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

CASE NO 62470/2015

In the matter between:

CORRUPTION WATCH (RF) NPC	First Applicant
FREEDOM UNDER LAW (RF) NPC	Second Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MXOLISI SANDILE NXASANA	Third Respondent
SHAUN ABRAHAMS	Fourth Respondent
DIRECTOR GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
CHIEF EXECUTIVE OFFICER OF THE NATIONAL PROSECUTING AUTHORITY	Sixth Respondent
NATIONAL PROSECUTING AUTHORITY	Seventh Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Eighth Respondent
THE HELEN SUZMAN FOUNDATION	*Amicus curiae*

AMICUS CURIAE'S **HEADS OF ARGUMENT**

INTRODUCTION

1. On 14 August 2017, by way of an order of this Court, the Helen Suzman Foundation (**"the HSF"**) was admitted as *amicus curiae* in these proceedings. The HSF was further directed to deliver written submissions

and granted leave to make oral submissions at the hearing of the matter, subject to any directions to be issued by the Court hearing the application. These are the written submissions filed on behalf of the HSF.

2. The former National Director of Public Prosecutions, Mr Mxolisi Sandile Nxasana ("**the NDPP"**) vacated his office after a long standing dispute between him, the President of the Republic of South Africa ("**the President**") and the then Minister of Justice and Correctional Services ("**the Minister**").

3. Since assuming the position of the NDPP, Mr Nxasana faced a nefarious campaign by senior members of the office of the National Prosecuting Authority (**"the NPA"**) to undermine his leadership and in particular his standing with the President.[1] The National Deputy Director, Advocate Jiba and the Special Director: Specialised Commercial Crime Unit, Advocate Mrwebi, appeared not to accept the appointment of Mr Nxasana as the NDPP. They had launched a similar campaign to disqualify Mr Stanley Gumede who was widely tipped to take up the position of the NDPP before Mr Nxasana's appointment.[2]

4. Adv Jiba and Adv Mrwebi have been found not to be fit and proper persons and have subsequently been struck off the roll of advocates.[3] It cannot be seriously disputed that these individuals were the direct cause of the dysfunctional state of the office of the NPA by actively undermining the leadership of Mr Nxasana and to the extent of further poisoning the President's mind about the possibility of Mr Nxasana reinstating criminal

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1 Para 12 of the third respondent's explanatory affidavit (**"the EA"**).

2 EA para 14.

3 *General Council of the Bar of South Africa v Jiba & Others 2017* (2) SA 122 (GNP), see also *Freedom Under Law v National Director of Public Prosecutions & Others* 2014 (1) SACR 111 (GNP) where the conduct of these officials was severely criticised by this Court.

charges against the President. In this context, Mr Nxasana's tenure as the NDPP would experience an early demise.

5. Central to this matter is what circumstances the head of the NPA, the NDPP, may be removed from office. The starting point is section 12 of the National Prosecuting Authority Act, 1998 (**"the NPA Act"**), which provides an exhaustive and prescriptive list of circumstances in which the NDPP may be removed.

6. The President purported to act under section 12(8) of the NPA Act when removing Mr Nxasana from office. This section governs the removal of the NDPP by the President, only in circumstances where the NDPP has requested that he or she be removed, and then only "*on account of continued ill-health"* or "*for any other reason which the President deems sufficient"*. As the record shows, and confirmed by Mr Nxasana, he did not make a request to be removed or to vacate the office of the NDPP. The request constitutes a jurisdictional fact in order for section 12(8)(a) to find application in the removal of the NDPP. Thus, where the NDPP does not make a request, that provision of the Act cannot be invoked. Thus, as we shall submit, the President purported to act under a provision where no jurisdictional fact existed.

7. The ongoing dispute between the President and Mr Nxasana culminated in a settlement agreement being reached and signed in May 2015. Mr Nxasana understood that the settlement agreement concluded by him and the

President and the Minister to be nothing more than the settlement of contractual and litigious disputes.[4]

8. Mr Nxasana stated that he never had any intention to make a request to vacate the office, and did not feel compelled to make such a request since at all times he considered himself to be fit and proper to hold the office of the NDPP.[5] Mr Nxasana wanted to continue in that position. Instead, Mr Nxasana, on his version, consented to the settlement agreement only when he considered the dispute between him and the President to be intractable and that the dispute was interfering with the integrity and the functionality of the NPA.[6] Mr Nxasana's version is confirmed by documents belatedly filed by the President to supplement the record.[7]

9. Mr Nxasana has felt compelled, having read and considered the respondents' answering affidavits to this application, to provide an explanatory affidavit and set out the material facts (which are contradictory to those set out in the respondents' answering affidavits), solely for the purposes of providing this Court with a complete and true reflection of the circumstances surrounding the conclusion of the settlement agreement, and to assist this Honourable Court.[8]

10. The President's version, on the other hand, is that Mr Nxasana requested that he be allowed to vacate his office as the NDPP *"citing the continued discord with the senior members of the National Prosecuting Authority and*

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4 EA para 26.

