

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

In the application for admission as *amici curiae* of:

CENTRE FOR DEFENDING DEMOCRATIC RULE NPC Applicant

In re - the matters between:

CASE NO: 93043/15

**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

and

CASE NO: 62470/2015

CORRUPTION WATCH NPC

First Applicant

FREEDOM UNDER LAW NPC

Second Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL

SERVICES

Second Respondent

MXOLISI SANDILE OLIVER NXASANA

Third Respondent

SHAUN ABRAHAMS

Fourth Respondent

DIRECTOR-GENERAL OF JUSTICE

Fifth Respondent

CHIEF EXECUTIVE OFFICER OF THE NPA

Sixth Respondent

NATIONAL PROSECUTING AUTHORITY

Seventh Respondent

DEPUTY PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA

Eighth Respondent

CDDR'S HEADS OF ARGUMENT

a. Introduction

1 The Centre for Defending Democratic Rule's ("*the Centre*") seeks admission to these proceedings as *amicus curiae*¹ to: **(a)** place certain documents before Court² in the form of Mr Mxolisi Nxasana's security clearance form,³ and the affidavit of Simon Jabulani Ntombela, the Director for the State Security Agency's Domestic Branch;⁴ and **(b)** to advance submissions on these documents.

2 Advocate Shaun Abrahams, the Fourth Respondent in both applications, has consented to the Centre's admission to these proceedings as *amicus*.⁵ However, Mr Nxasana, Corruption Watch and Freedom under Law, all oppose the Centre's admission as *amicus*.⁶

3 The Council for the Advancement of the South African Constitution, the Applicant under case number 93043/15, has not indicated their attitude to the Centre's application.

¹ **Record of Application ("R")**: p 9, para 5.

² **R**: p 12, para 8.

³ **R**: pp 14 - 15, paras 15 – 17.

⁴ **R**: p 16, paras 18 – 20.

⁵ **R**: p 26, para 2.

⁶ **R**: p 67, para 4; p 60, para 6 and p 62, para 4.

b. *The Centre's admission as amicus*

4 Rule 16A of the Uniform Rules of Court is permissive and does not prohibit the introduction of evidence in support of its submissions by an *amicus curiae* in a High Court, if it is in the interests of justice. However, whether, and to what extent, to allow an *amicus* to adduce evidence in support of its submissions remains within the discretion of the High Court, guided by the interests of justice.⁷

(i) *The documentary evidence the Applicant seeks to introduce*

5 The primary reason the Centre seeks to be admitted to these proceedings is essentially to place Mr Nxasana's security clearance form,⁸ and the State Security Agency's Director of the Domestic Branch, Simon Jabulani Ntombela's, affidavit⁹ before Court. These documents are not part of the record currently before Court, despite the fact that the contents of these documents appear to be a matter of public record.¹⁰

⁷ *Children's Institute v Presiding Officer, Children's Court, Krugersdorp & Others* 2013 (2) SA 620 (CC) at [17], [39], and [40(d)]. See also Section 173 of the Constitution which gives courts the inherent power to regulate their own process, taking into account the interests of justice.

⁸ R: pp 39 – 50 (Annexure "BSM7"). See also pp 14 – 15, paras 15 – 17.

⁹ R: pp 51 – 55 (Annexure "BSM8"). See also p 16, paras 18 – 19.

¹⁰ R: p 124.

- 6 The Centre submits that the contents of these documents are relevant to determine whether Mr Nxasana remains fit and proper to hold the office of National Director of Public Prosecutions (“*NDPP*”).¹¹
- 7 It appears from the text of the settlement agreement,¹² and the submissions advanced by the various Applicants in these proceedings, that the President, Minister and Applicants are satisfied that Mr Nxasana is fit and proper to continue in the position as NDPP, hence any further enquiry into his fitness to hold office is not necessary.
- 8 In fact, with reference to the impugned settlement agreement, the Corruption Watch applicants assert that Mr Nxasana’s competence and integrity have been established.¹³ However, this surely cannot be. In fact, that he was privy to a plainly unlawful agreement, whereby he was enriched by an amount of money that he must have known he was not entitled to, demonstrates his unfitness for office.¹⁴
- 9 It is in any event irrelevant to the Centre that the President, or any of the other parties to these proceedings, do not dispute Mr Nxasana’s fitness to hold the office of the NDPP. On the contrary the Centre, acting on behalf

¹¹ **R**: p 12, para 8.

