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

CASE NO: 93043/15

In the matter between:

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
NATIONAL PROSECUTING AUTHORITY	Third Respondent
MXOLISI NXASANA	Fourth Respondent
SHAUN ABRAHAMS	Fifth Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent

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APPLICANT'S HEADS OF ARGUMENT

CONTENTS

I INTRODUCTION

1. This application concerns the independence of the National Prosecuting Authority (**the NPA**) and its ability to act without fear, favour or prejudice.

2. The NPA is no ordinary statutory body. It is established by the Constitution[1] with the National Director of Public Prosecutions (**NDPP**)[2] as its head. While the President is empowered to appoint the head of the NPA, the President can remove the head of the NPA only with the approval of Parliament.

3. Mr Nxasana, the fourth respondent, was appointed as NDPP with effect from 1 October 2013.[3] However less than two years into his term of office and in the face of a Commission of Inquiry of indefinite duration, and political and financial pressure, Mr Nxasana entered into a Settlement Agreement with the President and the Minister of Justice in which he agreed to vacate the office of the NDPP in return for a golden handshake of approximately R17 million.

4. This application challenges the agreement by which Mr Nxasana agreed to resign as the NDPP. It seeks two forms of relief:

    4.1. First: the review and setting aside of the decision taken by the First and Second Respondents (**the Impugned Decision**) to enter into a settlement agreement (**the Settlement Agreement**) with Mr Nxasana. In terms of the Settlement Agreement, Mr Nxasana was paid an amount

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[1] Section 179 of the Constitution of the Republic of South Africa, 1996.

[2] Section 179(1)(a) of the Constitution.

[3] FA para 38 page 17.

exceeding R 17 million. In return, the inquiry into his fitness to hold office was abandoned, and he resigned from his position as NDPP.

4.2. Second: Consequential relief to restore Mr Nxasana to his position, require him to repay the misspent R17 million, and prevent the President from taking decisions regarding the NDPP while criminal charges against him are pending in the courts.

5. In addition to attacking the Settlement Agreement and its consequences, the applicant (**CASAC**) challenges the constitutionality of two aspects of section 12 of the NPA Act.

5.1. The power afforded to the President to suspend the NDPP and Deputy National Directors of Public Prosecution (**DNDPP**) unilaterally, indefinitely and without pay; and

5.2. The power in section 12(4) to extend the tenure of the NDPP and the DNDPP's.

6. In what follows, we address the following topics in turn:

6.1. First, we explain the **background** to this matter. This includes a brief account of the history of instability in the NPA, the disparity of treatment of Mr Nxasana and other senior officials in the NPA, and the alleged request made by Mr Nxasana to vacate the office of the NDPP.

6.2. Second, we briefly describe the applicable **legal framework** that governs the NDPP;

6.3. Third, we set out the grounds upon which the **settlement agreement** is

reviewable. In particular, the impugned decision violates the principle of legality as it was unlawful, irrational, and was taken for an ulterior purpose, and in circumstances where the President had a conflict of interest. In addition, the impugned decision constitutes administrative action and is reviewable under PAJA.

6.4. Fourth, we describe the **relief** sought in this application. It includes an order setting aside the settlement agreement, directing Mr Nxasana to repay the R17 million, and directing the Deputy President to appoint the new NDPP.

6.5. Finally, we set out the **constitutional challenge** to section 12(4) and portions of 12(6) of the National Prosecuting Act[4] on the basis that these sections undermine the independence of the NDPP and, consequently, the NPA as a whole.

II BACKGROUND TO APPLICATION

The history of instability in the NPA

7. There is a history of instability at the NPA.

8. The NDPP's term of office is a non-renewable term of 10 years.[5] Despite this, in the last ten years there have been four permanent NDPP's and an acting

[4] 32 of 1998.

[5] Section 12(1) of the National Prosecuting Authority Act 32 of 1998.

NDPP for nearly half that period.[6]

8.1. Vusi Pikoli was appointed as NDPP by President Mbeki on 1 February 2005 to replace Bulelani Ngcuka who had been the NDPP since 1998.[7]

8.2. Mr Pikoli was suspended approximately two years into his term of office on allegations related to charges of corruption against the National Commissioner of Police Mr Jackie Selebi. [8]

8.3. Mr Mkotedi Mpshe was appointed as acting NDPP pending the Ginwala Inquiry.[9] Mr Mpshe reinstated criminal charges against Mr Jacob Zuma.[10]

8.4. The Ginwala Commission released its findings on 4 November 2008. It found that the allegations against Mr Pikoli were entirely baseless. It made serious findings against Mr Menzi Simelane, who was subsequently appointed as the NDPP. Despite this, Mr Pikoli was removed from office by President Motlanthe.[11]

8.5. Mr Pikoli launched a review application. but eventually withdrew it on 21 November 2009, following the conclusion of a settlement agreement in which President Zuma acknowledged that he had the requisite integrity to hold senior public position, and agreed to a golden handshake of

[6] CASAC founding affidavit ("FA") para 25, page 14.

[7] FA para 26 page 15.

[8] FA para 27 page 15.

[9] FA para 27, page 15.

[10] FA para 28 page 15.

[11] FA para 30 page 15.

R 7.5 million. Under the settlement agreement, Mr Pikoli resigned from his position. That agreement is strikingly similar to the settlement agreement between the President, the Minister and Mr Nxasana that is the subject of this application.[12]

8.6. President Zuma thereafter appointed Mr Menzi Simelane as NDPP. His appointment was immediately taken on review by the Democratic Alliance. On 1 December 2011, the Supreme Court of Appeal (**SCA**) set aside the appointment of Mr Simelane. The SCA's order was confirmed by the Constitutional Court.[13]

8.7. From 5 October 2012, when the Constitutional Court confirmed the invalidity of the appointment of Mr Simelane, no new permanent NDPP was appointed.[14]

8.8. During this time, Adv Nomgcobo Jiba was the Acting NDPP.

8.9. On 27 June 2013, CASAC launched an application to the Constitutional Court to compel the President to appoint a permanent NDPP. On 30 August 2013, the President announced that Mr Nxasana would be appointed as permanent NDPP with effect from 1 October 2013.[15]

Events leading up to the Settlement Agreement

9. In October 2013, it was reported that Mr Nxasana had not obtained the

[12] FA para 35 page 16.

[13] *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA); *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC).

[14] FA para 31 page 17.

[15] FA para 37 – 38 page 17; annexure PN3, page 92.

necessary security clearance certificate for his position as NDPP.[16] The allegation was that Mr Nxasana had not obtained security clearance on the basis that, *inter alia*, he had killed a man.[17] While Mr Nxasana had been charged with murder, he was acquitted.

10. According to the Minister of Justice, during this period there was a lot of tension among senior officials at the NPA.[18] The Minister asserts in vague and obscure terms that it was this situation at the NPA, "*especially around Mr Nxasana*", that required urgent intervention.[19] The President in his Reasons (**President's Reasons**) states that he had various discussions regarding the discord that existed in the NPA between Mr Nxasana and the senior management.[20] This, however, is not borne out by the Rule 53 record that was filed. There is no evidence of the "various discussions" held between Mr Nxasana and the President.[21]

11. In May 2014, media reports alleged that Mr Nxasana had been called to a meeting with the then Minister of Justice and told to resign due to his failure to disclose his brushes with the law prior to his appointment. Mr Nxasana refused to resign, on the basis that he had done nothing wrong as his non-disclosures were irrelevant.[22] The President states that he has no knowledge of this

[16] FA para 40 page 17 - 18. President's AA para 28 page 375; Minister's AA para 8 page 415.

[17] FA para 40 page 17 – 18.

[18] Minister's AA para 5 – 6 page 414 – 415.

[19] Ibid.

[20] Supplementary Affidavit ("SA") para 9 page 181; annexure PN30 para 4 page 192.

[21] SA para 22.2 at page 185 – 186.

[22] FA para 42 page 18; annexure PN6 page 97.

meeting.[23] However, in Mr Nxasana's representations to the President on 1 August 2014, Mr Nxasana confirmed that media reports regarding the alleged meeting where he was asked to resign were accurate. Mr Nxasana states that *"As I confirmed in my response to the Minister dated 22 May 2014, he asked me to resign at a meeting on 21 May 2014. That allegation is true."*[24] The Minister denies the meeting.[25]

12. In his affidavit, Mr Nxasana suggests that there were politically motivated reasons why his fitness to hold office was being questioned publicly.[26] He claims that the attack on his fitness to hold office was a campaign motivated by the following:

    12.1. First, Advocate Jiba's resentment over the fact that she was not appointed as NDPP. He claims that she sought to discredit him in the eyes of the President and the public;[27]

    12.2. Second, the concern that Mr Nxasana would institute criminal charges against President Zuma. In his affidavit, Mr Nxasana states that he believes that Advocates Jiba and Mrwebi informed the President that he (Mr Nxasana) intended to reinstate the criminal charges against the President. He sought to address the issue directly and to re-assure the President. When the President raised the issue, Mr Nxasana told the

[23] President's AA para 42 page 375.

[24] Supplementary FA annexure PN34 para 21.

[25] Minister's AA para 19 page 425.

[26] Nxasana Affidavit paras 12 – 16 page 506 - 508. Mr Nxasana made similar claims in interviews given with the media – see FA para 43 page 18; annexure PN7 page 99.