5 EA paras 32 and 33.

6 EA para 27.

7 As summarised by the applicants at paras 37 to 37 of the applicant's heads of argument dated 18 February 2017 ("the applicants HOA).

8 Paras 5, 9 – 31, 51, 54 of the EA.

the enquiry as the primary reason. [The President] deemed the reasons to be sufficient and accepted the request. The request was not reduced to writing."[9] The President cannot, and does not,[10] deny that this version is inconsistent with the documentary evidence in question, particularly the letter from Mr Nxasana's attorneys of 10 December 2014 which states explicitly that *"it has never been the NDPP's intention to resign"*.[11]

11. Instead, the President only alleges that *"the disclosed documents contradict the signed settlement agreement"*.[12] The President's assertion is, with respect, unsustainable since:

11.1 There is nothing in the settlement agreement which indicates that Mr Nxasana requested to vacate his office.

11.2 The President recognised in the settlement agreement, that the NDPP is professionally competent, sufficiently experienced and conscientious and has the requisite integrity to hold a senior public position both in the public and the private sector.[13]

12. Based on these material recordals contained in the settlement agreement, it appears that no proper basis existed for the President to find that there were sufficient reasons for Mr Nxasana to wish to vacate the office of the NDPP. Thus, these recordals are at odds with the President's version that Mr Nxasana requested to be removed. In any event, even if Mr Nxasana had made the request (which does not appear to be supported by objective facts),

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9 1st Respondent's AA, para 12, Bundle p 551.

10 1st Respondent's AA to the applicant's further supplementary affidavit, para 17.1, Bundle p 738.

11 As quoted at para 40.3 of the applicant's further supplementary affidavit, Bundle p 643.

12 Para 15.2 of 1st Respondent's AA to the applicant's further supplementary affidavit, Bundle p 737.

13 Settlement Agreement Bundle pp 168-171.

the President could not accept that request whilst at the same time, recognising that Mr Nxasana remained capable, fit and proper to occupy the position of the NDPP.

13. Accordingly, it is submitted that Mr Nxasana's version should be accepted as it is supported by the documents and the objective facts surrounding the conclusion of the settlement agreement. The President's version, however, is contradicted thereby and the President is unable to explain this contradiction. In any case, judicial reviews, such as this application, may only be brought by way of application, regardless of any disputes of fact. If this Honourable Court ultimately cannot find for the applicants without resolving a critical dispute of fact on the papers, then it is respectfully submitted that it would be appropriate to have oral evidence heard by this Court on the specific disputed issues of fact as contemplated under rule 6(5)(g) of the Uniform Rules of Court.

14. If the Court accepts Mr Nxasana's version, it is submitted that this is the end of the matter and the purported removal of Mr Nxasana from the office of the NDPP under section 12(8) of the NPA Act was clearly unlawful and *ultra vires.*

15. If the President's version is accepted, however, or if the Court considers Mr Nxasana's willingness to agree to the settlement agreement as conduct amounting to a request to vacate his office, this, it is submitted, is still not the end of the enquiry. "Vacation" under section 12(8), properly interpreted, simply cannot include leaving office pursuant to a settlement agreement premised on being paid out any amounts to which the NDPP would not otherwise be entitled upon resignation, or being given any *quid pro quo*. Vacation simply means resignation, without the State bearing any burdens

beyond those attendant on resignation and set out explicitly under section 12(8). As such, even if the President's version of the facts is accepted, Mr Nxasana's leaving of office pursuant to a payment does not fall within section 12(8) and is not otherwise permissible in terms of the NPA Act. This is even more so having regard to the constitutional imperative of independence of the prosecutorial services, which will be discussed in detail below.

16. Furthermore, section 12(8) of the NPA Act provides for two grounds upon which a request may be allowed by the President, being on account of continued ill-health or, for any other reason which the President deems sufficient. Even if the NDPP makes a request to vacate his office, and even if it is accepted that a vacation on the basis of a settlement agreement for compensation, such as the one in the present case, qualifies as a vacation of office under section 12(8), the NDPP may still only be removed if one of these two requirements are met.

