decision to not *immediately* invoke his section 12(6) powers was *irrational*.[4] The applicants would have it that, upon receipt of the complaint, the President should have sprung into action - because the complaint was not *patently* ill-founded.[5] Indeed, on the applicants' account, he acted irrationally even in eliciting the respondents' side of the story.

---

[4] It is common cause that, because the power is executive rather than administrative in nature, the legality test applies. A decision of this kind will not be set aside merely because it is unreasonable.

[5] Elsewhere, applicants contend that the standard required to initiate the enquiries and suspension is a *prima facie* or arguable case (HoA, para 57).

6. Moreover, the founding affidavit is remarkably vague as to what precisely what rendered the decision to prefer charges against the Minister, Pillay and Magashula a form of misconduct, or a manifestation that the respondents are incompetent or unfit to hold office. The answering affidavit includes a detailed analysis of the relevant statutory and regulatory framework, setting out precisely why the special treatment accorded to a Pillay was indeed unlawful. The replying affidavit blithely declines to engage with this– contending simply that this will be the subject matter of the enquiry that they demand the President must institute.

7. Instead of attempting to grapple with respondents exposition of the relevant legal regime, the applicants contend that the fact that the NDPP withdrew the charges upon review, and in the course of so doing sought further information, *ipso facto shows* that the charges were baseless at inception. This is, with respect, argument. The viability of the charges falls to be considered when they were instituted. Not *ex post facto*.

8. Finally, the applicants are seemingly oblivious both to the very broad discretion vested in prosecutors in preferring charges, as well as to the review function of the NDPP.

ANNEXURES

9. The relevant narrative chronology is exhaustively set out in the answering papers. It is hence not necessary to reiterate the sequence of events here.

10. Attached as annexure "A" is an account of the basis for the charges. It is to be noted that in the answering affidavit, the applicants have not contested the full account presented in the answer. The annexure is furnished only for the eventuality that the matter may arise at the hearing.

URGENCY

11. Applicants contend that calamity that looms unless immediate steps are taken to remove the respondents from their posts. Every day the respondents remain in office "is a day that potentially *irreparably* prejudices the work of the NPA and jeopardizes the Republic".[6] Indeed the applicants lament that the preferral of the charges has already "*irreparably* damaged... the Republic's reputation and economy."[7]

---

6 HoA, para 31.

7 HoA, para 89.

12. But the applicants' *per se* argument, based upon the fact that the second, third and fourth respondents occupy senior positions in a key organ of state, falls short. There is no allegation that for the respondents to remain in place until such time as the application is heard in the ordinary course would hinder, scupper or prejudice any particular prosecution.

13. The applicants' fear "potential" harm.[8] That is not good enough. Their burden is to set out *particular* facts that establish an *actual or well-grounded* apprehension of irreparable loss if no relief is immediately granted. The applicants fail the test articulated in Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W):

> "Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

---

[8] See HoA, para 31. The heads of argument are replete with extravagant hyperbole. The respondents are said already to have exercised their powers with "disastrous and irreversible consequences to the Republic." (HoA, para 5).

14. Here, the applicants rushed to court, and allowing the President six days to act. When the President did not act immediately, they lodged these papers. We submit that the caution of Wepener J come into play. To avoid being struck from the roll with costs:

> "Practitioners would be well advised to be more realistic and to afford State departments a more reasonable time in which to file affidavits." In Re Several Matters on the Urgent Role 2013 (1) SA 549 (GSJ), para 17

15. It is submitted that this is precisely what should be ordered *in casu*.

16. Surprisingly, the applicants now 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." [9] Effectively, the applicants seek to amend their notice of motion to pre-empt decisions they anticipate *may* be adverse to the country at large.

17. The applicants claim that the suspension issue is "narrow". But in fact it lies at the heart of the applicants' case; suspension is not an incidental element consequent upon the enquiry provided for in s 12(6) of the NPA Act. More particularly, the applicants' case for urgency is tied to the remedy of suspension. On the applicants' account, it is only the

---

[9] HoA, para 118.

disablement of the respondents that can forestall the dire consequences of which the applicants warn.

18. In the wake of the applicants' replying affidavit, it has become clear what really animates the application. In the guise of challenging the President's (non) decision under s 12(6) of the NPA Act, the applicants wish to forestall the laying of charges against the Minister with respect to the so-called Rogue Unit. They point to what they describe as "the NDPP's threat, on 31 October 2016, that further charges against Min. Gordhan and the other accused are under investigation."[10]

19. Two points fall to be made.

19.1. First, there has been no *threat*. Abrahams has simply said that investigations into the "Rogue Unit" icontinue.[11]

19.2. Second, if it is considered necessary to pre-empt charges in the future, the applicants (or, more properly, the Minister himself), have their remedy in an application for a permanent stay of prosecution of the Minister.

---

[10] HoA, para 50.

[11] FA, para 154.

20. One suspects that it is the applicants' awareness that they are unlikely to obtain a permanent stay that has prompted them to adopt a circuitous route to the same destination – an attempt to compel the President to suspend the respondents. Indeed, in their prior application (under Case No. 83058/16), reviewing the decision to prefer charges, the applicants effectively sought a permanent stay of prosecution. However, that aspect of the relief was abandoned when the applicants withdrew that application, in the wake of the decision to review and withdraw the charges against the Minister.[12]

21. The applicants attach no weight to the disruption that would be caused if the NPA were decapitated overnight by the suspension of the respondent. In that regard, the case of Helen Suzman Foundation v Minister of Police 1054/2015 JDR 0249 (GP) is instructive. The court, in holding that the head of the DPCI, General Dramat be permitted to remain in his office pending an appeal from a decision setting aside his suspension, observed that the ongoing absence of the leadership of a vital national institution may adversely affect the functioning thereof:

> "The case has evoked nationwide interest and concern and the public perception of the criminal law system itself is at stake, particularly in this county which suffers from high levels of corruption, often involving senior public officials. As it is pointed

---

[12] It is interesting to note that in that prior application the applicant came to the assistance only of the Minister. It seems telling that they did not challenge the charges against Pillay and Magashula.

> out in the founding affidavit in the main application, [Dramat] is at the very heart of the DPCI's ability to function effectively and fulfil its constitutional mandate. [Dramat] makes dozens of critical operational, institutional and financial decisions which may have a substantial bearing on on-going sensitive and high profile investigations and pending cases, the rights and expectations of members of the public, and the very structure and operational integrity of the DPCI."