[27] Nxasana Affidavit para 14 page 507 - 508.

President that he had been misled.[28] In addition, in his representations to the President, Mr Nxasana stated that *"It was brought to my attention that rumours about me were circulating. One of the rumours is that I intended reinstating criminal charges against the President. That rumour is false."*[29]

13. On 4 July 2014, the President informed Mr Nxasana that he had decided to institute an inquiry into Mr Nxasana's fitness to hold office in terms of section 12(6)(a)(iv) of the NPA Act.[30] At the end of that month, the President informed Mr Nxasana that he intended to suspend him with pay pending the outcome of the inquiry.[31]

14. A Commission of Inquiry was appointed seven months later, on 5 February 2015, to conduct the inquiry into Mr Nxasana's fitness to hold office as the NDPP.[32] The Commission was to be chaired by Advocate Nazeer Cassim SC (**the Cassim Commission**). The inquiry was, however, short lived.

15. On 10 May 2015, the day before the Commission was to begin its hearings, the President instructed Adv Cassim SC to terminate the inquiry.[33] The President gave no precise reason for halting the inquiry. After the fact, and nearly three weeks after the inquiry was halted, the Presidency made the vague assertion that it was of the view that it would not be in "best interests" of the government

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[28] Nxasana Affidavit para 13 p 507.

[29] Supplementary FA annexure PN34 para 22.4.

[30] FA para 45 page 19; annexure PN8 page 103.

[31] Nxasana Affidavit para 19 page 509.

[32] FA para 47 and 49 page 19.

[33] FA para 52 page 20 – 21.

or Mr Nxasana to continue with the inquiry.[34]

16. Adv Cassim SC however expressed the view that:

> *"It would appear to him that the incumbent himself is someone who exercises an independent mind, for instance, when the Mduli matter was heard by a judge, he followed the judge's ruling. His conduct shows that he appears to be a man who is independent. Another question is, why didn't the President do his homework, before appointing him? One would have to look into the person's background before making an appointment.*"[35]

17. On 15 August 2014, Mr Nxasana launched urgent proceedings to interdict his suspension by the President. He did so on the basis that he did not have sufficient information to respond to the allegations made against him. He says that he did not proceed with the urgent application because negotiations commenced between him and the President, with a view to settling the dispute that had arisen regarding his continued service as the head of the NPA.[36]

The Settlement Agreement

18. On 9 May 2015, Mr Nxasana signed the Settlement Agreement with the President and the Minister.[37] In the Settlement Agreement, the President -

    18.1. recognised that Mr Nxasana is *"professionally competent, sufficiently experienced and conscientious and has the requisite integrity to hold a senior public position both in the public and in the private sector"* (para

[34] President's AA para 34.2; Annexure PN 19 page 143.

[35] FA para 54 page 21; Annexure PN15 page 135.

[36] Nxasana Affidavit para 22 page 509 - 510.

[37] FA para 57 page 22; Annexure PN 18 page 140 – 143.

2)

18.2. stated that Mr Nxasana was "*To relinquish his post as National Director of Public Prosecutions from 1 June 2015."* (para 3).

19. Prior to his departure from the NPA, the Minister of State Security gave Mr Nxasana a security clearance certificate.[38]

20. On 31 May 2015, the Presidency published a statement announcing that it had reached a settlement with Mr Nxasana. The statement noted that Mr Nxasana is professionally competent and possesses the requisite experience and integrity to hold a senior position, and that the President *"expresses his sincere gratitude to Mr Nxasana for his contribution to the work of the National Prosecuting Authority and wishes him well in his future endeavours."*[39] The complete about-turn – from asserting that Mr Nxasana was unfit for his office, to recording that he is qualified for the post and thanking him for his work – remain unexplained.[40]

The disparity in treatment between Mr Nxasana and other senior NPA officials

21. The President's starkly different treatment of Mr Nxasana, as compared with other senior officials in the NPA who were facing serious allegations, is difficult to understand. It lends credence to the assertion that there were other underlying reasons that motivated the President's decision to take the action

[38] FA para 55 page 21; Annexure PN 16 page 136 – 137.

[39] FA para 59 page 23; Annexure PN 19 page 143.

[40] FA para 59 page 23.

that he did against Mr Nxasana.

22. The ethical conduct of Advocates Jiba, Mrwebi and Mzinyathi had been called into question in various judicial decisions. These related to the decision by Advocate Jiba to withdraw charges against Lt-Gen Richard Mdluli, who had been charged with fraud, corruption, money laundering, murder, kidnapping, intimidation, assault with intent to do grievous bodily harm and defeating the ends of justice.

23. Freedom Under Law (FUL) took Advocate Jiba's decision to have the charges withdrawn on review. Their application was upheld by Murphy J. He held that charges should be reinstated and investigated. Murphy J also found that Advocates Jiba, Mrewbi and Mzinyathi had acted dishonestly.[41] This decision was upheld by the SCA.[42]

24. In addition, Adv Jiba's integrity had been attacked for lying under oath in the matter concerning the prosecution of Johan Booysen,[43] and the challenge by the Democratic Alliance to the decision to drop charges against President Zuma.

25. After these decisions were handed down, Mr Nxasana took steps against these senior officials. An opinion from senior counsel recommended that the NPA take disciplinary action, bring criminal charges, and refer them to the General Council of the Bar (**GCB**). On 18 July 2014, the NPA wrote to the Minister explaining why it wanted these officials suspended and asking that its

[41] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP).
[42] *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA).
[43] *Booysen v Acting National Director of Public Prosecutions and Others* 2014 (2) SACR 556 (KZD).

memorandum be forwarded to the President with a request that he provisionally suspend the officials and hold an inquiry into their fitness to hold office, the criminal investigations and actions by the GCB.[44] No response was received from the Minister.

26. On 31 July 2014, the CEO of the NPA informed the Minister that the NPA had appointed a committee headed by retired judge Zak Yacoob (**the Yacoob Committee**) to investigate unethical and unprofessional conduct by the NPA staff, including Advocates Jiba, Mrwebi and Mzinyathi.[45]

27. The Yacoob Committee completed its work in October 2014. It made negative findings regarding the conduct of Advocates Jiba, Mrwebi and Mzinyathi.[46] The NPA informed the Minister of the Yacoob Committee's findings. Again, no action was taken by the Minister.

28. The letter to the Minister dated 18 July 2014 (requesting that the President suspend Advocates Jiba, Mrwebi and Mzinyathi) was not forwarded to the President. Mr Nxasana then wrote directly to the President and personally handed him the letter.[47] This was because Mr Nxasana was of the view that the action was required to bring stability to the NPA.[48] The President took no action against Advocates Jiba, Mrwebi and Mzinyathi.

29. The disparity in treatment of Mr Nxasana as opposed to Advocates Jiba,

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[44] FA para 70 – 71 page 26.

[45] FA para 72 page 26; annexure PN22 page 150.

[46] FA para 73 page 27.

[47] The President now alleges in his answering affidavit in this matter not to having received this letter and that "Per error I admitted receipt of this letter in the Corruption Watch matter". President's answering affidavit para 40.3 page 375.

[48] FA para 75 page 27.

Mrwebi and Mzinyathi leads to the reasonable conclusion that the reason why President and the Minister wanted Mr Nxasana removed from the NPA was not because of a genuine concern about his alleged past criminal behaviour, but because of his (justifiable attempts) to have these officials suspended, disciplined and struck from the roll.

30. By the time this application was launched, no action had been taken by the Minister or the President against Advocates Jiba, Mrwebi or Mzinyathi.

31. Action against these three senior officials of the NPA was finally taken by the GCB. It applied to this Court to have Advocates Jiba, Mrwebi and Mzinyathi struck off the roll of admitted advocates. Legodi J granted the application against Advocates Jiba and Mrwebi for their conduct in the Mdluli matter. He said, in relation to Advocates Jiba and Mrwebi -

> *"I cannot believe that two officers of the court (advocates) who hold such high positions in the prosecuting authority will stoop so low for the protection and defence of one individual who had been implicated in serious offences*.
>
> . . . *By their conduct, they did not only bring the prosecuting authority and the legal profession into disrepute, but have also brought the good office of the President of the Republic of South Africa into disrepute by failing to prosecute Mdluli who inappropriately suggested that he was capable of assisting the President of the country to win the party presidential election in Mangaung during 2011 should the charges be dropped against him.*
>
> *It is this kind of behaviour that diminishes the image of our country and its institutions which are meant to be impartial, independent and*

transparent in the exercise of their legislative public powers."[49]

32. Mr Nxasana's attempts to have action taken against Advocates Jiba and Mrwebi have thus been vindicated by the Court. Unfortunately, because of his efforts to hold these senior officials to account, Mr Nxasana was singled out and subjected to political and financial pressure to vacate his office.

33. Despite the President's assertions in his affidavit in this Court that he was awaiting "*pending judicial pronouncements on the fitness or otherwise of these advocates*",[50] the President subsequently refused to place the Advocates Jiba and Mrwebi on suspension even after the Court found that they were not fit and proper and struck them from the roll of advocates.[51] The President's conduct contradicts his assertions in his answering affidavit before this Court.

34. The disparity in the treatment of Mr Nxasana gives rise to the reasonable inference that he was induced to leave the NPA in order to protect Lt-Gen Mduli and the dishonest prosecutors (Advocates Jiba and Mwrebi).[52] No other reasonable or plausible explanation has been given by the Minister or the President.