17. There has never been an allegation that Mr Nxasana was removed due to continued ill-health. Instead, the President has made it clear that Mr Nxasana was removed for reasons which the President deemed sufficient, in particular that Mr Nxasana’s job at the NPA was becoming more difficult due to tensions with other senior members of the NPA and the shadow of the enquiry initiated against him by the President under section 12(6) of the NPA Act.

18. It is necessary to determine whether these reasons are sufficient for purposes of section 12(8). The HSF submits from the outset that the words *"for any other reason which the President deems sufficient*" do not provide the President with unfettered discretion bolstered by a blank cheque, to accept a request from the NDPP to vacate his office on any reason, which in

the President's subjective opinion, is sufficient. Ultimately, the President's conduct is subject to the Constitution and conduct inconsistent with it is plainly unlawful – this including the exercising of the President's power under section 12(8) of the NPA Act.

19. The applicants have already set out the constitutional imperative under section 179 of the Constitution that the NPA exercises its functions *"without fear, favour or prejudice"*. This plainly means that the NPA's functions must be exercised independent from executive, political or other interference. The HSF will not repeat the submissions but will, further herein below, make submissions on the nature of the independence that is required to be given to the NDPP in light of:

19.1 The Bill of Rights; and

19.2 South Africa's international law obligations.

20. It is in light of this independence, as well as with due regard to the President's obligations under the Bill of Rights, and South Africa's international law obligations, that section 12(8) of the NPA Act and, in particular the requirement of sufficient reasons, must be interpreted.

CONSTITUTIONAL AND INTERNATIONAL DUTIES

21. In determining the constitutionality of the President's decision to remove Mr Nxasana under section 12(8) of the NPA Act, we respectfully submit that this Honourable Court is enjoined to consider South Africa's international law obligations (section 233 of the Constitution). We shall submit that -

21.1 In the present case, it is necessary to consider those international instruments that require the State to establish mechanisms that combat

corruption and organised crime (amongst other forms of morally and constitutionally destructive crimes), as well as those measures that have been recognised as central to the realisation of the objectives of an international instrument.[14]

21.2 The lawmakers of the Constitution should not lightly be presumed to have authorised any law which might constitute a breach of the obligations of the State in terms of international law.[15] The provisions of the NPA Act could not have been intended to be applied in a manner that is in breach of South Africa's international law obligations.

22. Independent prosecutorial bodies, ie bodies which are sufficiently protected from executive, political and other interference, are indispensable in the fight against, *inter alia*, corruption and organised crime. The NPA is one such body. Prosecutors must not be subject to the influence of any of the branches of government.[16] Where the NPA's independence is undermined, legislatively or otherwise, it will in turn impact on the capacity of these bodies effectively and efficiently to combat these vices and to fulfil their constitutional, legislative and international law mandates.

23. Before turning to the State's obligations under international law, we outline its obligations under the Constitution and we have regard to constitutional provisions that pertain to the policing and combatting of corruption and organised crime.

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[14] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) at paras [104] – [112] and [114].

[15] AZAPO & Others v President of the Republic of South Africa 1996 (4) SA 671 (CC) at 688B-C.

[16] *Glenister II.*

24. Section 7(2) of the Constitution obliges the state to "*respect, protect, promote and fulfil the rights in the Bill of Rights*". Thus, in addition to imposing a negative obligation on the State "*not [to] act in a manner which would infringe or restrict [a] right*"[17] in the Bill of Rights, the State must, in appropriate circumstances, take deliberate and reasonable steps to give effect to these rights. These can be either through the enactment or amendment of legislation, the adoption of policies, or through other State-directed measures. This aspect of the state's constitutional obligations has been repeatedly affirmed by the courts.[18]

25. This positive obligation applies in respect of both socio-economic and civil and political rights.**[19]**

26. In addition to its positive obligation, the executive and the legislature are also obliged to refrain from taking any measures which unjustifiably infringe any rights in the Bill of Rights.

27. When a court interprets these provisions, it is required under section 39(1)(a) of the Constitution to "*promote the values that underlie an open and democratic society based on human dignity, equality and freedom*". The positive duties imposed on the State – in particular the President - should not

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[17] *Loc cit.*

[18] See, for example, *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at para [31], *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para [44], *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Carmichele*, *ibid*; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA); *City of Cape Town v Rudolph* 2004 (5) SA 39 (C); *Mohamed v President of the RSA* 2001 (3) SA 893 (CC).