22. Also relevant regarding prematurity is another decision of similar ilk arising from the same subject matter. Independent Police Investigative Directorate and Another v Minister of Police and Another (6588/2015) [2015] ZAGPPHC 138 (18 March 2015), the applicant sought an urgent interdict to restrain the Minister from suspending the Second applicant (McBride) from his position as the Executive Director of the Independent Police Investigative Directorate. The interim interdict was sought pending a final determination as to the lawfulness of the underlying decision.

23. Although the Minister had not suspended McBride at the time the application was heard, counsel for McBride submitted that this was no obstacle to obtaining interim relief, inasmuch as the application was launched, not only to protect the second applicant's rights, but also to preserve the independence and effective functioning of IPID, and to prevent further ministerial interference. Should a suspension be effected, such an act would have immediate deleterious consequences, especially in the extant "political climate".

24. Rejecting this argument, the court observed that

> "I cannot simply accept as a given that such person would be open to unlawful manipulation or that the public would perceive this to be so. Fortunately vigorous debates are held in the press about such appointments and the background of such persons. The fact of the matter is of course that the applicants do have the right to approach the Court for the relief in part B. That right has not been taken away from them and cannot be taken away from them. It also requires no interdict in the interim. I am not satisfied that the applicants have shown that they will suffer irreparable harm in the meantime. If actual harm does arise on some or other ground, whilst an application for the main relief is pending, nothing would stop them from approaching Court for appropriate relief."

25. *In casu*, the applicants also have alternative, more suitable relief, in the form of an application for stay of prosecution.

THE MATTER IS NOT RIPE FOR HEARING

26. Allied to the above argument is the argument that this matter is premature.

27. Plasket AJA held as follows:

> "Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process …. Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma."[13]

---

[13] In Macrovest 102 (Pty) Ltd t/a Business Intelligence and Mazizi v Municipal Manager of the Nelson Mandela Metropolitan Municipality and Others (467/2012) [2012] ZAECPEHC 16 (8 March 2012), the applicant sought an interim interdict

28. This test falls to be applied here. There has been no "impact" of the President's "decision" – precisely because he has taken no decision at all.

29. The President simply has not been given a reasonable opportunity to apply his mind as to whether or not he should act in terms of section 12(6) of the NPA Act. His (non) decision has had no impact, on either the respondents, or the applicants. The notice of motion, in paragraph 1 challenges the "the failures, *alternatively*, refusal by the first respondent" to take steps under section 12(6)(*a*) of the NPA Act. But the President has in no sense *refused* to invoke his section 12(6) powers. Nor can he properly be said to have *failed* to exercise those powers. The applicants are abusing the process by attempting to stampede the President into action, without affording either the opportunity for those affected to make representation, nor for the President properly to apply his mind.[14]

30. The respondents are entitled not to be subject to suspension and enquiry without the opportunity to properly to state their case. As has

---

restraining the awarding of a tender pending finalization of review proceedings. The applicant contended that the decision to exclude the applicant from the tender process was irrational, and that the first respondent "is to shortly award the tender to either the fourth or the fifth respondent".

[14] The right of the respondents to make representations is discussed at paras 68-82 below.

been recognized by the courts, adverse reputational consequences will almost invariably follow a suspension.[15]

31. Moreover, the suspensions may be of long duration, especially if the outcome of the investigation is subject to judicial review and potentially subsequent appeals. In a matter that remains pending in the Pretoria High Court, FUL challenged the decision of the President not to suspend Ms Jiba as Deputy National Director of Public Prosecutions. Pending final relief, FUL sought to have her suspended. Dismissing the application, Prinsloo J noted that it was not possible to anticipate when the main application would be finally determined; it might result in an appeal process years into the future:

> "The impact of such relief, if it were to be granted, on the lives and careers of [the individual respondents], let alone the NPA, is obvious." (Freedom Under Law v NDPP (Case No. 89849/15) (19 Nov 2015), para 26.)[16]

32. The applicants contend that the President claims to be entitled "to push out the making of his actual decision indefinitely."[17] But all that the

---

15 Mogathle v Premier of the North West Province and Another [2009] 4 BLLR 331 (LC).

16 Para 26

17 HoA, para 17

President requires is an opportunity to make a decision within "a reasonable time".[18]

33. Yet, the applicants' position is that in this instance, a *reasonable time* is no time at all. They contend:

> "The potential harm… is too great for any rational decision-maker in the position of the President to countenance [*sic*] even the shortest of delays."[19]

THE NPA ACT AND THE PRESIDENT'S DISCRETION

34. In terms of Section 179 (1) (a) of the Constitution of the Republic of South Africa, 1996 (the "*Constitution*"), the National Director of Public Prosecutions (the "*NDPP*"), who is the head of the Prosecuting Authority, is appointed by the President.[20] The President appointed Abrahams as NDPP on 18 June 2015.[21]

---

18 Noupoort Christian Care Centre v Minister of National Department of Social Development 2005 (10) (BCLR) 1034 (T) (a person may institute a review where delay in question is unreasonable, even where no time period has been prescribed in any statute).

19 HoA, para 25. See also HoA para 49 (contending that the President had a duty to act as "soon as it came apparent that the charges may have been without foundation, which at latest was on 31 October 2016.")

20 The NDPP, and any DNDPP and Director must all "possess legal qualifications that would entitle him of her to practice in all courts in the Republic," and "be a fit and proper person, with due regard to his or her experience, conscientiousness

35. The NDPP is vested by section 179(2) of the Constitution and Chapter 4 of the NPA Act with the powers, functions and duties to institute criminal proceedings on behalf of the State and to carry out any necessary functions and duties incidental thereto.

36. In terms of the NPA Act, under the NDPP sit four DNDPPs; several Directors of Public Prosecutions ("*DPPs*") at the seat of each Provincial Division of the High Court, and four Special Directors of Public Prosecutions ("*SDPPs*"), all of whom are accountable to the NDPP.

37. The four DNDPPs are assigned their responsibilities by the NDPP.[22]

38. The NPA Act grants power to the President to appoint the four DNDPPs, "after consultation with the Minister and the National Director" (s 11(1)).

39. Section 179(5)(d) of the Constitution, which empowers the NDPP as the National Director, when requested, to review a decision to prosecute or

---

and integrity, to be entrusted with the responsibilities of the office concerned". (NPA Act s.9(1).

21. The circumstances under which Adv Abrahams' predecessor left office is the subject of another pending application, Corruption Watch (RF) NPC v President of the Republic of South Africa (G) (filed 3 August 2015) (R: 542).