The purported request by Mr Nxasana to vacate the office of the NDPP

35. The President's Reasons specifically refer to the provisions of section 12(8) of the NPA Act which permits the NDPP to request permission from the President

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[49] *General Council of the Bar of South Africa v Jiba and Others* 2017 (2) SA 122 (GP) at paras 167 – 169.

[50] President's AA para 40.6 page 379.

[51] *General Council of the Bar of South Africa v Jiba and Others* at para 177.

[52] Indeed, in his affidavit, Mr Nxasana states that his initiation of disciplinary action against Advocates Jiba, Mrwebi and Mzinyathi appeared not to be supported by the Minister and the President. Nxasana affidavit para 27.3 page 512 - 513.

to vacate his office.[53] The President alleges that *"Mr Nxasana made a request on those grounds."*[54]

36. This version of events appears for the first time in the President's Reasons. Tellingly, there is no record at all of Mr Nxasana ever having made a request in terms of section 12(8) of NPA Act. Mr Nxasana expressly denies having ever made such a request. In his affidavit, Mr Nxasana states:

> "***I DID NOT REQUEST TO LEAVE OFFICE***
>
> *32. It was never my request to vacate the office, nor did I ever make such a request of the President, in terms of sections 12(8) of the NPA Act.*
>
> *33. I did not feel compelled to make such a request since I have at all times considered myself to be fit and proper to hold office of the NDPP and I had no intention of leaving the office of the NDPP.As explained above, the settlement discussions were only commenced as a result of the ongoing dispute between myself and the President."*[55]

37. These claims are corroborated by contemporaneous correspondence cited by Mr Nxasana and by correspondence revealed in the Corruption Watch / Freedom Under Law application, including the following:

37.1. Mr Nxasana's lawyers wrote to the President on 10 December 2014 and explicitly stated that he had no intention of resigning.

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[53] Section 12(8) of the NPA Act states that:

(a) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office—

(i) on account of continued ill health;

or

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

[54] SA para 10 page 182; annexure PN30 para 6 page 192.

[55] Nxasana's affidavit para 32 – 33 page 514 - 515.

37.1.1. The letter noted that—

> "*it has never been the NDPP's intention to resign from his position since he considers himself to be a fit and proper person to hold this position*"
>
> "*the proposed settlement was triggered by discussions which the NDPP had with the President following the latter's announcement of his decision to hold an enquiry into the NDPP's fitness to hold office and possible suspension pending the enquiry*."

37.1.2. Mr Nxasana's attorney also reiterated what Mr Nxasana had apparently previously told the President, namely that "*he will only consider stepping down from office if he is fully compensated for the remainder of his entire contract as head of the National Prosecuting Authority*" and that "*there is no factual or legal basis for our client to step down from his position.*"[56]

37.2. Mr Nxasana addressed a letter to the President on 3 November 2014, which indicated that his preference was to resolve the dispute between them through a section 12 enquiry rather than in mediation as the President had suggested.[57]

37.3. Ms Makhene of the Presidency responded on 12 December 2014, saying that there had been a breakdown in the negotiations and asking whether Mr Nxasana would consent to mediation.[58]

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[56] Nxasana's affidavit para 35 – 36 page 515; "MN1" page 526. RA para 9.5.2 page 442.

[57] Nxasana's affidavit para 39 page 516; RA para 9.5.1 page 441; annexure PN 39 page 491.

[58] RA para 9.5.3 page 442; annexure PN41 page 493.

37.4. Mr Nxasana responded on 15 January 2015 repeating his preference for a section 12 inquiry but saying that he was willing to consider mediation.[59]

37.5. On 23 January 2015, Ms Makhene informed Mr Nxasana that the President would be proceeding with the inquiry into Mr Nxasana's fitness to hold office.[60]

38. Mr Nxasana's version of events is corroborated by his conduct, which is apparent from his affidavit and the Record in this matter.[61] Mr Nxasana's conduct was wholly inconsistent with that of a person who had requested to vacate his office in terms of section 12(8).

38.1. At no point did Mr Nxasana give any indication that he wanted to vacate his position. His consistent response to the allegations against him was that the allegations did not constitute misconduct and that there was no justification to suspend him.[62] He believed that *"To suspend in these circumstances would amount to interference with the office of the NDPP*."[63]

38.2. His position throughout was that his subordinates – in particular Advocate Jiba – were improperly undermining his authority, and that it was they not he that should face disciplinary proceedings.[64]

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[59] RA para 9.5.4 page 442; annexure PN42 page 496.

[60] RA para 9.5.5 page 442; annexure PN43 page 497.

[61] SA para 14 – 15 page 182-3.

[62] SA para 16 page 183.

[63] SA para 17 page 183.

[64] SA para 19 page 184.

38.3. He launched an urgent application to interdict the President from suspending him until he was provided with sufficient information about the allegations against him that he could "*respond to and rebut them fully*".[65]

38.4. He maintains that he communicated his position to the Minister in unambiguous terms during a meeting at the Sheraton Hotel on 26 February 2015. Initially, the Minister stated that his understanding was that Mr Nxasana and the President had reached an agreement, in terms of which Mr Nxasana would leave the NPA. Mr Nxasana corrected him, advising him that *"the opposite was in fact true*" as he had never had any intention of leaving the NPA and that his discussions with Mr Hulley (the President's legal representative) were aimed at resolving the dispute so that he could remain in office.[66]

39. By contrast, the President and the Minister failed to put up any evidence to support the assertion that Mr Nxasana requested to vacate his office:

39.1. The President alleges that the request was made verbally and that it was never reduced to writing. This is untenable. It is utterly implausible that Mr Nxasana and the President, having conducted their entire relationship in writing, abandoned this practice at the time that Mr Nxasana was said to have requested to vacate his office.[67]

39.2. Similarly, the Minister attaches no evidence of the alleged request. The

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[65] Nxasana Affidavit para 40 page 517.

[66] Nxasana's affidavit para 37 page 515 – 516.

[67] Replying Affidavit ("RA") para 9.1 – 9.2 page 440.

high-water mark is an alleged meeting at the Sheraton Hotel, at which Mr Nxasana allegedly requested to vacate his office. The Minister does not identify the date upon which the alleged meeting took place. Mr Nxasana has denied that he made such a request at the meeting held at the Sheraton on 26 February 2015.[68]

40. The only reasonable conclusions that can be drawn from the express statements of Mr Nxasana, the above letters and Mr Nxasana's conduct are the following:

40.1. Mr Nxasana did not request to vacate his office as NDPP in terms of s 12(8).

40.2. Mr Nxasana only left his office because he was offered R17.3 million. This was the stated precondition for him to leave office.[69]

40.3. Given the President's earlier opposition to paying the full amount, it is not believable that Mr Nxasana would later make a request to resign – so late in the day – for reasons that are not mentioned elsewhere in the Record, and that the President would then agree to pay him the full R17.3 million.[70]

40.4. Given the clear history of correspondence, it is also not believable that Mr Nxasana would make such a request without there being any written record. It is also not plausible that the request would not be recorded in

[68] Nxasana's affidavit para 37 page 515 – 516.

[69] RA para 9.6.1 page 442.

[70] RA para 9.6.2 page 443.

the settlement agreement itself.[71]

41. The inescapable conclusion from the facts and all the documents that have been put before the Court is that the settlement agreement was concluded for an ulterior purpose and in contravention of the NPA Act and the Constitution.

42. The President recently filed an answer to Mr Nxasana's affidavit. His position appears to be that, because Mr Nxasana was willing to negotiate leaving his position as NDPP, he had made a request to vacate in terms of section 12(8). He argues that the request to vacate is independent of the Settlement Agreement. This position is completely untenable:

42.1. Despite the mass of correspondence between Mr Nxasana, the President and the Minister, there is not a single document that mentions s 12(8). The President never points to a specific meeting or document where the alleged request was made.

42.2. Section 12(8) does not contemplate a negotiated exit. It contemplates a request to leave on the terms determined in the section, and the President either accepting or rejecting that request. Section 12(8)(c) states clearly what financial compensation a vacating NDPP shall receive. That is plainly not what occurred here, as Mr Nxasana refused to leave unless his terms, including the payment of R17 million were met. The President could not reasonably have believed that the ongoing negotiations with Mr Nxasana constituted a voluntary request to vacate. If he did, he would not have agreed to pay Mr Nxasana R17

[71] RA para 9.6.3 page 443.

million. He would have had no reason to do so.

43. However, even if one were to accept the President's version, it would not constitute a defence to the application. Whether or not there was a request in terms of section 12(8) is a question of objective legal fact. Put differently, a request to vacate from the NDPP is a jurisdictional fact that must exist before the President can exercise his power to accept the request. It is plain that no such request was made:

43.1. Mr Nxasana states unambiguously that he never made such a request;[72]

43.2. There is no such request in writing (as the section seems to demand), and no record of an oral request; and

43.3. It was clear to all parties that Mr Nxasana was not willing to vacate office on the terms set out in s 12(8)(c) concerning the pension granted to an NDPP who vacates his office in terms of s 12(8); and

43.4. The actual terms of Mr Nxasana's departure are inconsistent with the clear prescripts of s 12(8)(c).

44. Thus, even if (despite the absence of any evidence to support such a belief) the President believed Mr Nxasana had made a section 12(8) request, the Settlement Agreement remains unlawful for the reasons set out below.