[19] See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at paras [11] – [14]; *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC) at paras [19] – [20] and paras [26] – [47]; *Minister of Health v Treatment Action Campaign and Others* No 2 2002 (5) SA 721 (CC) at paras [23] – [73] and paras [82] – [95]; *Khosa v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* (6) BCLR 569 (CC) at paras [40] – [67]; *Carmichele*, *supra* note **Error! Bookmark not defined.**, para [44]; *S v Baloyi (Minister of Justice and Another Intervening*) 2002 (2) SA 425 (CC) at para [11].

be restrictively construed: a broader and more generous interpretation would be the one that accords with the injunction of section 39(1)(a).[20]

28. These obligations further provide for the requirement that the state should avoid taking measures that unnecessarily or unreasonably diminish its capacity to fulfil, promote, protect or respect these rights, or inhibit the realisation of constitutionally guaranteed rights by their holders.

29. Since it has been recognised domestically – in legislation and case law – that corruption and organised crime can have a profoundly negative impact on the capacity of the state to protect, promote and fulfil the rights in the Bill of Rights and on the capacity of individuals to realise these rights, conduct of the state that does not ensure adequate independence on the part of a body tasked with combatting corruption and organised crime fails to satisfy these constitutional requirements.[21]

30. Further as we demonstrate below, there is a recognised danger and possibility that an infringement on the independence of prosecutorial bodies, such as the NPA, provides for a fertile ground upon which corruption can flourish. Corruption and organised crime have a pervasive and destructive effect on the ability of the State to fulfil, and of individuals to realise, a number of fundamental rights contained in the Bill of Rights, including the rights to equality, dignity, freedom and security of the person, as well as the

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[20] This reading would be consistent with section 41(1)(b) of the Constitution read with section 87 and item 1 of schedule 2 of the Constitution. In this regard, see Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA); Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA); Minister of Safety and Security v Carmichele, ibid; Minister of Safety and Security v Hamilton 2004 (2) SA 216 (SCA)).

[21] See also section 41(1)(b) of the Constitution, which requires the government in all its manifestations to "*secure the well-being of the people of the Republic*" and by the oath of office of the President prescribed by section 87, read with item 1 of schedule 2, to "*protect and promote the rights of all South Africans"*.

rights of access to housing, healthcare, food and water, and social security. As stated in *Glenister II*:

> "*Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights. Organised crime and drug syndicates also pose a real threat to our democracy. The amount of drugs confiscated inside our borders testifies to this. The sophisticated international network that is responsible for transporting these drugs requires urgent attention.*
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> "*For our country to win the war against these serious crimes, we need to enhance the capacity of the police to prevent, combat and investigate these crimes and other national priority crimes.*"[22]

31. In the Promotion and Combating of Corrupt Activities Act, 2004 ("**PRECCA**"), for example, it is stated that "*corruption and related corrupt activities undermine . . . rights, endanger the stability and security of societies, undermine the institutions and values of democracy . . . jeopardise sustainable development, the rule of law and the credibility of governments".*

32. The Constitutional Court, in *S v Shaik*,[23] observed that corruption is "*antithetical to the founding values of our constitutional order*".[24] Similarly, in

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[22] *Glenister II* at 57 to 58.

[23] *S v Shaik* 2008 (2) SA 208 (CC).

[24] *Ibid*, at para [72].

South African Association of Personal Injury Lawyers v Heath,[25] it said that corruption undermines:

> "*. . . the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state*".[26]

33. The NPA is an indispensable institution in combatting and punishing acts of corruption. But it can realistically fulfil this function only if its structural independence and integrity is honoured and protected. In the earlier Supreme Court of Appeal case of *S v Shaik*,[27] the following observations were made about the pervasive and destructive effects of corruption on the realisation of constitutional rights:

> "*The seriousness of the offence of corruption cannot be over-emphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that with its putrefying effects is halted. Courts must send out an unequivocal message*

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[25] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

[26] *Ibid*, at para [4].

[27] *S v Shaik* 2007 (1) SA 240 (SCA).

that will not be tolerated and that punishment will be appropriately severe. In our view, the trial Judge was correct not only in viewing the offence of as serious, but also in describing it as follows:

> *'It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream.'*

It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies."[28]

34. The Supreme Court of Appeal summed up the above succinctly in *S v Sadler*,[29] where it held that:

> "*[i]t is unnecessary to repeat yet again what this Court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration*."[30]

35. The negative relation between corruption and organised crime, on the one hand, and the diminished capacity to protect, promote and fulfil various

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[28] *Ibid*, at para [319].

[29] *S v Sadler* 2000 (1) SACR 331 (SCA).