¹² Corruption Watch papers (Case No 62470/2015): Court File 1, Settlement Agreement, May 2015: p 363, clause 2.

¹³ Corruption Watch papers, para 57.3, p 38.

¹⁴ See also the Corruption Watch applicants’ characterisation of his conduct, at para 57.5, p 38.

of the interests of the “*poor and most vulnerable*”¹⁵ and “*the rights of ordinary citizens of South Africa*”,¹⁶ believes that the NDPP must be a person whose integrity and character is beyond reproach.

10 All the documentary evidence that was placed before the Cassiem Enquiry, including the two documents the Centre seeks to place before this Court, raise important questions about Mr Nxasana’s fitness to hold office.¹⁷

11 The documentary evidence, particularly the fact that Mr Nxasana failed to disclose his murder charge and refused to make it known when he was challenged by Ntombela to do so, at the very least raises questions about his integrity and ability to make sound judgments. These concerns must be raised with Mr Nxasana in an appropriate forum,¹⁸ like a Commission of Enquiry into his fitness to hold the office of NDPP.

¹⁵ R: p 103, para 3.2 and p 104, para 3.2.3.

¹⁶ R: p 104, para 3.2.3.

¹⁷ R: p 94, para 8.

¹⁸ R: pp 94 – 95, para 9.

12 The Centre submits that the appointment of the NDPP is a matter of “public concern”. The test is an objective one:¹⁹

“In determining whether the subject matter of the Commission’s investigation is indeed a matter of public concern, the test to be applied is an objective one. The legally relevant question is not whether the President thought that the subject matter of the enquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion. In this context, the Constitution requires that the notion of public concern be interpreted so as to promote the spirit, purport and objects of the Bill of Rights and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern.”

¹⁹ *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC) at [171], cited in *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC) at [19].

13 Section 9 of the National Prosecuting Authority Act, 32 of 1998, provides that:

“9 Qualifications for appointment as National Director, Deputy National Director or Director

(1) *Any person to be appointed as National Director, Deputy National Director or Director must- ...*

(b) *be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.”*

14 In order to determine whether a person is “*fit and proper*”, our Courts have determined a three-stage enquiry – albeit in the context of the Admission of Advocates Act, 74 of 1964 and the Attorney’s Act, 53 of 1979 – as follows:²⁰

“First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry.

²⁰ **General Council of the Bar of South Africa v Geach & Others** 2013 (2) SA 52 (SCA) at [50].

Second, it must consider whether the person concerned “in the discretion of the court” is not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment.

And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.”

- 15 The Centre submits that Mr Nxasana’s decision not to disclose his previous murder charge raises serious questions about his “*conscientiousness and integrity*”, to be entrusted with the responsibilities of the office of the NDPP. This is because the overarching requirement for suitability to hold the office of NDPP is to be “*fit and proper*”. This means that the candidate, or Mr Nxasana in this case, must have the capacity to do the job well and the character to match the importance of the office. Experience, integrity and conscientiousness are all intended to help determine a possible appointee’s suitability “*to be entrusted with the responsibilities of the office concerned*”. Similarly, laziness, dishonesty and general disorderliness must of necessity disqualify a candidate. The

person entrusted with the responsibilities of the NDPP must exercise a strong disposition to the truth.²¹

16 Contrary to the submissions advanced by the Applicants, Mr Nxasana's fitness to retain office cannot be based on the view of the President or the Minister. In addition, whilst a determination may involve a value judgment, it does not mean that the decision and evaluation lies within the sole and subjective preserve of the President. Moreover, given that the NDPP must perform its functions without fear, favour or prejudice, it is imperative that the exercise of those powers are executed with the kind of integrity and character that is completely beyond reproach. Finally, the position of the NDPP is vitally important to the functioning of our democratic state, operating within constitutional bounds,²² and as such the NDPP must demonstrate an ability to take decisions that foster sound judgment in the execution of his duties.

17 Therefore, Mr Nxasana's ability to resume office, should this Court so decide, must be objectively determined.

²¹ *Helen Suzman Foundation v President of the Republic of South Africa & Others* 2015 (2) SA 1 (CC) at [63] – [64].

²² *Democratic Alliance* above, at [20] – [26].

c. *Is the Centre's motivation to participate in these proceedings questionable?*

18 Mr Nxasana raises four points of concern to suggest that the Centre has some ulterior motive for seeking to participate in these proceedings.