III THE APPLICABLE LEGAL FRAMEWORK

45. Before turning to specific grounds on which the decision to enter into the

[72] Nxasana Affidavit at paras 32 page 514 – 515 and 45 page 518.

Settlement Agreement may be impugned, it is necessary to set out the Constitutional and legal framework governing the NPA and the need to ensure its independence.

The Constitution and the Independence of the NPA

46. The NPA was established in terms of section 179 of the Constitution.

47. Section 179(1)(a) of the Constitution provides that the responsibility for the appointment of the NDPP falls on the President as the head of the national executive. As noted above, there is no similar provision in relation to the removal of the NDPP.

48. The NPA is given the power in section 179(2) to *"institute criminal proceedings on behalf of the state."* [73] In doing so, the NPA must "*exercise its functions without fear, favour or prejudice."*[74]

49. In order to achieve this, the independence of the NPA is constitutionally guaranteed. This was underscored in *Certification of the Constitution of the Republic of South Africa,*[75] where the Constitutional Court held that section 179(4) of the Constitution provides:

> *"that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any*

[73] Section 179(1)(a) of the Constitution.

[74] Section 179(4) of the Constitution. See also section 32 of the NPA Act.

[75] 1996 (4) SA 744 (CC).

> *legislation or executive action inconsistent therewith would be subject to constitutional control by the courts."*[76] [Underling added].

50. The independence of the NPA is particularly important given its place in the criminal justice system and its role in combatting crime and corruption. In *Glenister v President of the Republic of South Africa and Others (Glenister II),*[77] the Constitutional Court emphasised that corruption is detrimental to the protection and promotion of rights in the Bill of Rights and to the foundational principles of constitutional democracy. [78] It reiterated the NPA's duty to prosecute crimes involving corruption. It held—

> *"It is equally clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law. In turn the national prosecuting authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices."*[79] [Footnotes omitted] [Underlining added]

51. The Court recognised that, in order to effectively perform its functions, an agency involved in fighting corruption must be adequately independent. When considering the meaning of 'adequate independence' in relation to the Directorate of Priority Crimes Investigation (**the Hawks**), Ngcobo CJ observed that:

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[76] *Certification* judgment at para 146.

[77] 2011 (3) SA 347 (CC) at 174.

[78] *Glenister* at para 175 - 176.

[79] *Glenister* at para 176.

> *"The question, therefore, is not whether the DPCI is fully independent, but whether it enjoys an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it 'discharges its responsibilities effectively', as required by the Constitution*."[80]
>
> "*Ultimately therefore, the question is whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as to shield it from undue political influence."*[81]

52. In the *Helen Suzman Foundation*[82] case, which also considered the adequacy of the independence of the Hawks, the Court held that the "*overriding consideration*" is whether the autonomy-protecting features in the legislation enable members of the institution to carry out their duties vigorously, without fear of reprisals.

53. In addition, the Constitutional Court has held that the appearance or perception of independence plays an important role in evaluating whether independence in fact exists. The Court explained 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*

[80] *Glenister* at para 125.

[81] *Glenister* at para 121.

[82] *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) at para 32.

an institution is independent is a component of, or is constitutive of, its independence."[83]

54. These standards apply with equal force to the NPA, given its role in prosecuting crimes involving corruption (including high-level political corruption). Hence, the NPA must be protected from undue political interference in the performance of its functions. In *Democratic Alliance*, the Constitutional Court emphasised that the NDPP is "*non-political*". Yacoob ADCJ explained:

> "*It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that prosecution policy is complied with are, as I have said earlier, fundamental 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.*"[84]

Need for independence of the NDPP

55. The NDPP has extensive powers and responsibilities under the NPA Act, including the following:

55.1. The National Director, as the head of the prosecuting authority, shall have authority over the exercising of all the powers, and the performance of all the duties assigned to any member of the prosecuting authority by the Constitution, the NPA Act or any other

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[83] *Glenister II* at para 207, with reference to *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 and Valente v The Queen [1986] 24 DLR (4th) 161 (SCC) at 172.

[84] *Democratic Alliance* (n 13) at para 26.

law (section 22(1));

55.2. The National Director must determine prosecution policy and issue policy directives; may intervene in any prosecution process when policy directives are not complied with; and may review a decision to prosecute or not to prosecute (section 22(2)); and

55.3. The National Director may conduct any investigation he or she may deem necessary in respect of a prosecution or a prosecution process, or directives or guidelines issued by a Director (section 22(4)(a)(i)).

56. The NDPP is central to the NPA's ability to function effectively and to fulfil is constitutional mandate. He or she provides strategic leadership to the NPA, sets its prosecutorial policies, may intervene in prosecutions, and may review the decision to prosecute. The NPA's independence therefore depends on the NDPP being sufficiently insulated from political interference. Without adequate protection against interference, the NDPP might be pressured into dropping charges in high level political cases to protect the interests of powerful individuals, or into pursuing prosecutions for a political agenda.

Security of tenure and removal from office

57. A fundamental aspect of the structural and operational autonomy of an institution is the security of tenure of its members, particularly its Director.[85]

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[85] *Glenister II* at para 213. In *Mcbride v Minister of Police and Another* 2016 (2) SACR (CC) which considered with the independence of the Independent Police Investigative Directorate ("IPID")(the body mandated to investigate corruption involving the police), the Constitutional Court listed various criteria for determining the independence of an anti-corruption body, including

"*Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference."*

Security of tenure requires protection against termination of employment or suspension at the discretion of the Executive. The importance of security of tenure in securing the independent functioning of an agency was explained in *Glenister II*:

> "*While it is not to be assumed, and we do not assume, that powers under the SAPS Act will be abused, at the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.*[86]

58. The Court observed that the employees of the DPCI's predecessor (the Directorate of Special Operations, better known as **the Scorpions**) enjoyed far greater security of tenure, and explained that

> "*The special protection afforded the members of the DSO served to reduce the possibility that an individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution.*"[87]

59. The NPA Act contains provisions to secure the tenure of the NDPP. These include:

59.1. Section 12(1) of the NPA Act, which provides that in the ordinary course, the term of office of the NDPP is for a non-renewable period of

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(See paragraphs 35 and 36)

[86] *Glenister II* at para 222.

[87] Glenister II at para 226.

ten years or until he or she attains the age of 65 years.

59.2. There are limited grounds which the President may remove the NDPP. The four grounds provided for in the NPA Act include:

(i) 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.[88]

59.3. The President may provisionally suspend the NDPP from office pending an inquiry into his fitness to hold office and may thereupon remove the NDPP on one of the grounds listed above (section 12(6)(a)). The President's decision to remove the NDPP must be referred to Parliament within 14 days (section 12(6)(b)) and confirmed or rejected within 30 days (section 12(6)(c)).

59.4. Section 12(8) of the NPA allows the NDPP to voluntarily vacate his office. It provides:

"*(a) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office—*

(i) on account of continued ill health;

(ii) for any other reason which the President deems

[88] Section 12(6)(a) of the NPA Act.

sufficient.

(b) The request in terms of paragraph (a) (ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.

(c) If the National Director or a Deputy National Director—

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

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

59.5. The important elements of section 12(8) of the NPA are the following:

59.5.1. The NDPP must make a request;

59.5.2. The request must relate to his or her health or another reason the President deems adequate;

59.5.3. The request must be made 6 months before the date of the resignation, unless the President orders otherwise; and

59.5.4. The departing NDPP is only entitled to the amount ordinarily available to retiring or medically boarded civil servants.

60. Importantly, the NPA Act must be interpreted so as to promote the state's constitutional obligation to combat corruption.[89] Where there are multiple interpretations, the Court must adopt the one that best promotes the "*spirit, purport and objects of the Bill of Rights*",[90] including the duty in terms of s 7(2) to take reasonable steps to combat corruption.[91]

IV THE SETTLEMENT AGREEMENT IS REVIEWABLE

61. In light of the above, the decision to enter into the Settlement Agreement is reviewable because it is:

    61.1. Unlawful;

    61.2. Irrational;

    61.3. Motivated by an ulterior purpose; and

    61.4. Taken in circumstances in which the President has a conflict of interest.

62. We address each of these grounds in turn.

63. Before we do, we note that the Courts have yet to settle whether the appointment, removal or suspension of the NDPP constitutes administrative action or executive action. In *Simelane,* the Constitutional Court was of the view that it was not necessary for it to decide whether the appointment of the NDPP

[89] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at para 89.

[90] Constitution s 39(2).

[91] *Glenister*.

constituted administrative or executive action, given that rationality was a requirement of both.[92]

64. The same is true here. All but two of the grounds of review on which CASAC relies[93] apply under both legality review and review in terms of PAJA. Those two grounds are unreasonableness and failure to consider relevant factors. We do not address those grounds directly as they are covered in substance by the four complaints identified above.

The decision is unlawful

65. In *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others,*[94] the Constitutional Court confirmed that the Executive may not exercise any power or perform any function beyond that conferred by law.[95]

66. The President has attempted to bring the Settlement Agreement within the scope of the law by asserting that Mr Nxasana made a request to vacate his office in terms of section 12(8) of the Act. [96] On this version, the Settlement Agreement merely gave effect to Mr Nxasana's request.

67. The President's position is untenable on both the facts and the law, for the

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[92] *Simelane* at para 12.