22. The DPPs, who are responsible for prosecutions in their respective provincial jurisdictions, resort under the National Prosecuting Services ("*NPS*"), headed by a DNDPP.

not to prosecute. After consulting the relevant Director; and after taking representations, within a period as specified by him, from the accused persons, the complainant and any other persons or party whom Abrahams consider relevant.

40. This is in line with the provisions of section 179(5)(d) of the Constitution, read with section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 (the "NPA Act"), to review a decision to prosecute and to decide whether to continue or discontinue a prosecution.[23]

41. The NPA receives representations from accused persons and/or their legal representatives in respect of matters in both the lower and High Courts, which are submitted to the Control Prosecutors, Senior Public Prosecutors, Chief Prosecutors, the DPP Offices and/or to Special DPPs.[24]

42. Since Abrahams' appointment in June 2015, he has reviewed numerous cases. In giving effect to Abrahams' constitutionally entrenched review powers Abrahams have overruled the original decisions of Directors of Public Prosecutions and/or Special Directors to prosecute or to discontinue prosecutions in more than 16 instances.

---

[23] AA: para 84 p 231

[24] AA: para 83 p 230

Abrahams has also agreed with the original decisions of Directors of Public Prosecutions and/or Special Directors in 97 matters.[25]

43. Whilst Abrahams have the power to institute a prosecution, Abrahams would only do so in very rare instances. If Abrahams made a decision to prosecute, it would not be competent for me to review Abrahams' own decision in terms of the Constitution or the NPA Act. [26]

44. In light of the applicants' confusion as to the standards and protocols governing the inception of a prosecution, on the one hand, and the post facto powers of review vested in the NDPP, on the other, it may be helpful to set out the statutory framework.

45. Section 24 of the NPA Act sets out the powers, duties and functions of Directors and Deputy Directors. Section 24(1) provides as follows:-

> "Subject to the provisions of section 179 and any other relevant section of the Constitution, this Act or any other law, a Director referred to in section 13(1)(a) has, in respect of the area for which he or she has been appointed, the power to –
>
> (a) institute and conduct criminal proceedings and to carry out functions, incidental thereto as contemplated in section 20(3);

---

25 AA: para 85 p 231.

26 In National Director of Public Prosecutions v Zuma 2009 (2) SCA 277 (SCA) at 305, para 70, Harms DP said: "Section 179(5)(d) does not apply to reconsideration by the NDPP of his own earlier decision but is limited to a review of a decision made by the DPP or some other prosecutor for whom a DPP is responsible."

(b) supervise, direct and co-ordinate the work and activities of all Deputy Directors and prosecutors in the Office of which he or she is the head;

(c) supervise, direct and co-ordinate specific investigations; and

(d) carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of this Act."

46. We turn to the provisions of the NPA Act directly implicated in the present litigation.

47. Section 12(5) provides that a DNDPP "shall not be suspended nor removed from office except in accordance with the provisions of subsections (6), (7) and (8)" Section 12(6)(a) 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."

48. The permissive form "*may*" denotes that the President exercises a broad discretion - as one would expect given the far-reaching implications of the suspension of an incumbent of high office.[27]

49. As to prematurity, De Ville writes -

> "A final decision must generally have been taken before the courts will involve themselves with a matter. The courts do not want to waste their time on hearing a matter (prematurely) when the error might not affect the final outcome or the final decision might be favourable to the applicant."[28]

50. It is thus premature to bring an application for review,[29] or to seek a declaratory order[30] or an interdict[31] against a public authority to which

---

27 By contrast, s. 12(6)(b) employs the peremptory "shall" form. As elaborated on below, the difference between these immediately succeeding provisions is not without significance.

28 P 449.

29 See Jamile and Others v African Congregational Church 1971 (3) SA 86 (D); Matthysen Busvervoer (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Kimberley en Andere 1987 (4) SA 490 (NC) 497E-F; Independent Municipal and Allied Trade Union and Others v MEC: Environmental Affairs, Developmental Social Welfare and Health of the Northern Cape Province and Others 1999 (6) BCLR 664 (NC)694G-697C; 1999 (4) SA 267 (NC) 300G-303C (decision to terminate employment without compliance with requirements of procedural fairness cannot be set aside on review as no final decision taken).

30 See Oneshelf Trading Nine (Pty) Ltd v De Klerk NO and Others 1997 (3) SA 103 (W), wherein the applicants sought an order that the court set aside the decision of the IBA to grant a private broadcasting licence to a specific party and correct such decision (the court granting the licence to the applicant. The court was only prepared to set aside the decision (the IBA not having been properly constituted when it took the decision) and refer it back to the IBA. The applicant alternatively sought an order that it be declared that the party to whom the licence was

the exercise of such function was entrusted, in circumstances where no final decision had yet been taken by such authority.

SEPARATION OF POWERS

51. Contending that they need to satisfy only a "low" threshold, the applicants seek to force the President's hand.[32]

52. That is not consistent with the principle of separation of powers. But, as the Constitutional Court has observed:

> "Although there are no bright lines that separate the roles of the Legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation."[33]

---

granted, was precluded from holding such a licence. Streicher J held that "it would be premature for the Court at this stage, before the matter has been considered by a properly constituted council of the third respondent, to make any findings in that regard" (p.15).

31 See Theron v Town Council of Springs 1945 TPD 55 at 59 (resolution adopted by council to grant general dealer's licence and communicated to him, but certificate not handed to him; counsel held not to have taken final decision; application for interdict that certificate be issued denied; Klink v Government of the Republic of South Africa and Others 1997 (10) BCLR 1453 (E) (order sought compelling the Legal Aid Board to grant legal aid to applicant premature, because decision had yet been made).

33 Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC), para 98.

53. The applicants can challenge the President's decision only on grounds of rationality and legality. The question is hence not whether the decision not to take steps against the respondent was correct, desirable, or even reasonable – but whether the decision was so flawed as to vitiate the purpose for which the power is vested. The applicants, acknowledging that the test applicable here is the rationality of the President's decision, described that threshold as "low".[34] But the rationality test sets a high bar for the applicant, in the sense that it will not suffice merely to show that the decision under attack isnot one the Court would have taken..