[30] *Ibid*, at para [13]. This dictum was referred to by the courts in *S v Kwatsha* 2004 (2) SACR 564 (E) at page 569; and *S v Salado* 2003 (1) SACR 324 (SCA) at para [3].

human rights, on the other hand, has been recognised by our government,[31] the United Nations,[32] the World Bank,[33] the Organisation for Economic Co-operation and Development ("**OECD**"),[34] the African Union,[35] and the South African Development Community.[36]

36. It has been noted that the effects of corruption of those entrusted to enforce the law and other public officials include "*distrust of police and politicians, susceptibility to the influence of organized crime, loss of tax and other revenues, resulting in economic losses, a climate of cynicism and a general disregard for standards of ethical behavior, suppression of or unfair treatment of minority groups or the less-privileged persons in the society, and*

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[31] Fraser-Moleketi, Géraldine. "*Statement by Ms. Géraldine Fraser-Moleketi, Minister for the Public Service and Administration, Republic of South Africa*", High-Level meeting: the OECD Anti-Bribery Convention – Its Impacts and Its Achievements. Rome, 21 November 2007, http://www.oecd.org/dataoecd/12/47/39867375.pdf, page 4: *"corruption is fundamentally undemocratic and undermines the legitimacy and credibility of democratically elected governments, responsible and accountable public officials … corruption is systemic and its effects undermine and distort the value systems of all societies and their peoples."*

[32] See the preamble and foreword to the United Nations Convention against Corruption, resolution of the UN General Assembly, A/RES/60/207, 22 December 2005, and United Nations Anti-Corruption Toolkit (2002) http://www.unodc.org/pdf/crime/toolkit/f5.pdf..

The UN Corruption Convention was adopted by Resolution A/RES/58/4 of 31 October 2003, at the fifty-eighth session of the General Assembly of the United Nations, and came into force on 14 December 2005. South Africa became a party to the UN Corruption Convention by ratification on 22 November 2004.

[33] World Bank, "*Report on Governance and Development*" (1992): *"It is generally agreed that corruption threatens economic growth, social development, the consolidation of democracy, and the national morale. Corruption hinders economic efficiency, diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures and deters foreign investors. It also erodes the constituency for development programmes and humanitarian relief."*

[34] See the preamble to OECD Convention on Combating Bribery of Foreign Public Officials in International Business. This was entered into force on 15 February 1999, and South Africa became a party to it by accession on 19 June 2007. South Africa is one of seven non–OECD member countries that are party to the Convention.

[35] See the preamble and article 2 of the African Union Convention on Preventing and Combating Corruption, which was signed on 11 July 2003. South Africa ratified the Convention on 11 November 2005, and it entered into force on 5 August 2006.

[36] See the preamble to the South African Development Community Protocol against Corruption was signed by the Heads of State of all 14 SADC member states on 14 August 2001. South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.

inadequate or inappropriate performance of their duties by police and government officials".[37]

37. The state is obliged to ensure that the bodies which deal with crime and corruption are sufficiently independent in order to ensure that the rights in the Bill of Rights are respected, protected, promoted and fulfilled. The independence of the body which is legislatively mandated to prosecute cases of corruption and crime in general is an essential feature of the ability to fulfil its mandate effectively, and cannot be compromised.

38. This requirement is affirmed in a number of international instruments on the issue.[38] The Republic has signed and ratified six international agreements directly relating to corruption and organised crime:

38.1 the United Nations Convention against Corruption ("**the UN Corruption Convention**");[39]

38.2 the African Union Convention on Preventing and Combating Corruption ("**AU Convention**");[40]

38.3 the OECD Convention on Combating Bribery of Foreign Public Officials in International Business ("**OECD Convention**");[41]

38.4 the United Nations Convention against Transnational Organised Crime ("**the UN Organised Crime Convention**");[42]

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[37] KRATCOSKI INSTITUTIONAL AND POLICE CORRUPTION Police Practice and Research, 2002, Vol. 3, No. 1, pp. 73–78.

[38] See, also, *Impact of corruption on the human rights based approach to development.* United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme. September 2004, http://www.undp.org/oslocentre/docs05/Thusitha_final.pdf, at page 23.

[39] See fn 32 above.

[40] The AU Convention was adopted on 1 July 2003 and entered into force on 5 August 2006. It was signed by South Africa on 16 March 2004 and ratified on 11 November 2005.

[41] See fn 34 above.

38.5 the South African Development Community ("**SADC**") Protocol Against Corruption, 2001 ("**SADC Corruption Protocol**");[43] and

38.6 the SADC on Combating Illicit Drugs ("**SADC Drugs Protocol**").[44]

39. In 2004, Parliament enacted PRECCA, giving effect to UN Corruption Convention and the SADC Corruption Protocol.[45] It also appears that PRECCA covers South Africa's obligations under the OECD Convention.[46]

40. **UN Corruption Convention**

40.1 Article 11 of the UN Corruption Convention imposes an obligation on South Africa to guarantee the independence of all bodies tasked with combatting corruptions. Under Article 36 of the UN Corruption Convention:

> "*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry*

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[42] The UN Organised Crime Convention was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations and came into force on 29 September 2003. South Africa became a party on 20 February 2004.