[93] FA at paras 126-7, page 47.

[94] 1999 1 SA 374 (CC).

[95] *Fedsure* at para 58.

[96] President's AA, para 54.2 at page 383.

following reasons:

67.1. First, as explained above, there is no evidence to support the President's claim that Mr Nxasana requested to vacate his office. On the contrary, Mr Nxasana has expressly denied that he made such a request. Mr Nxasana's version is supported by contemporaneous correspondence, as well as his conduct.

67.2. Second, the Settlement Agreement does not portray itself as a grant of a request in terms of section 12(8) of the NPA Act. Nor, objectively can it be said to meet the minimum criteria set out in section 12(8), in that:

67.2.1. Mr Nxasana did not make a request to be relieved of his duties. He has strongly denied doing so. His statements prior to the conclusion of the Settlement Agreement and in his affidavit indicate that he believes that he was forced out of office for political reasons.[97]

67.2.2. While he was willing to negotiate an exit on his terms, Mr Nxasana was not willing to leave office on the terms dictated in s 12(8).

67.2.3. As there was no request, there was no reason put forward by Mr Nxasana for the President to consider.[98] Although section 12(8) of the NPA Act allows the President to accept "*any other reason*" he deems sufficient, it must be a reason that is advanced

[97] FA para 105.1 page 40; Nxasana Affidavit para 13 – 14 page 507 - 508.

[98] FA para 105.2 page 40.

independently by the NDPP. Section 12(8) cannot be interpreted to permit the President to rely on a reason that was not advanced by the NDPP. The latter interpretation would be contrary to the purpose of the section 12(8) as it would undermine the constitutionally enshrined independence of the NPA.[99]

67.2.4. If there was a request (which is denied), it was not made six months prior to Mr Nxasana's departure. There is no indication that Mr Nxasana sought a shorter period or that the President acceded to this request.[100]

67.2.5. Mr Nxasana was paid the full value of his salary for his outstanding term of office. That far exceeds the pension to which he would have been entitled under section 12(8).[101]

67.3. Third, properly interpreted, once the President acts in terms of section 12(6) and initiates an inquiry into the NDPP's fitness to hold office, a resignation in terms of section 12(8) is no longer possible. The inquiry

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[99] In *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), the Constitutional Court held that statutes must be interpreted in light of their purpose and context, and must be construed consistently with the Constitution. The Court held at para 28:

"*A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."

[100] FA para 105.3 page 40.

[101] FA para 105.4 page 40.

must be completed and the President must make a decision whether or not to recommend removal. This is vital to maintain the independence of the NPA and the constitutional values of openness and accountability. The public have a right to know whether allegations that led to an inquiry into the NDPP have any basis. If the inquiry is started and not completed because the NDPP resigns, this will inevitably undermine the independence of the office. It will be unclear whether there were legitimate reasons for the NDPP's resignation, or whether the allegations were a pretext to force him out of office. At the very least, it could be perceived as undermining the independence of the NPA when allegations that led to an inquiry are not openly and fully dealt with. Put simply, the process under s 12(6) and the process under s 12(8) are mutually exclusive. Having expressly initiated the one, the President and the NDPP were precluded from invoking the other.

68. In the absence of a section 12(8) request, the Settlement Agreement falls to be reviewed and set aside. A decision to enter into a settlement agreement with the NDPP outside the prescripts of the NPA Act is unlawful and unconstitutional. The NDPP's security of tenure is undermined when the President is permitted, outside of the prescripts of the NPA Act, to offer a financial inducement to an incumbent NDPP to leave. This is precisely why the NPA Act requires the NDPP to make a request, and specifies the financial payment to which a resigning NDPP is entitled.

69. The Settlement Agreement is therefore inconsistent with sections 12(6) and 12(8) of the Act, as well as the constitutional guarantee of independence of the

NPA.

The decision was irrational

70. Rationality requires that government action must be rationally connected to a legitimate government purpose.[102] This is sometimes rephrased as a requirement that public power *"must be rationally related to the purpose for which the power was conferred."*[103]

71. The Constitutional Court has said that the principle of legality requires "*that both the process by which the decision is made and the decision itself must be rational.*"[104] In order to determine whether a decision is procedurally irrational, a court must–

> *"look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality."*[105]

72. It on this basis that our courts have held certain executive acts invalid due to a process deficiency – such as failing to consult with victims or civil society

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[102] See, for example, *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC) at para 85.

[103] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC) at para 27. See, most recently, *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17 at para 78.

[104] *Simelane* ibid at 34. *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017) at para 64.

[105] *Simelane* ibid at 37.

organisations,[106] and failing to consider evidence suggesting that a candidate for appointment as NDPP is not fit for office.[107]

73. It is submitted that both the process by which the Settlement Agreement was made and the Agreement itself are irrational.

74. The parties' goals in concluding the Settlement Agreement are recorded in the Agreement as follows:

> *"5. The parties recognise that protracted litigation process will not be in the interests of the office of the [NDPP], the functioning of the NPA nor the Republic of South Africa.*
>
> *6. The parties are also mindful that the public glare brought on by the holding of an enquiry whilst necessary for transparency in our democracy, has unintended consequences.*
>
> *7. The parties are fully cognisant of the costs implications for litigating and/or concluding the enquiry which resources may be better applied given the challenges our country faces."* [108]

75. These reasons are patently irrational.

75.1. The litigation arose because of the inquiry into Mr Nxasana's fitness to hold office. If the President and the Minister were satisfied that Mr Nxasana was indeed fit to hold office there would no longer be a need to hold an inquiry.

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[106] *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) at para 69. *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) 70 – 74.

[107] *Democratic Alliance*

[108] FA annexure PN18 para 5 -7 page 140 – 141.

75.2. Indeed, the President and the Minister expressly state that they are satisfied that Mr Nxasana was fit and proper to remain in the office.[109]

75.3. As the President was satisfied that Mr Nxasana was fit and proper, the inquiry should have been terminated and Mr Nxasana permitted to return to his job.

75.4. It appears that the Settlement Agreement is entirely unrelated to achieving the expressly stated purpose of the Agreement. The only step that was rationally connected to these goals was to terminate the inquiry into Mr Nxasana.

76. This is a general problem with of "golden handshake" agreements of this type. They are inevitably used for one of two illicit aims:

76.1. To force out a person who is in fact independent. The person is subjected to a baseless disciplinary inquiry. Despite the lack of substantive merit, he faces months or years on suspension, and potentially years of costly and embarrassing litigation. He is offered the opportunity of avoiding that, and being paid a substantial sum of money. Even an apparently independent person such as Mr Nxasana or Mr Pikoli will be tempted to take the money in order to avoid the alternative.

76.2. To pay someone who is in fact guilty of wrongdoing. Instead of conducting a proper inquiry to determine the person's guilt or innocence, she is paid a significant sum of money. Both parties appear to benefit by avoiding the difficulties of an investigation. But it is plainly

[109] FA annexure PN19 page 143.

not in the public interest to pay public funds to a person who is guilty of misconduct.

77. In both instances, these golden handshake agreements are inherently irrational. If a person is innocent, they should remain in their position. If they are guilty, they should not be paid.

78. Golden handshakes perpetuate corruption by allowing good people to be pushed out of power, and bad people to take more public money. In *Glenister*, the Constitutional Court held

> "*corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.*
>
> …
>
> *Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner.*"[110]

79. Allowing the type of agreement concluded by the President, the Minister and Mr

[110] *Glenister* para 176.

Nxasana is inconsistent with the state's constitutional duty to fight corruption.

80. Accordingly, CASAC submits that the decision was irrational and must be set aside.

Ulterior purpose

81. CASAC submits that the irrationality of the Settlement Agreement suggests that, in fact, the Agreement was concluded for another reason altogether. This is supported by the fact that:

81.1. It is the President and the Minister who created the very situation that they regard as untenable.

81.2. Once the President and the Minister were satisfied that Mr Nxasana was fit and proper they should have allowed him to continue in the position as NDPP and decided not to pursue the inquiry.

81.3. The discrepancy in the treatment of Advocates Jiba, Mrwebi and Mzinyathi, and the timing of the moves against Mr Nxasana lead to the inevitable conclusion that the inquiry was aimed at protecting those whom Mr Nxasana had sought to have disciplined or suspended.[111]

81.4. Mr Nxasana believes that his suspension was unrelated to the reasons given by the President and was, instead, a politically motivated attempt to silence him and impede the work that he has been doing at the

[111] FA para 61 – 86 pages 28 – 30.

NPA.[112]

81.5. Advocate Cassim was of the view that there seemed to be no basis for a finding that Mr Nxasana was not fit and proper to serve as NDPP.[113]

82. CASAC respectfully submits that the only reasonable inference to be drawn from these facts is that the President acted for an ulterior purpose when he attempted to remove Mr Nxasana as NDPP. That purpose was to protect Adv Jiba and others at the expense of Mr Nxasana.

Conflict of interest

83. The Constitution provides in section 96 that a member of Cabinet must not expose himself to any *"situation involving the risk of a conflict between [his] official responsibilities and private interests".*[114]

84. In *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others,*[115] the Constitutional Court discussed the meaning of 'placing yourself in situation involving the risk of a conflict' in the context of the upgrades to the President's Nkandla home. The Court held that:

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[112] FA annexure PN34 209 – 218.

[113] FA para 54 page 21; annexure PN15 page 135.