54. The separation of powers doctrine goes hand in hand with judicial deference. A court should "only in very exceptional circumstances interfere with the decisions of the executive."[35] The importance of the doctrine of separation of powers in staying the hand of the courts when it comes to decisions of the President was vindicated in the Masethla decision of the Constitutional Court, in which the power to appoint heads of the intelligence services under s. 209(2) was held to include the correlative power to dismiss.[36]

---

34 HoA, para 66.

35 Offit Enterprises (Pty) Ltd and Another v Coega Development Corp (Pty) Ltd and Others 2009 (5) SA 661 (SE).

36 2008 1 BCLR 1 (CC).

55. The authorities make clear – if there was ever doubt - that where the Constitution and the legislative scheme give the President a special power to appoint, it constitutes executive, not administrative action. The power to dismiss - being a corollary of the power to appoint - is similarly executive action.[37] In Masethla, the Court held:

> "It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security."[38]

56. In another context, O'Regan J said:

> "A Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field."[39]

THE JUDGMENT OF DOLAMO J

57. Perhaps it is not surprising that the decision in *Democratic Alliance v the President of the Republic of South Africa and Others* (17782/15)

---

37 As already noted, the Applicant has now acknowledged that rationality and legality are the sole bases upon which they base their challenge.

38 Para 77.

39 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC), para 48.

[2016] ZAWCHC 66 (23 May 2016), a case in which the Cape High Court (*per* Dolamo J), dismissed an application sounding in precisely the same terms as the present application (as it related to Ms Jiba, the Deputy National Director of Public Prosecutions), has not found its way onto the applicants' list of authorities. The DA's application for leave to appeal was dismissed.

58. In language that resonates *in casu*, the court rejected the DA's argument based upon adverse consequences that would purportedly follow if Ms Jiba remained at her post.

> "The allegations that public perception of the NPA is affected by her presence are not supported by any objective and empirical facts.
>
> The allegation that the President failed to suspend her for an ulterior purpose, at best, is pure speculation. There is no nexus between the stance she took in relation to the spy tapes and the allegation that the President has an interest in retaining her in her position so that she can continue to act in the President's own personal interest."[40]

59. Dolamo J added, in language that applies no less to this matter:

> "Unwarranted suspension brought about by untested allegations may disrupt the smooth running of the institution. While the President is empowered by section 12(6)(e) to take swift action when necessary to allay concerns about the integrity of the NPA or when the conduct of the DNDPP is called into question, he however, cannot do so without due consideration for all the relevant factors and circumstances. In this respect, he would call

---

[40] Para 87.

> for, be guided by and rely on people who have intimate knowledge of the facts and their surrounding circumstances. He will be in a better position to exercise his discretionary powers on receipt of appropriate advice."[41]

60. Dolamo J emphasised that as here, the President's decision should be informed by representations of the subject of the complaint:

> "Relevant factors which the President would consider would include inter alia, Adv Jiba's response to the criticism which had been levelled against her. Her response certainly brought about a different perspective to the judicial and other criticism against her."[42]

61. The learned judge also affirmed the separation of powers considerations set out above:

> "Even if I am convinced that the President should have decided otherwise, I am not at liberty to intervene. I can only intervene if it can be shown that the President exercised the power bestowed upon him by section 12(6)(a) of the NPA Act in a manner manifestly at odds with the purpose for which the power was conferred. This has not been shown to be the case."[43]

62. Finally, as to substitution, Dolamo J wrote:

> "Even if I am wrong in concluding that the President's decision to await the outcome of the GCB application was irrational and unlawful it does not follow that I am at liberty to usurp his powers and order a suspension and the holding of an enquiry. I am constrained by the separation of powers doctrine which precludes

---

[41] Para 88.

[42] Para 89.

[43] Para 95.

> me from wading in an (*sic*) announcing my preferences. ... I find that there would have been no compelling reasons to substitute the President's decision with this Court's order. … "

THE RESPONDENTS' RIGHT TO *AUDI* IS IMPLICATED

63. The applicants would have it that there is no bar to the President acting immediately upon their demand, because the respondents have no right to be heard. They say that, because the power at issue is executive, "*audi* is not implicated at all; the decision is (the President's) sole fiat". But that is flatly wrong. But the proposal that the right of *audi* arises only where a decision is administrative in character was put to bed even before the right to fair administrative procedure was embodied in the new constitutional order.

64. In 1991, the Appellate Division held that the *audi* principle, as a rule of natural justice, comes into play "whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his or her liberty or property or existing rights", unless the statute expressly or by implication indicates the contrary.[44] In a parallel case, the court rejected the argument that an intention to exclude the right to be heard was to be inferred from the fact that Cabinet exercises a prerogative:

---

[44] South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A), 10.

> "If the Legislature sees fit to involve the Cabinet in the process of the dismissal of a public servant, I can perceive no reason why, in relation to the duty to observe the *audi alteram partem* principle, the Cabinet is in a position any different from that of the Minister or a lesser functionary of the executive Government."

65. And it cannot be said that the fact that s. 12(6) of the NPA makes no express provision for *audi* entails that those affected need not be heard. As De Ville writes:

> "The fact that the legislature did not expressly make provision for a specific procedure to be followed in the taking of a decision is all the more reason for requiring compliance with strong procedural safeguards. "

RESPONDENTS HAVE THE RIGHT TO AUDI, AS TO BOTH ENQUIRY AND SUSPENSION

The right in law to *audi* with respect to suspension

66. Suspension pending an enquiry is of its nature punitive – except in the rare instance where it is justified by a well-founded belief that the presence of the officer will hamper the investigation. Howie J observed that suspension of a public employees:

> "Unquestionably constitutes a serious disruption of his rights. The implications of being deprived of one's pay are obvious. The implications of being barred from going to work and pursuing one's chosen calling, and of being seen by the community round one to be so barred, are not so immediately realised by the outside

observer.... There are indeed substantial social and personal implications inherent in that aspect of suspension..."[45]

67. Going further, in Mogothle v Premier of the North West Province & Another[46] the Court deemed suspension of an employee pending an inquiry into alleged misconduct to be equivalent to arrest. It should therefore be used only when there is a reasonable apprehension that the employee would interfere with investigations or pose some other threat.