[43] The SADC Protocol was adopted on 14 August 2001 and came into force on 6 August 2003.

[44] The SADC Drugs Protocol was adopted on 24 August 1996 and entered into force on 20 March 1999. South Africa is a signatory to the SADC Drugs Protocol and has ratified the Protocol.

[45] See Preamble to PRECCA.

[46] OECD (2008) "*Specialised anti-corruption institutions. Review of models*" Paris: OECD, http://www.oecd.org/dataoecd/7/4/39971975.pdf, at page 6. Whilst PRECCA is silent on the creation of a specific institution to combat corruption, it nonetheless confers certain investigation powers on the NPA in terms of sections 22, 23 and 27 of the NPA Act. Indeed, the legislature has a choice, either to establish the anti-corruption agency as an independent agency, or locate it either within the SAPS or the NPA. See *Glenister II* at 383A-B

out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks."

40.2 Article 26 of the UN Corruption Convention makes it clear that measures must be taken to protect all members of the justice system, which would naturally include members of the NPA, from intimidation and interference:

"*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

…

"(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention."

40.3 It is submitted that the state is, of course, entitled to employ measures to prevent corruption and strengthen the moral and prosecutorial integrity within the NPA, and this includes disciplinary and removal measures under section 12 of the NPA Act. Under Article 11 of the UN Corruption Convention, however, if such measures are implemented, they must be done "*in accordance with the fundamental principles of the nation's legal system*" and in accordance with the prosecutorial independence established under South Africa's constitution. Where it appears that the section 12 mechanisms are employed for ulterior purposes, involving removing a credible and competent NDPP (in the

pretence of settling a suspicious dispute), there is a violation of the Constitution and South Africa's international law obligations.

40.4 Independence does not merely envisage bodies acting separately and without undue influence from the judicial, executive and legislative arms of government. The guarantee must include a duty on the state to prevent undue interference by third parties with the functions and processes of such bodies.[47]

41. **The AU Convention**

41.1 Article 5(3) of the AU Convention provides that state parties undertake to "*[e]stablish, maintain and strengthen independent national anti-corruption authorities and agencies*".

41.2 Article 20(4) reinforces the importance of independence in more direct terms. It states that "*the national authorities or agencies shall be allowed the necessary independence and autonomy, to be able to carry out their duties effectively.*"

42. **The OECD Convention**

42.1 In 2013, the OECD undertook a review of the models of the various specialised anti-corruption institutions internationally. The OECD report - "*Specialised anti-corruption institutions. Review of models*" (2013) ("**the OECD Report**") identified that the main criteria for effective anti-

[47] Hussman et al, "*Institutional arrangements for corruption prevention: Considerations for the implementation of the United Nations Convention against Corruption Article 6*", Anti Corruption Resource Centre, 2009, at page 12.

corruption agencies is their independence, specialisation, adequate training and resources.[48]

42.2 The OECD Report defined independence as follows:

> "*Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. Thus, genuine political will to fight corruption is the key prerequisite for independence. Such political will must be embedded in a comprehensive anti-corruption strategy. The independence level can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for the director's appointment and removal, proper human resources management, and internal controls are important elements co prevent undue interference. Independence should not amount to a lack of accountability: specialised services should adhere to the principles of the rule of law and human rights, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work. Furthermore, no single body can fight corruption alone. Inter-agency co-operation, and co-operation with civil*

[48] The OECD drew these criteria from the provisions of UN Corruption Convention as well as the Council of Europe Criminal Law Convention on Corruption.

society and businesses are important factors to ensure their effective operations".[49] (emphasis added)

43. The OECD Report also found that:

> *"[w]hile formal and fiscal independence is required by international instruments and is an important factor influencing the institution 's performance, it does not in itself guarantee success. Any kind of formal independence can be thwarted by political factors. It is genuine political commitment, coupled with adequate resources, powers and staff, which are as crucial as formal independence, if not more so, to the success of an anticorruption institution. Consequently, in light of international standards, one of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of structural and operational autonomy secured though institutional and legal mechanisms aimed at preventing undue political interference as well as promoting "pre-emptive obedience". In short, "independence" first of all entails de-politicisation of anti-corruption institutions. The adequate level of independence or autonomy depends on the type and mandate of an anti-corruption institution. Institutions in charge of investigation and prosecution of corruption normally require a higher level of independence than those in charge of preventive functions; multi-purpose*