[114] Section 96(2)(b) of the Constitution provides that:

> Members of the Cabinet and Deputy Ministers may not –
>
> . . .
>
> (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.

[115] 2016 (3) SA 580 (CC).

> *"the mere fact of the President allowing non-security features, about whose construction he was reportedly aware, to be built at his private residence at government expense, exposed him to a "situation involving the risk of a conflict between [his] official responsibilities and private interests". The potential conflict lies here. On the one hand, the President has the duty to ensure that State resources are used only for the advancement of State interests. On the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal benefit from indifference. To find oneself on the wrong side of section 96, all that needs to be proven is a risk. It does not even have to materialise."*[116]

85. As was held by the Constitutional Court in the *Economic Freedom Fighters* judgment, all that needs to be proven is a risk of a conflict, not that the risk has materialised. This refutes that President's argument that there is no conflict of interest as there are currently no criminal charges pending against him.[117] The question is whether there is a real risk of a conflict. The unavoidable answer to this question is yes.

85.1. Early in this process, during his representations, Mr Nxasana felt it necessary to reassure the President that the rumours that he would reinstate criminal charges against the President were false.[118]

85.2. If the President believes that there is a real or reasonable risk that charges may be reinstated, he is likely to appoint someone who is sympathetic to him and who is not expected to proceed with the

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[116] *Economic Freedom Fighters* at para 9.

[117] President's Answering Affidavit

[118] Supplementary FA annexure PN34 para 22.4.

prosecution with any vigour.[119]

86. CASAC submits that it has demonstrated that the President has placed himself in a position involving the risk of a conflict between his official responsibilities and his private interests. In light of this conflict, the President would be unable to perform the function of appointing a new NDPP. The President is constitutionally prohibited from doing so. In the circumstances, the Constitution permits the Deputy President to step in and fulfil this function.[120]

V RELIEF SOUGHT IN THE REVIEW

87. Section 172(1)(a) of the Constitution provides that when a court decides a constitutional issue within its powers, it must declare any law or conduct inconsistent with the Constitution invalid to the extent of such inconsistency. This section is peremptory.[121]

88. Once the conduct is declared invalid, both PAJA and the Constitution give the Court a broad discretion to formulate a remedy that is just and equitable.[122] In the circumstances of this case, we respectfully submit that a just and equitable remedy would be to direct Mr Nxasana to repay the R17 million and to resume his post as NDPP (or inform Mr Abrahams that he is the Acting NDPP) until the Deputy President appoints a new NDPP.

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[119] RA para 16.1 para 447.

[120] RA para 16.3 and 16.4 at page 448.

[121] *McBride* at para 23.

[122] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd And* Others 2011 (4) SA 113 (CC) at paras 83 – 85.

Repayment of the R 17 million

89. None of the parties oppose the relief sought in prayer 2 that Mr Nxasana repay the amount of approximately R 17 million. Both the President and the Minister admit that Mr Nxasana was only entitled to his full retirement package and that the monetary payment under the Settlement Agreement is reviewable as it is inconsistent with section 12(8).[123]

90. As noted earlier, this constitutes a concession that there was no s 12(8) request. As Mr Nxasana always made it clear he would only vacate office if he was paid the full R17.3 million, a concession that he was not entitled to that amount is a concession there was no s 12(8) request, and that the Settlement Agreement was unlawful.

91. Put differently, the amount would not have been payable if there had been a s 12(8) request. The fact that the payment was made demonstrates that something else happened, outside s 12(8). That is why the President and the Minister now opportunistically suggest that he was not entitled to the amount which they agreed to pay. But that cannot alter the legal nature of what actually occurred.

A declaration that Mr Nxasana is the incumbent NDPP or that Mr Abrahams is the acting NDPP

92. The President opposes this relief on the basis that:

[123] RA para 13 and 14 page 446. President's AA para 7.6 – 7.9 pages 348 – 349. Minister's AA para 9 page 421.

92.1. It is not competent for this Court to declare Mr Nxasana the NDPP as that would usurp the functions of the Executive and the separation of powers;[124]

92.2. Flowing from the above, it is not competent for the court to appoint an acting NDPP. This is a decision that must be taken by the President unless he is absent from the Republic or unable to perform his functions.[125]

92.3. Mr Nxasana may not want to return to the position of NDPP and cannot be forced to do so. Similarly, Mr Abrahams may not wish to be Acting NDPP and cannot be compelled to do so. [126]

92.4. Finally, there is no longer a relationship of trust between Mr Nxasana and the President. [127]

93. These arguments are wrong in fact and law. When considering a constitutional matter, the Court is empowered to make any order that is just and equitable.[128] This would include the remedy of reversing the unlawful decision and returning to the state of affairs that existed before the unlawful decision. By ordering this the Court would not be usurping the Executive's role, but would uphold the rule

[124] President AA para 7.31 - 7.44 pages 353 – 357.

[125] President's AA at 7.36 at page 354.

[126] President's AA at 7.34 at page 353. Respondent's AA at para 12 at page 283 and para 41.5 at page 306

[127] NPA AA para 52.6 of the NPA at page 316.

[128] *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs* [2017] ZACC 7 at para 82.

of law by the Executive's appointment of Mr Nxasana as NDPP.[129]

94. It is the general position that unlawful conduct must be set aside. As Froneman J put it in *AllPay 2*: "*Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.*"[130] Doing so is not an interference with the separation of powers.

95. Indeed, a court should allow invalid action to have valid effects only where the particular circumstances justify such an order.[131] The relevant factors will include: the seriousness of the breach, the delay in launching the challenge, the culpability of either party, the impact on the public at large, and the availability of other remedies.[132]

96. In this case, those factors weigh strongly against any order other than restoring Mr Nxasana to his position:

    96.1. The violation was serious because it was obviously unlawful, and sought to subvert the constitutionally guaranteed independence of the NDPP.

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[129] RA at para 18 page 450.

[130] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) at para 30.

[131] See, for example, *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) at para 85.

[132] See D Freund & A Price 'On the legal effects of unlawful administrative action' (2017) 134 *SALJ* 184 at 204-6.

96.2. There was no serious delay in launching the application.

96.3. Restoration will only have a positive effect on the public because it will restore faith in the independence of the NPA.

96.4. Mr Nxasana has indicated that he is able and willing to resume the role of NDPP.[133] It is therefore possible to give effect to the order.

96.5. The President and the Minister have indicated that they believe that Mr Nxasana is fit and proper person to hold the office of NDPP. It is difficult to understand why, in those circumstances, there would be no trust between the President and Mr Nxasana. The President certainly makes no attempt to explain why he does not trust Mr Nxasana.

96.6. In any event, it is not necessary for the President to 'trust' Mr Nxasana in this sense. The position is different from that of the head of the National Intelligence Agency. In *Masetlha*, the Constitutional Court held that the President could remove the head of the NIA without a hearing solely because of a breakdown in the relationship of trust between them.[134] This was because of the need for the two to work closely together. But the NPA Act clearly specifies the grounds on which the NDPP can be removed from office. Losing the trust of the President is not one of them. Indeed, the NDPP is <u>not</u> part of the executive arm, but an independent body designed precisely to place distance between the Cabinet and prosecutors. As the Constitutional Court explained in

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[133] Nxasana Affidavit at para 61 page 525.

[134] *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC).

Legal Soldier:

> "*The most important change brought about by s 179 . . . is that a single national prosecuting post was created. Previously there was a direct link between the Minister of Justice and the various Attorneys-General, whose activities such Minister coordinated and to whom they reported. What s 179 did was to slot the NDPP in between the political head of the Department of Justice and the officers at the head of the provincial prosecutorial divisions. The effect of the change was to gather the strands of the country's prosecutorial services in the hands of one non-political chief executive officer directly appointed by the President.*"[135]

97. Moreover, a similar argument was rejected in *McBride*. The Minister of Police argued that, despite its finding that the underlying legislation was invalid, the Court should not set aside the disciplinary proceedings against Mr McBride. Bosielo AJ rejected that suggestion. Instead, he upheld the High Court's order which gave the Minister 30 days to institute disciplinary proceedings against Mr McBride.[136] In this instance, there is no need for such a via media, because the Minister and the President have expressly stated that Mr Nxasana is a fit and proper person for the position.

98. The only possible reason not to order Mr Nxasana's reinstatement is potential unfairness to Adv Abrahams. But in a position as important as the NDPP, that is no reason at all. This is not a labour dispute. It concerns the independence of one of the most important crime-fighting positions in the Republic. Any

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[135] *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* [2001] ZACC 12; 2002 (1) SA 1 (CC); 2001 (11) BCLR 1137 (CC) at para 19.

[136] *McBride* at paras 45-56.

possible prejudice to Adv Abrahams is far outweighed by the need to ensure the integrity and independence of the office.

99. There is another concern. If this court were to refuse to reinstate Mr Nxasana, it would create a dangerous precedent. In future disputes with the NDPP, the President could again illegally force the incumbent's removal, replace her with someone more pliant, and then claim that the deed could not be undone. That is plainly inconsistent with the need for independence.

100. To be clear, CASAC accepts that all the decisions taken by Adv Abrahams during his tenure should remain valid. That is plainly necessary to prevent massive disruption.[137] It argues only that he should cease to occupy the position that should never have been vacant.