68. It hence cannot therefore be gainsaid that a suspension triggers the right to *audi*.

69. As to the substantive basis for suspension, the Gradwell case, concerning the failure to deal with *prima facie* allegations of misconduct, is salient:

"The judge a quo ... erred in declining to adjudicate on the papers whether the MEC had a justifiable reason to believe that the Respondent had engaged in serious misconduct. It is possible to do so on the papers; and whether the respondent was denied a hearing prior to suspension had no bearing on his ability to deal with the damning allegations made against him in the answering affidavits. The matter could and should have been resolved in accordance with the principles laid down in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd. Where disputes of fact arise on the affidavits in

---

45 Muller v Chairman, Minister's Council, House of Representatives at 523 B-D

46 [2009] 4 BLLR 331 (LC)

> motion proceedings, a final order (be it a declaratory or an interdict) may be granted provided those facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent (excluding those that are untenable or patently un-creditworthy), justify such an order. In other words, relief should be granted only if the common cause facts and the tenable version of the respondent form an adequate base for the remedy.[47]

In the present case, the MEC's version sets out a detailed and compelling prima facie case of serious misconduct against the respondent. As discussed earlier, most of the allegations were not even canvassed, never mind denied, by the respondent in reply. The reasons he advanced for not dealing with them are at best spurious, if not misleading. By the same token, the case made by the MEC that the respondent's presence at the workplace 'might jeopardise any investigation' was both logical and justifiable in light of the seriousness of the alleged misconduct. The complaint against the respondent includes the accusation that the respondent brought pressure to bear on his subordinates to act inappropriately and the assertion that he would be in a position to do so again, were he to remain in the post.[48]

In the final analysis, therefore, the outcome on the evidence presented is that the conditions precedent to the lawful exercise of the power of suspension (a prima facie case of serious misconduct and a risk of the investigation being jeopardized) were indeed fulfilled. The only remaining question in relation to the legality of the suspension, is whether the suspension was unlawful because the MEC failed to observe the principle of audi alterem partem."[49]

The right in law to audi prior to institution of an enquiry

---

47 Para 29

48 Para 30

49 Para 31

70. In their founding papers, the applicants appear to have adopted an interpretation of section 12(6) of the NPA Act as conjunctive, in the limited sense that a provisional suspension would invariably follow the institution of an enquiry.

71. But in reply, the applicants' would have it that, even to the extent that the *audi* right arises with respect to suspension, it has no application with respect to a decision as to whether or not to institute an enquiry.[50] That cannot be so. Where, as here, the implications of an enquiry are far-reaching, and will have serious reputational consequences for the subjects of that enquiry, the right to be heard does indeed arise. Certainly, there is no *per se* rule that the decision to institute an enquiry does not trigger *audi.*

72. It must be borne in mind also that an enquiry of this inevitably entails a significant investment of state resources. In the enquiry instituted against the former NDPP, Mr Nxasana, there were three commissioners, evidence leaders, and a number of counsel, for a hearing that it was contemplated could be lengthy.[51] T

---

[50] HoA, para 79.

[51] In the event, the enquiry was terminated on the first day.

73. The respondents do not argue for an "enquiry about an enquiry".[52] All that is contended is that the President must apply his mind to the grounds advanced for and against an enquiry, including representations by the respondents, before including s 12(6) of the NPA Act as against the respondents.

The right to audi by virtue of legitimate expectations

74. The respondents submit that even if it might be said that no *audi* right attaches with respect to the President's decision either as to the enquiry or suspension as a matter of law, the right to be heard attaches by virtue of the doctrine of legitimate expectation.

75. On 14 November the President invited the respondents to make representations in connection with the applicants' demand. As at the time of the submission of these heads, the respondents are preparing such representations pursuant to the invitation; it is anticipated that these will be lodged timeously.[53]

76. The Constitutional Court has held as follows with respect to legitimate expectations:

> "In terms of the doctrine, the *audi* principle applies to cases where

---

[53] R.215

> the aggrieved person's legitimate expectation was affected by the decision reached, even if such person had no antecedent rights affected thereby."[54]

77. At common law, a legitimate expectation may arise either from an express promise given on behalf of a public authority, or from the existence of a regular practice which a person can reasonably expect to continue.[55]

78. It is now well established that the fact that an administrative body has given an undertaking that it will act in a particular manner suffices to give rise to a legitimate expectation: "(T)he fact that the undertaking was not made in relation to a "regular practice", or that such undertakings might not have been given in the past, is irrelevant".[56]

79. In this instance, there is, in fact, relevant prior practice. When the process of suspending Mr Nxasana, Abraham's predecessor, commenced, he was offered the opportunity to make representations,

---

54 Walele v City of Cape Town and Others 2008 (6) SA 129 (CC), para 28. (Emphasis added)

55 Executive Committee for Health and Social Services (Hlophe J) ("it is in the interests of good administration that a public body should . . . implement whatever promise it may have made so long as the implementation thereof does not interfere with its statutory duty"); National Director of Public Prosecutions v Phillips and Others ("A legitimate expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken.)"

56 Claude Neon Ltd v Germiston City Council 1995 (3) SA 710 (W) at 718I–719B.

and did so. General Dramat was likewise allowed the opportunity to interpose representations.

The Ulterior Purpose Argument

80. The applicants appear to suggest that both the initiation of the prosecution and the President's (non) decision under section 12(6) of the NPA Act are animated by ulterior purpose.

81. Where the test is, as here, that of rationality, the applicants' burden in demonstrating ulterior purpose is especially onerous. The separation of powers doctrine applies not only in adjudicating reasonableness, but also in considering an argument that a decision-maker was animated by ulterior purpose. That requires the courts to defer to the decision-maker's determination of the purpose of the relevant statutory provision.[57]

82. Moreover, where a decision-maker takes a decision for both authorised and unauthorised purposes, the Court must determine the validity of the

---

57 See Baker v Canada (Minister of Citizenship and Immigration) (1999) 174 DLR (4th) 193 (SCC) para 56 (per L'Hereux Dube): "[D]eferential standards of review may give substantive leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination".

decision with reference to the dominant purpose; if the unauthorised purpose is not shown to be dominant, the action will not be invalid.[58]

83. The same apply with respect to the applicants' suggestion that the prosecution itself was animated by improper purposes.

84. For the reasons set out above, in the circumstances which led to the charges being brought, the decision to prosecute was eminently justified when tested against the threshold of prospects of success.

85. The nefarious motive of the respondents and the President was, so it is implied by the applicants, to serve the interests of the political factions within the ruling party that are aligned against the Minister. But in place of factual allegations in support thereof, one finds in the papers reference to "*speculation* that the NPA offices had improperly been influenced" .[59] There is loose talk told of an "environment where *suspicions* are rife that Min Gordhan and the Treasury are at battle with various third parties".[60] No court can attach weight to innuendo and media-sourced speculation.

---

58 See University of Cape Town and Another v Minister of Education and Culture and Others 1988 (3) SA 203 (C) at 212F-I; see also De Ville: *Judicial Review of Administrative Action in South Africa* (2003) p 174.