19 The first is that the Centre has only recently been formed, and therefore could not have been in possession of the documents it now seeks to place before this Court. Moreover, Mr Nxasana takes the view that "*the timing of the CDDR's registration and attempted intervention in this matter is concerning ...*" because "*it appears that its formation was motivated by this case and by [his] role in it following the filing of [his] explanatory affidavit*".²³

20 The reason why the Centre was formed is to represent ordinary citizens of South Africa, but particularly those that have been marginalised.²⁴ Its formation is not motivated by this case, nor Mr Nxasana's role in these proceedings. Mr Nxasana himself places no evidence, other than mere conjecture, to support this weak attempt to cast aspersions on the Centre's involvement in these proceedings.

²³ R: p 71, para 25.

²⁴ R: p 103, para 3.2; p 104, paras 3.2.2.6 and 3.2.3.

21 The second concern raised by Mr Nxasana is that the Centre contradicts itself regarding the reason for its admission to these proceedings. Mr Nxasana attempts to suggest that the documentary evidence and the submissions which the Centre seek to make, apart from being irrelevant, are contradictory.²⁵ This is not correct. The relevance of the contents of the documentation bears on the relief this Court is called to grant by the Applicants. The Centre's submissions advanced in the preceding section are relevant to the outcome of these proceedings.

22 The third concern is formulated as an invitation requiring the Centre to disclose how it came to possess the documentary evidence it now seeks to introduce to these proceedings.²⁶ Apart from the fact that the documentary evidence which was to serve before the Cassiem Enquiry have been a matter of public record since 6 May 2015, and have featured in newspaper articles, one such being Dispatch Live on 12 May 2015,²⁷ the manner in which the Centre attained the information is irrelevant to these proceedings.

23 Finally, Mr Nxasana accuses the Centre's deponent, Mr Matiwane, of being associated with the Gupta family, because he contributed opinion pieces to newspaper houses owned or associated with the Gupta family.²⁸ In his reply Mr Matiwane explains that he has written a number of opinion

²⁵ R: pp 71 – 72, paras 26 – 32.

²⁶ R: pp 72 – 73, paras 33 – 35.

²⁷ R: p 124.

²⁸ R: p 73, paras 36 – 38.

pieces since last year and has approached a number of newspaper houses, including the ones listed by Mr Nxasana, to have them published. The only newspaper houses that published the opinion pieces, without remuneration, are those mentioned by Mr Nxasana. This does not mean that Mr Matiwane has an illicit association with the Gupta family. There is certainly no corrupt motive for him to participate in these proceedings, as suggested by Mr Nxasana.

- 24 The Centre's involvement in these proceedings is not part of a strategy to ensure that Mr Nxasana does not return to public service as Mr Nxasana suggests.²⁹ This is not only unsubstantiated conjecture, but defamatory. Whether or not Mr Nxasana returns to public service as the National Director of Public Prosecutions is a decision for this Court.

d. Conclusion

- 25 In conclusion, the Centre submits that it is in the interests of justice for it to be admitted as *amicus* and to advance the submissions it seeks to do. The Centre's contentions may materially affect the outcome of the case, insofar as it relates to the nature of the relief the Court is called upon to craft.³⁰

²⁹ R: p 73, para 38.

³⁰ *Minister of Justice & Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) at [30].

26 In the circumstances, the Centre asks this Court to exercise its discretion in favour of admitting the Centre to these proceedings as *amicus* and to afford it an opportunity to advance its submissions at the hearing of this matter.

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21 August 2017

LIST OF AUTHORITIES

1. ***Children's Institute v Presiding Officer, Children's Court, Krugersdorp & Others*** 2013 (2) SA 620 (CC)
2. ***President of the Republic of South Africa & Others v South African Rugby Football Union & Others*** 2000 (1) SA 1 (CC)
3. ***Democratic Alliance v President of the Republic of South Africa & Others*** 2013 (1) SA 248 (CC)
4. ***General Council of the Bar of South Africa v Geach & Others*** 2013 (2) SA 52 (SCA)
5. ***Helen Suzman Foundation v President of the Republic of South Africa & Others*** 2015 (2) SA 1 (CC)
6. ***Minister of Justice & Constitutional Development and Others v Southern Africa Litigation Centre and Others*** 2016 (3) SA 317 (SCA)