The Deputy President's appointment of the new NDPP

101. This relief is opposed by the President on the following grounds:

101.1. When the President is unable to perform his duties or is out of the country, he may designate a Minister or another member of cabinet to perform the functions of President. It is not clear why such a person could not appoint the NDPP.

101.2. The Constitution does not prescribe time-limits for the exercise of any power of the President, so the 60-day time limit set out in the order is

[137] See *Democratic Alliance* and *McBride*.

invalid.[138]

102. CASAC concedes that another person who has been duly appointed as Acting President under section 90(1) of the Constitution may appoint the new NDPP. However, s 90(1) makes it clear that another Minister can be appointed only if the Deputy President is not available. That is why it reads: "*an office-bearer **in the order below** acts as President: (a) The Deputy President. (b) A Minister designated by the President.*" The Deputy President must first act as President. Only if for some reason he is unable to do so, may the President designate another person.

103. The section is clearly designed to deal with situations where, for example, the President and the Deputy President are overseas or incapacitated, or are killed. That is why it provides an ordered list of who will take over the mantle of President.

104. In any event, where the President's inability arises from a conflict in terms of s 96(2)(b), it would be non-sensical to allow the President to select the Minister who would assume his powers. The reason is simple: given the President's conflict of interest, the decision must be completely insulated from the President's influence.[139]

105. The purpose of the 60-day time limit in prayer 7 is to ensure that the order is implemented speedily. The appointment of a permanent NDPP is a matter of urgency and priority. If it is further drawn out, it will undermine the

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[138] President's AA paras 7.41 – 7.44 at pages 356 – 357.

[139] RA para 20.1 page 451.

independence of the NPA.

VI THE CONSTITUTIONAL CHALLENGE

106. We address the two constitutional challenges separately: first the power to extend the NDPP's tenure in s 12(4), and then the power of unilateral, indefinite and unpaid suspension in s 12(6).

107. It is first necessary to reiterate what is stated above about the independence of the NPA being guaranteed by s 179(4) of the Constitution. Prosecutorial independence is vital for a functioning criminal justice system, for the protection of the rights in s 35(3) of the Constitution, and for the battle against corruption. Indeed, it is in cases of corruption by public officials that the independence of the NPA will be most tested, and therefore must be most carefully protected.

Extension of tenure

108. Section 12(4) makes it possible for the President to extend the term of the NDPP beyond 65 years. It provides:

> "*(4) If the President is of the opinion that it is in the public interest to retain a National Director or a Deputy National Director in his or her office beyond the age of 65 years, and—*
>
> > *(a) the National Director or Deputy National Director wishes to continue to serve in such office; and*

> *(b) the mental and physical health of the person concerned enable him or her so to continue,*
>
> *the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a National Director's term of office shall not exceed 10 years.*"

109. On its face, section 12(4) undermines security of tenure. In *Justice Alliance of South Africa v President of the Republic of South Africa and Others,*[140] the Constitutional Court explained why a similar provision in relation to the Chief Justice was inconsistent with independence:

> *"In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that an extension may operate as a favour that may influence those judges seeking it. The power of extension in section 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it."*[141]

110. In *Justice Alliance*, the Constitutional Court confirmed that such extension of tenure provisions could be seen as benefits and form of political favour to the person who is given the extension. This could be seen as impairing

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[140] 2011(5) SA 388 (CC)

[141] *Justice Alliance of South Africa* at para 75.

independence and impartiality.

111. This reasoning was confirmed in *Helen Suzman Foundation v President of the Republic of South Africa and Others* with regard to the head of the Hawks:[142]

> *"Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to "behave" herself in anticipation of renewal."*[143]

112. This reasoning applies equally to section 12(4) of the NPA Act.

113. There is nothing to distinguish section 12(4) of the NPA Act from the provisions that were declared unconstitutional in *Justice Alliance* and *Helen Suzman.* As noted above, the NDPP sits between the judiciary and the executive. Like the judiciary, the NDPP enjoys a constitutional guarantee of independence. The principles that apply to the Chief Justice and the head of the Hawks apply with equal force to the NDPP.

114. Section 12(4) of the NPA Act allows the President to extend the tenure of the NDPP and the DNDPP. There is good reason to believe that this will or may incline an NDPP and a DNDPP who is approaching the age of 65, and wishes to remain in office, to ensure that he remains in the President's good books and does not do anything to earn the disapproval of the President.

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[142] 2015 (2) SA 1 (CC).

[143] *Helen Suzman* at para 81.

115. CASAC submits that the appropriate remedy is that section 12(4) must be declared invalid. It cannot be saved, and there is no need to afford Parliament an opportunity to remedy the defect.

Unilateral, indefinite suspension without pay

116. In this section, we deal with the attack on s 12(6) under three headings:

116.1. The constitutional flaw;

116.2. The Respondents' defences; and

116.3. Remedy.

The Constitutional Flaw

117. Section 12(6) reads in full:

> *(6)(a)* ***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.*

(b) The removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.

(e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, ***no salary or such salary as may be determined by the President.***

118. The constitutional flaw in s 12(6) arises from the combination of three factors:

118.1. It permits the President to suspend the NDPP or DNDPP without any form of prior or immediate parliamentary oversight. While removal can only happen with the agreement of Parliament, suspension is the prerogative of the President alone. That is the case, even if we accept that the President may only suspend the NDPP for one of the reasons

set out in s 12(6)(a).[144]

118.2. There are no timeframes for when the President must initiate the formal inquiry after he has suspended the NDPP or DNDPP. In the case of Mr Nxasana, this was done seven months after the President's decision to suspend. There is also no time limit for the conduct of the inquiry, or for the President to take a decision following a finding by the inquiry. This allows for a situation where the NDPP can be suspended for a lengthy period before his fitness to hold office is actually determined. This is starkly inconsistent with the strict time frames in the NPA for the President to inform Parliament that he or she wants the NDPP removed and for Parliament to vote on the matter.[145]

118.3. Finally, section 12(5)(e) of the NPA provides that the default is that the NDPP receives no salary, unless the President decides otherwise. Even then, the NDPP will only receive "*such salary as may be determined by the President*". This discretion as to whether to afford the NDPP a salary, and of so how much, is untrammelled and unguided.

119. When combined, these elements mean that the President has the power unilaterally and indefinitely to suspend the NDPP and DNDPP without pay. That is unconstitutional.

120. In *Helen Suzman Foundation*, the Constitutional Court confronted very similar

[144] See *Helen Suzman Foundation* at para 84.

[145] See section 12(6)(b) and (c).

provisions with regard to the independence of the head of the Hawks – s 17DA(2) of the South African Police Service Act 68 of 1995. Those provisions, like s 12(6), permitted the Minister of Police to:

120.1. Unilaterally suspend the Head of the Hawks;

120.2. Determine whether he would receive a salary during his suspension; and

120.3. Determine the length of the suspension.[146]

121. Mogoeng CJ held that the power to suspend for reasons like misconduct and inability was consistent with independence. But the holding of an inquiry "*as the Minister deems fit*" and "*the possibility of a suspension without pay and benefits provided for in subsection (2)(c)*" were not.[147] As the Chief Justice explained:

> "*Suspension without pay defies the exceedingly important presumption of innocence until proven guilty or the audi alteram partem rule and unfairly undermines the National Head's ability to challenge the validity of the suspension by withholding the salary and benefits. It irrefutably presumes wrongdoing. An inquiry may then become a dishonest process of going through the motions. Presumably, the Minister's mind would already have been made up that the National Head is guilty of what she is accused of. Personal and familial suffering that could be caused by the exercise of that draconian power also cry out against its retention. It is the employer's duty to expedite the inquiry to avoid*

[146] *Helen Suzman Foundation* at para 83.

[147] *Helen Suzman Foundation* at para 85.

lengthy suspensions on pay."[148]

122. The SAPS Act also permitted suspension and removal initiated by Parliament. In those instances, there was no possibility of suspension without pay. "*This suspension by the Minister and removal through a parliamentary process*", unlike unilateral, indefinite, and unpaid suspension under s 17DA(2), "*guarantees job security and accords with the notion of sufficient independence for the anti-corruption entity the state creates.*"[149] The NPA Act allows Parliament to compel the President to remove the NDPP, but makes no provision for a suspension pending the outcome of that process.

123. Because of both the ability of limitless suspension without pay, and removal without parliamentary oversight, the Constitutional Court declared the whole of s 17DA(2) of the SAPS Act invalid.

124. A similar result was reached in *McBride*. The High Court had found that the legislative provisions regulating the suspension and removal of the Executive Director of the Independent Police Investigative Directorate (**IPID**) were inconsistent with the constitutional guarantee of independence in s 206(6). While the provisions required the Executive Director to be paid during his suspension, the court still found that they were unconstitutional:

> "*The Minister's power to <u>unilaterally suspend</u> or remove the Executive Director poses substantial risks to the independence of IPID and its ability to investigate corruption and other abuses of power within the police service. An Executive Director who constantly fears for his or her job will be less inclined to carry out these responsibilities where this*

[148] Ibid.

[149] Ibid at para 91.