59 HoA, para 84. (Emphasis added).

60 HoA, para 85. (Emphasis added).

86. And even if the prosecution was, in some sense, animated by a political agenda, that would not suffice to render the prosecution bad in law. What is required is that the prosecution has used its powers for ulterior purposes. Harms DP wrote:

> "A prosecution is not wrongful merely because it was brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, which, in any event, can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions."[61]
>
> …
>
> "This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality. The facts in High stead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others, illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits - they had enough exhibits already - but to put Highstead out of business. In other words, the confiscation had nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what 'ulterior purpose' in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction, the reliance on this line of authority is misplaced as was the focus on motive."[62]

---

61 National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA), Para 37.

62 See above, para 38.

87. Insofar as it is necessary at all to address the suggestion that Abrahams is but a puppet in the hands of political enemies of the Minister, it is noteworthy that, at the time Abrahams was considering whether or not to withdraw the charges, he encountered resistance from Lieutenant-General Ntlemeza ("**Ntlemeza**"), Head of the Directorate for Priorities Crimes Investigations ("**the Hawks**"). The latter hotly insisted that the charges should not have been withdrawn.

88. That is hardly consistent with the suggestion that Abrahams was acting as on the orders of the President in a sinister political campaign against the Minister.

EQUALITY BEFORE THE LAW

89. Much of the applicants' case is premised upon the assumption that the Minister, by virtue of his high office enjoys, if not immunity from prosecution, at least the right to a process that is not ordinarily enjoyed by other subjects of criminal investigation. It is suggested, for example, that the Minister was entitled to be consulted before the charges were instituted.

90. But that proposal flies in the face of the fundamental principle that all are equal before the law, embodied in s. 9 of the Constitution.

91. Section 32(1)*(a)* of the NPA Act provides:-

> "A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law."

92. In President of the Republic of South Africa and Others v South African Rugby Football Union and Others,[63] it was submitted that an order requiring the President to testify in court inconsistent with the dignity of his office. The Constitutional Court rejected the suggestion that the President was, in this sense, beyond legal process. The Court held "the administration of justice cannot and should not be impeded by a court's desire to ensure that the dignity of the President is safeguarded".[64]

93. The Constitutional Court cited Clinton v. Jones, 520 U.S. 681 (1997) in which the United States Supreme Court declined to uphold immunity for a President regarding civil suits. Earlier, the US Supreme Court had observed:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it .... It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. This language recognizes that there is no room for

---

63 (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999)

64 See above, para 242

> presidential immunity from criminal prosecution in a society built upon a structure of laws, and not men."[65]

94. By similar token, the Italian Constitutional Court has held:

> "No one man can be above all others and above the government. To suggest otherwise is a violation of the principle that all citizens are to be treated equally under the eye and arm of the law."

95. On this basis, it was ruled that Prime Minister Berlusconi enjoyed no special privilege over ordinary citizens, like anyone else, he is subject to prosecution.

96. It is interesting to consider a milestone in the development of the common law principle that even the sovereign is not above the law. At his trial for treason in 1649, King Charles I, invoking the divine right of Kings, proclaimed that no earthly body had the right to try him.[66] The Lord President responded thus:

> "Truly, sir, you have held yourself, and let fall such language, as if you had been no way subject to the law, or that the law had not been your superior. Sir, the court is very sensible of it, and I hope so are all the understanding people of England, that the law is your superior."

---

65 U.S. v. Lee, 106 U.S. 196, 220.

66 King Charles at Tryal at the High Court of Justice sitting in Westminster Hall, Saturday, Jan. 20, ended Jan. 27, 1648 March 9, 1649. http://quod.lib.umich.edu/e/eebo/A47456.0001.001/1:2.7?rgn=div2;view=fulltext.

THE COURT'S DISCRETION AS TO REMEDY

97. When a decision is reviewed and found wanting, the court retains a residual discretion to refuse to set the decision aside.[67] In a sense, the 'invalid' administrative decision is clothed *post facto* with validity.[68] One may look to the decision in Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA):

> "(A) court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide." [69]

98. The decision of the SCA in Judicial Service Commission and another v Cape Bar Council and Another 2013 (1) SA 170 (SCA) is apposite. The Cape Bar Council (CBC) had challenged the JSC's decision not to fill certain vacancies on the Cape Bench, on the basis that the JSC had not been properly constituted when it took the decision. The JSC took an *in limine* point that the CBC's application was defective, because a declaration of invalidity required joinder of the successful candidate,

---

67 Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others 2008 (4) SA 43 (SCA) ([2008] 3 All SA 245, para 13.

68 Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA) ([2005] 4 All SA 487) paras 28 – 29; Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA) para 9.

69 Para 36.

Judge Henney. The JSC argued that the application had a direct bearing on his interests in that if granted, it would inevitably lead to the setting-aside of his appointment.

99. The Court rejected that argument:

> "Even if an administrative decision is challenged and found wanting, courts still have a residual discretion to refuse to set that decision aside.[70]
>
> …
>
> Anyone who seeks the setting-aside of Judge Henney's appointment would have to persuade the court, not only that the recommendation of the JSC was invalid, but also that the dire consequences of the setting-aside of his appointment, more than a year after the event, would be justified."[71]

100. The same pragmatic considerations apply here.

No Substitutionary Order Should Issue

101. The respondents submit that in the event that the President's decision is reviewed and set aside, the matter should be remitted to the President for his re-consideration in the light of the Court's decision.

---

70 Para 13.

71 Para 49.

102. The applicant would have this Court itself decide that the respondents must be suspended. Such an order is not readily granted. Courts' reluctance to substitute their own decisions for that of an administrative authority, is based upon the principle of separation of powers, and the distinction between appeal and review, that is canvassed above.[72]

103. The Constitutional Court recently stated that:

> "Even where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator."[73]

104. Notably, the Supreme Court of Appeal overturned Murphy J's substitution of the decision to withdraw charges against General Mdluli, and instead remitted the matter to the NPA.[74] The Supreme Court of Appeal did not share Murphy J's lack of confidence in the NPA's ability properly to make a fresh determination.

105. There is no reason that this reasoning should not apply here.

---

72 Niewoudt v Chairman Amnesty Sub-Committee, Truth and Reconciliation Commission 2002 (3) SA 149; JR De Ville, Judicial Review of Administrative Action in South Africa, Lexis-Nexis, 2003, page 335; Baxter, Administrative Law, Juta & Co Ltd 1984, page 681.