[49] The OECD Report, at page 12.

bodies that combine all preventive and repressive functions in one single agency call for the highest level of independence, but also the most transparent and comprehensive system of accountability".[50]

"The question of independence of the law enforcement or prosecutorial bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. Police and other investigative bodies are in most countries highly centralised, hierarchical structures reporting at the final level to the Minister of Interior or Justice. Similarly, but to a lesser extent, this is true for prosecutors in systems where the prosecution service is part of the government and not the judiciary. Finally, in certain countries the Prosecutor General or head of an anti-corruption body can be appointed by, and directly report to the President. In such systems the risks of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case. Accordingly, the independence of such bodies requires careful consideration in order to limit the possibility of individuals abusing the chain of command and hierarchical structure, either to discredit the

[50] *Ibid*, at page 27.

> *confidentiality of investigations, or to interfere in crucial operational decisions such as commencement, continuation and termination of criminal investigations and prosecutions. There are many ways to address this risk. For instance, special anti-corruption departments or units within the police or the prosecution service can be subject to separate hierarchical rules and appointment procedures; police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor".*[51] (emphasis added)

44. **UN Organized Crime Convention**

44.1 The UN Organized Crime Convention also requires state parties to establish anti-corruption institutions which are sufficiently independent to perform their tasks. Article 9(2) provides that:

> *"[e]ach state party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions".*

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[51] *Ibid*, at page 28.

45. **The Southern African Development Community Protocols**

45.1 South Africa is a member state of the SADC. This body has adopted two Protocols which are relevant to the prevention and combating of corruption and organised crime.

The SADC Drugs Protocol

45.2 Under Article 8 of the SADC Drugs Protocol[52]:

> "*1. Member States shall institute appropriate and effective measures for co-operation between enforcement agencies to curb corruption, resulting from illicit drug trafficking.*
>
> *2. Measures to be taken shall include the following:*
>
> *a) establishment of adequately resourced anti-corruption agencies or units that are:*
>
> *(i) independent from undue intervention, through appointment and recruiting mechanisms that guarantee the designation of persons of high professional quality and integrity;*
>
> *(ii) free to initiate and conduct investigations*".

[52] Whilst this protocol is directed at drug trafficking, it similarly advocates for the establishment, resourcing and independence of agencies to deal with this form of organised and morally corrupt activity.

The SADC Corruption Protocol

45.3 Under Article 4(g) of the SADC Corruption Protocol, parties must:

> "*adopt measures which will create, maintain and strengthen…*
>
> > *(g) Institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption.*"

46. The aforementioned international instruments demonstrate the significance of the independence of the body mandated to fight corruption and organised crime. This is particularly so for the body tasked with the ultimate and exclusive power to bring prosecutions against individuals accused of corruption and related crimes. This body must further be shielded from undue interference by individuals and/or organisations which it intends to prosecute, could prosecute or is prosecuting.

CORE REQUIREMENTS FOR INDEPENDENCE

47. From the international instruments above, it is patent that whilst the measures to be adopted by a member state may depend on the "*fundamental principles of a member state's legal system*", there are certain core characteristics that must accompany any body tasked with combatting corruption and organised crime. In addition, it is submitted that the member state is obligated to ensure that these characteristics prevail under all and any conditions. The said independent body must:

47.1 allow investigators and prosecutors autonomous decision-making powers in handling cases;

47.2 not be subject to undue influence, specifically undue political influence; and

47.3 have structural and operational autonomy.

48. The United Nations in its "Anti-Corruption Toolkit" has set out that:

> "*[i]t is essential that investigators be subject to overall regulation and accountability for their activities, but that such oversight does not extend to interference with operational decisions such as whether a particular individual should be investigated, what methods should be used, or whether a case should be the subject of further action, such as criminal prosecution, once the investigation has concluded*".[53]

49. In *Glenister II*, it was held that the State has a duty to fight corruption by setting up concrete and effective mechanisms to prevent and root out corruption and cognate corrupt practices. The statutory framework in place must ensure that the bodies tasked with fighting corruption are sufficiently independent; and that it has adequate structural and operational autonomy, which is secured through institutional and legal mechanisms, to prevent undue political interference. Further, whatever mechanisms that are put in place must ensure that such bodies are in fact adequately independent and

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[53] United Nations Anti-Corruption Toolkit (2002) http://www.unodc.org/pdf/crime/toolkit/f5.pdf.

that they are also reasonably perceived by the public as being adequately independent.[54]