> *threatens to embarrass or expose the Minister or other high-ranking politicians. Furthermore, the absence of security of tenure undermines public faith in IPID, as a reasonable person would have grounds to believe that IPID lacks the independence to pursue its mandate vigorously.*"[150]

125. Kathree-Setiloane J stressed the risk that indefinite suspension posed to independence:

> "*The impugned legislative provisions sadly fall short of the standard of independence established internationally in that they permit the Minister of Police to remove the Executive Director without parliamentary oversight, without substantive constraints on the power of removal* <u>*or suspension, and in circumstances where the Minister may suspend the Executive Director indefinitely*</u>*.*"[151]

126. She declared the relevant sections unconstitutional invalid "*to the extent that they purport to authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or to remove from office the Executive Director*".[152] In order to cure the defect, the learned judge read-in the provisions of s 17DA of the SAPS Act which, following the Constitutional Court's judgment in *Helen Suzman Foundation* invalidating s 17DA(2), only permitted suspension following the initiation of an investigation by the National Assembly.

127. Her judgment and order were upheld by the Constitutional Court. As Bosielo AJ explained:

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[150] *McBride v Minister of Police and Another* [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) at para 55 (our emphasis).

[151] Ibid at para 58 (our emphasis).

[152] Ibid at para 77.1.

> "*In this case, acting unilaterally, the Minister invoked the provisions of section 16A(1) of the Public Service Act, placed Mr McBride on suspension and instituted disciplinary proceedings against him. Undoubtedly, such conduct has the potential to expose IPID to constitutionally impermissible executive or political control. That action is not consonant with the notion of the operational autonomy of IPID as an institution. Put plainly it is inconsistent with section 206(6) of the Constitution.*"[153]

128. Precisely the same considerations as were present in *Helen Suzman Foundation* and *McBride* apply in this matter. The NPA Act permits unilateral, indefinite suspension without pay, at the sole discretion of the President. That is not constitutionally defensible.

129. The only difference is that, unlike the Hawks and IPID, the removal of the NDPP is subject to parliamentary approval – either through the ability to restore the NDPP, or by initiating his removal. But that possibility does not affect the impact of the suspension power on the independence of the NDPP. As both *Helen Suzman Foundation* and *McBride* make clear, the risk of lengthy suspension without pay is sufficient to affect independence, particularly where that power is placed solely in the hands of the executive. The fact that the President is currently facing multiple criminal charges only demonstrates the need to isolate the NDPP from political interference.

Respondents' Defences

130. The Minister, who is responsible for defending the constitutionality of the NPA Act, raises only one defence. He argues that the provision is not problematic because "*[t]he NDPP has a right to challenge his suspension*" and "*the*

[153] *McBride CC* at para 40.

President has a duty in terms of the constitution to exercise his powers in accordance with the constitution."[154] The NDPP too appears to argue that the possibility of review saves the provisions from unconstitutionality.[155] These arguments were roundly rejected by the Constitutional Court in *Glenister II*:

130.1. First, it held that the possibility of an *ex post facto* review "*does not constitute an effective hedge against interference.*"[156] The Court held:

> "*In short, an ex post facto review, rather than insisting on a structure that ab initio prevents interference, has in our view serious and obvious limitations. In some cases, irreparable harm may have been caused which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. Only adequate mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking.*"[157]

130.2. Second, it pointed out that by holding that the structural mechanisms in place were inadequate to protect independence, it was not assuming that those powers would be abused:

> "*While it is not to be assumed, and we do not assume, that powers under the SAPS Act will be abused, at the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures*

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[154] Minister's AA at para 35, page 432.

[155] NDPP AA at paras 54.5, 54.7 and 54.10.

[156] *Glenister II* at para 247.

[157] Ibid.

entrenching their employment security to enable them to carry out their duties vigorously."[158]

131. The NDPP advances one further ground to defend s 12(6). He argues that in terms of the common law, the President is obliged to afford the NDPP a hearing before he is suspended and before deciding whether to grant him a salary or not.[159] This argument is equally misguided:

131.1. First, it is uncertain whether the NDPP has a right to be heard before the President takes a decision. In *Masetlha*, the Constitutional Court held that the President was not required to grant the head of the NIA a hearing before suspending or dismissing him.[160] Ironically, the President appears to support this position and argue that he is not required to comply with the *audi* principle before suspending the NDPP.[161]

131.2. However, the President may be mistaken. The suspension of the NDPP is different from suspension of the Head of the NIA because the NDPP's suspension is limited to the listed grounds in s 12(6)(a), and the law on procedural rationality has moved on since *Masetlha*.[162] But, even if the President is required to afford the NDPP a hearing, the same would have been true of the exercise of the power to suspend in both *Helen Suzman Foundation* and *McBride*. Yet in both cases the

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[158] Ibid at para 222. See also paras 234-236.

[159] NDPP's AA at paras 54.4-54.6.

[160] *Masetlha* at paras 77-78.

[161] President's AA at para 76, page 393 - 4.

[162] See *Albutt* and *Democratic Alliance*.

Constitutional Court found the provisions unconstitutional. Indeed, the Court did not even mention the right to a hearing as a relevant consideration.

132. Lastly, the President appears to argue that this Court should not consider the constitutional challenge because it does not arise on the facts of the case.[163] It is correct that the suspension of the NDPP is not directly relevant as Mr Nxasana has, subsequent to his suspension, left office.

133. However, the story of Mr Nxasana and the story of Mr Pikoli demonstrate the risks. Mr Nxasana was suspended for seven months before an inquiry was even instituted. He eventually agreed to leave office, precisely because of the ongoing suspension - which, it turns out, was entirely baseless. Similarly, Mr Pikoli was suspended for several years. Despite being cleared by the Ginwala Inquiry, he was still removed from office. Although he challenged his removal he, like Mr Nxasana, eventually accepted a golden handshake. Both instances demonstrate the potential for unilateral, indefinite, unpaid suspension to be used to push out an independent NDPP.

134. In any event, it is not necessary for the constitutional challenge to arise from the facts of the case in order for this court to consider it:

134.1. Our law permits abstract constitutional challenges to legislation. In *Lawyers for Human Rights*, the Constitutional Court held that although abstract challenges are generally undesirable, they are permissible in appropriate circumstances. The relevant factors to consider are:

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[163] President's AA at para 18, page 371 - 2.

> "*whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.*"[164]

In this matter, all those factors point to the need to consider an abstract challenge.

134.2. When the alleged unconstitutionality relates to independence, abstract challenges are vital. As the Constitutional Court has repeatedly held, the problem is not only the actual exercise of unconstitutional powers, but the subtle ways in which the mere existence of those powers undermines independence. The NDPP will refrain from acting independently because he fears indefinite, unilateral, unpaid, suspension, and the "*factual predicate*" will never arise.

134.3. If the *"factual predicate"* does arise, the damage will already have been done. The NDPP will have been suspended and will have to litigate for several years, and seek confirmation in the Constitutional Court, to attack the underlying power to suspend him. That is what occurred in *McBride* and *JASA*, and is obviously undesirable. It would have been preferable if an NGO had pre-emptively challenged the relevant statutory provisions so that Chief Justice Ngcobo's term was never extended and Mr McBride was never unconstitutionally suspended.

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[164] Ibid at para 16, quoting with approval *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 234 (O'Regan J).

134.4. That is why in both *Glenister II* and *Helen Suzman Foundation*, there was no factual predicate to the challenge. The challenges were raised in the abstract because the law was perceived to fall short of the constitutional requirement for an independent corruption fighting body. The constitutional injunction here is of course far more direct as the independence of the NDPP is expressly protected in s 179.

135. For all these reasons, the attack on s 12(6) of the NPA Act must succeed.

Remedy

136. CASAC seeks the following relief:

136.1. An order of notional severance declaring that section 12 of the NPA Act is unconstitutional to the extent that it permits unilateral, indefinite and unpaid suspension.

136.2. An order suspending the declaration of invalidity for 12 months to allow Parliament to remedy the constitutional defect;

136.3. An interim order of severance and reading in providing that during the suspension: -

136.3.1. An additional subsection shall be inserted after section 12(5)(a) that reads:

"(aA) The period from the time the President suspends the National Director or Deputy National Director to the time he or she decides whether or not to remove the National Director or Deputy National Director shall not

exceed six months"

136.3.2. Section 125(e) shall read:

"*The National Director or Deputy National Director provisionally suspended from office shall receive for the duration of the suspension, his or her full salary ~~[no salary or such salary as may be determined by the President]~~ ; and*

136.4. An order declaring that, should Parliament fail to remedy the defect within 12 months, the interim order will become final.

137. CASAC submits that such an order adequately balances the need to respect Parliament's role in determining how best to secure the independence of the NPA, while also protecting the independence of the institution in the interim.

138. This is substantially similar to the approach adopted in the most recent comparable case: *McBride*. There, the Constitutional Court endorsed the High Court's remedy of: (a) suspending the order of invalidity; and (b) temporarily reading the section so that the provision in s 17DA of the SAPS Act applied.

139. CASAC is not wedded to the particular wording for the proposed interim reading-in. If the Respondents wish to propose an alternative interim arrangement that would adequately protect the independence of the NDPP, CASAC will be happy to consider it. For example, this Court could adopt the approach in *Helen Suzman Foundation* and *McBride*: the section could be altered so that, like s 17DA of the SAPS Act, it only permits suspension following initiation of an investigation by Parliament. There may be other adequate alternatives. To date, however, the Respondents have not

suggested any better remedy.

CONCLUSION

140. CASAC respectfully submits that an order in terms of the notice of motion should be granted and that the order should include the costs of two counsel.

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14 July 2017

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23. South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs [2017] ZACC 7.

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