73 Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another (2015) ZACC 22, para 50.

74 NDPP and Others v FUL [2014] ZASCA 58

CONCLUSION AND COSTS

106. It is submitted that the application should be dismissed, and that the respondents be awarded costs, including the costs of three counsel. The general rule to which the applicant rightly refers – that generally speaking the unsuccessful the applicant that pursues a *bona fide* constitutional argument against an organ of state should not be mulcted with costs,[75] must yield, in light of the conduct of the applicants.

107. The respondents' submission is that an exception to the Biowatch principle is warranted in a case such as this in which the applicants have cynically attempted to stampede the President into taking a decision absent a showing of urgency.

Hilton Epstein SC

Kennedy Tsatsawane

Michael Osborne

Teneille Govender

21 November 2016

---

75 Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

Annexure "A"

INSTITUTION OF THE CHARGES

108. The applicants' case with respect to the initiation of the prosecution boils to an assertion that there was no basis to bring charges against the Minister, Pillay and Magashula and that the respondents have rendered themselves unfit and improper to remain in office. The applicants complain that at no time *were the allegations of fraud or theft ever put to the accused*" and that *these charges were distinct from those which had been investigated and publicised up until this point*.

109. There is no merit to this allegation. The issue relating to Pillay's so-called early retirement arose from the investigation conducted by the Hawks.[76]

110. The applicants confuse the distinct enquiries that Abrahams conducted in reviewing the decision to bring the charges. They say that the enquiries directed at the GEPF ought to have been done prior to the decision to bring the charges. The applicants are wrong in this regard. The relevant sequence of events is as follows:

---

[76] Paragraphs 15 and 16 of the Minister's statement to the Hawks deals with exactly this point. The Minister was asked about it and he answered it.

110.1. Abrahams received oral representations to review the decision to bring charges from Pillay and Magashula on or about 16 and 17 October 2016.

110.2. Abrahams directed enquiries to the GEPF and others. The subpoena issued to the GEPF was issued on 20 October 2016, after Abrahams had received representations from Pillay and Magashula. The GEPF was requested to confirm that Pillay's early retirement was the same as the 3000 cases referred to in the memorandum which the Minister approved.

111. What emerged from the representations was that the special assignment from which Pillay benefited was unlawful.

112. Other cases of early retirement did not involve the employer paying the early retirement penalty. It is only in respect of early retirement for transformation purposes that the employer paid the penalty. That was not what Pillay's early retirement was about. The purpose was to allow him getting access to his pension benefits (before his retirement date) in order to finance the education of his children

113. The applicants seem unaware of Pillay's memorandum (attached to their founding papers on page 96) in which he said:

> *"Should you favourably consider my proposal to serve SARS in a different capacity, such service will have to be subject to that I*

> *be appointed as a contract employee. This will allow me more flexibility in terms of making a decision to finally part ways with SARS, should I come to such a decision. The second condition will be that my early retirement is approved in terms of the provisions of section 16(6)(a) and (b) of the Public Service Act, meaning that the Minister, in terms of the provisions of the aforementioned section approve that the penalty imposed on my pension benefits be Rule 14.3.3 (b) of the GEPF Rules, be paid by SARS to the GEPF …"*

114. It was the payment of the "*penalty imposed on my pension benefits*" in terms of Rule 14.3.3 of the GEPF Rules by the South African Revenue Service, authorised by the Minister, which was unlawful. Sections 16(6)(a) and (b) of the Public Service Act, 1994 do not make provision for an employer to pay the penalty in circumstances were an employee took early retirement in order to access pension benefits in order to provide educational funding.

115. In his memorandum, Pillay made it clear that his pension benefits would be reduced by 14.4% if Ministerial approval was not received. But he would not have had to motivate for Ministerial approval if the law permitted an employer to pay the penalty on behalf of its employee.

116. As far as early retirement is concerned, regard must be had to the following important factors:

116.1. Early retirement is permitted in law, and it triggers withdrawal from the GEPF.

116.2. Early withdrawal from the GEPF is also permissible in terms of the GEPF Law and GEPF Rules.

116.3. The GEPF Rules impose a penalty on early withdrawal, via a reduction of one's pension benefits.

116.4. It is *only* when one retires early for the employer's transformation purposes that the employer pays the penalty on behalf of the employee. This is provided for in the so-called Employee Initiated Severance Package. Pillay does not refer to it in his memorandum, nor is it referred to in the memorandum which the Minister approved. (It is also not mentioned in paragraphs 15 and 16 of the Minister's statement to the Hawks).

THE CONTEXT IN WHICH THE CHARGES WERE CONSIDERED

117. The scheme Pillay devised required the Minister's and the Commissioner's approval. The Minister approved the scheme after he had become the Minister of Finance and responsible for, amongst others, the South African Revenue Service.

118. The scheme involved the following steps:

118.1. Pillay taking early retirement from the South African Revenue Service. This was in itself lawful, but was tainted by the fact that there was no genuine intention to retire at all.

118.2. The Minister approving that Pillay's penalty be paid on his behalf by his employer, SARS. This was unlawful because the penalty must be paid by the employee, not by the employer. In fact, the GEPF Rules provide a mechanism in terms of which the early retirement penalty is paid. This is done by reducing the pension benefits, according to the formula provided for in the GEPF Rules.

118.3. The Minister approving the reappointment of Pillay to the very same position from which Pillay supposedly retired. An impression was created that Pillay was going to retire when in fact he was not going to retire and all the parties involved did not intend that he would retire.

119. The essence of Symington's memorandum addressed to the Minister on 17 March 2009 is that Pillay's decision to take early retirement was financially unsound, and would become financially sound only if:

119.1. the Minister approved the early retirement;

119.2. the Minister approved the payment of Pillay's penalty to the GEPF by the SARS;

119.3. the Minister approved Pillay's immediate reappointment to the same position.

120. Symington further advised that Pillay should withdraw his application for early retirement - if the Minister did not approve all of the above components of the scheme.

The transaction was in *fraudem legis*

121. In fact, the transaction is a textbook example of a transaction or a scheme which is in *fraudem legis* for the following reasons:

121.1. The intention of the parties was not that Pillay would retire.

121.2. GEPF was told that Pillay was taking early retirement when in fact he was not retiring at all.

121.3. The transaction would have resulted in Pillay paying his own penalty if it was a genuine and lawful transaction.

121.4. The transaction was concluded in order to enable Pillay to access pension benefits to finance the education of his children.

122. The transaction would not have been concluded had the Minister not authorised that Pillay's penalty to the GEPF be paid The suggestion by the Minister in paragraph 15 of his statement to the Hawks that Pillay "took early retirement" is not accurate.

123. The suggestion that advice was sought and obtained from, the Department of Public Service and Administration to the effect that the transaction "*were lawful and unusual*" is contradicted by an e-mail from the Acting Director-General of that Department. It shows that the advice which was sought related to the so-called Employee Initiated Severance Package. That is different from the early retirement Pillay wanted. Pillay did not in any event qualify for this package because he was appointed in terms of the South African Revenue Service Act 34 of 1997. The package only applies to employees employed in terms of the Public Service Act, 1994 and who were "*affected by transformation and restructuring who wish to exit the public service, to apply for an employee-initiated severance package*."

124. A simulated transaction was described in Zandberg v Van Zyl 1910 AD 302 at 309 as follows:

> *"*Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature."

Absence of legal basis for the transaction

125. In his letter to the Minister, Magashula sought the Minister's approval in terms of section 16(2A)(a) of the Public Service Act 1994. This section provides that:

> "(2A)(a) Notwithstanding the provisions of subsections (1) and (2)(a), an officer, other than a member of the services or an educator or a member of the State Security Agency shall have the right to retire from the public service on the date on which he or she attains the age of 55 years, or any date after that date."

126. This section simply creates a right of a Public Service Employee to retire at the age of 55 years or after attaining that age. The executive authority's approval is not required for that purpose.

127. Magashula further relied on Rule 14.3.3(b) of the Rules of the GEPF. Rule 14.3.3 deals with members with 10 years and more pensionable service. Rule 14.3.3(b) provides that:

> "(b) A member who retires on account of a reason mentioned in Rules 14.3.1(d) or (e) and who has at least 10 years' pensionable service to his or her credit, shall be paid the benefits referred to in Rule (a) above: Provided, that such benefits shall be reduced by one third of one percent for each complete month between the member's actual date of retirement and his or her pension-retirement date.

128. It is clear from Rule 14.3.3(b) that it only applies to a person who retires on account of a reason mentioned in Rules 14.3.1(d) or (e).

129. Rule 14.3.1(d) deals with a member who retires before his or her pension-retirement date but not on a date prior to the member attaining the age of 55 years: Provided that such a member has the right to retire on that date in terms of the provisions of any Act which regulates his or her terms and conditions of employment. Pillay had a right to retire in terms of the provisions of the Public Service Act 1994 referred to above. Accordingly, Rule 14.3.1(d) is the one which applied to him.

130. Rule 14.3.3(b) to which reference has already been made above, provides that a person who retires on account of a reason mentioned in Rules 14.3.1(d) or (e) shall be paid "the benefits referred to in Rule (a) above: Provided, that such benefits shall be reduced by one third of one percent for each complete month between the member's actual date of retirement and his or her pension-retirement date." This Rule applied to Pillay because in terms of Rule 14.3.1(b) he was retiring "*before his or her pension-retirement date in terms of the law governing his or her terms and conditions of service*" being the Public Service Act to which reference has already been made above.

131. There is no provision in the Public Service Act, 1994, in particular in section 16 thereof, in terms of which provision is made for the South African Revenue Service to pay what Pillay himself described in his memorandum as "the penalty imposed on my pension benefits per Rule 14.3.3(b) of the GEPF Rules." Rule 14.3.3(b) of the GEPF Rules simply

makes provision for the reduction of the pension benefits of a person who retires before his or her pension-retirement date. It makes no provision for the employer of such a person to pay the penalty which is imposed in terms thereof.

132. The applicants' reliance upon the provisions of section 17(4) of the GEPF Law, 1996; Rule 20 of the Rules of the GEPF; and the contents of the Government Employees Pension Fund Members Guide in their letter dated 14 October 2014[77] is misleading.

133. Section 17(4) of the GEPF Law, 1996 deals with a situation where the employer or if any legislation adopted by parliament places an additional financial obligation on the GEPF. In that event, the employer or the government shall pay the financial obligation it has placed on the GEPF. This is not what happened in this case. The penalty obligation was imposed upon Pillay by the Rules of the GEPF, and not upon the GEPF.

134. The penalty obligation also did not arise from the employer's action or operational requirements – it arose from Pillay's early retirement. Pillay accepted that he himself triggered the penalty. He acknowledged the

---

[77] FA7 on page 89.

fact early retirement would result in a loss of 14.4% of his pension benefits, which is why the scheme had to be designed.

135. Section 17 of the GEPF Law deals with the funding of the GEPF. The section does not deal with penalties which must be paid by employees who are taking early retirement. The section is clearly not concerned with penalties which the Rules of the fund impose upon retiring employees. The GEPF is not funded by penalties levied upon early retirees.

136. Section 17(4) makes it clear that it is concerned with any action taken by the employer or if any legislation adopted by parliament (places any additional financial obligation on the Fund) the person who places such an obligation on the Fund is then made responsible to pay the fund "*an amount which is required to meet such obligation*."

137. In the case of Pillay, no obligation whatsoever was placed on the GEPF. On the contrary, the obligation was placed on Pillay to pay the penalty. In the premises, section 17(4) of the GEPF Law does not assist the applicants.

138. Rule 20 of the Rules of the GEPF similarly does not assist the applicants. Rule 20 deals with compensation to the GEPF on retirement or discharge of a member prior to attainment of the member's pension retirement date.

139. The Rule applies to a situation where a member –

> "becomes entitled in terms of Rule 14.8 to the pension benefits in terms of a severance package, referred to in that Rule, or is discharged prior to his or her pension retirement date and at such retirement … in terms of the Rules becomes entitled to the payment of an annuity or gratuity or both an annuity and a gratuity in terms of the Rules, and any of these actions result in an additional financial liability to the fund."

140. In this case, the GEPF did not attract "an additional financial liability." On the contrary, it is Pillay who attracted a penalty for himself. He, and not the South African Revenue Service, had to pay the penalty.

141. The applicants' reliance on the Government Employees Pension Members Guide is misplaced. The sentence quoted therefrom, is inconsistent with the GEPF Law and the Rules of the GEPF.

142. On any proper and rational interpretation of the guide upon which the applicants seek to rely, the only situation which could be contemplated therein is where "*the employer granted permission for your early retirement*" for the employer's own operational reasons, such as transformation reasons. There can be no basis on which the government should fund the early retirement of its employees in circumstances where that has nothing to do with operational reasons.