50. Having outlined the standard required by the Constitution, the Court then considered the situation of another crime fighting institution, the Directorate for Priority Crime Investigation ("**the DPCI**"). The DPCI had been established under the South African Police Service Act, 1995 ("**the SAPS Act**") and the Court was concerned with whether particular provisions of the Act complied with the above requirement of independence. After examining the content of the SAPS Act, the Court summarised its key grounds for finding certain provisions of the SAPS Act unconstitutional as follows:

> "*I have concluded that the absence of [inter alia] specially secured conditions of employment, … [is] inimical to the degree of independence that is required. . . .*
>
> *Regarding the entity's conditions of service, I have found that the lack of employment security, including [inter alia] … flexible grounds for dismissal that do not rest on objectively verifiable grounds like misconduct or ill-health, are incompatible with adequate independence. So too is the absence of statutorily secured remuneration levels. I have further found that the appointment of its members is not sufficiently shielded from political influence.*"[55]

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[54] *Glenister* supra note **Error! Bookmark not defined.** at paras [175]-[207]. See also *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) ("***JASA***") at para [68].

[55] *Glenister* supra note **Error! Bookmark not defined.** at paras [248]-[250].

51. In the case of *McBride v Minister of Police and others*[56] ("***McBride***"), the above principles were found not to be unique to the DPCI, but applicable also to other corruption fighting institutions, in this case specifically the Independent Police Investigative Directorate ("**IPID**"). IPID is, in part, mandated to investigate corruption within the SAPS[57] and the root of this mandate is section 206(6) of the Constitution. The Constitutional Court held thus:

> "*It is therefore necessary to its credibility and the public confidence that it be not only independent but that it must also be seen to be independent to undertake this daunting task without any interference, actual or perceived, by [the relevant executive authority, in this case] the Minister*."[58]

52. With this in mind, the Court considered what constituted "*sufficiently independent*" for the purposes of the head of IPID, noting that the head of this institution could not simply be treated as any government employee might be:

> "*It is axiomatic that public servants are government employees. They are beholden to government. They operate under government instructions and control. The authority to discipline and dismiss them vests in the relevant executive authority. This does not require parliamentary oversight. To subject the Executive Director of IPID to*

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56 2016 (2) SACR 585 (CC).

57 Section 28(1)(g) of the Independent Police Investigative Directorate, 2011.

58 *Mcbride*, [41].

the same regime is to undermine or subvert his independence. It is not congruent with the Constitution.

"*What then does the independence of IPID mean? Does it mean complete or sufficient independence? Admittedly, it is difficult to attempt to define the precise contours of a concept as elastic as this. It requires a careful examination of a wide range of facts to determine this question. Amongst these are the method of appointment, the method of reporting, disciplinary proceedings and method of removal of the Executive Director from office, and security of tenure. However, this Court has had occasion to deal with the independence of a similar institution in Helen Suzman Foundation and Glenister II. Although the two cases deal with the independence of the DPCI, whose mandate is different to that of IPID, they offer useful guidelines in giving substance to IPID's constitutionally guaranteed independence – they offer bright lights for us as we traverse this new area.*"[59]

53. The Constitutional Court in *McBride* made special mention of the importance of the head of IPID's security of tenure for the independence of IDIP:

"*On the other hand, section 6 of the IPID Act gives the Minister enormous political powers and control over the Executive Director of IPID. It gives the Minister the power to remove the Executive Director of IPID from his office without parliamentary oversight. This is antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room*

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[59] *McBride*, [30] – [31].

for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not.

"*To subject the Executive Director of IPID, which the Constitution demands to be independent, to the laws governing the public service – to the extent that they empower the Minister to unilaterally interfere with the Executive Director's tenure – is subversive of IPID's institutional and functional independence, as it turns the Executive Director into a public servant subject to the political control of the Minister***."**[60]

54. While the principles set out above were discussed in the context of the DPCI and IPID, there is no reason to contend that these principles should not apply with equal or greater force to the NPA, the ultimate authority upon which the decisions on whether or not a prosecution for charges of corruption should be brought. The above quotation correctly emphasises that the requirement of strictly defined independence becomes all the more acute in circumstances where there is systemic corruption and organised crime.[61]

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[60] *McBride*, [38] – [39].

[61] The Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations (Final Report, February 2006) ("**the Khampepe Report**"), page 335 of the Court Record.

THE IMPLICATIONS OF INDEPENDENCE ON THE INTERPRETATION OF SECTION 12(8)

55. The Constitution and the NPA Act appear to provide adequate mechanisms to shield the NDPP from undue political influence. Section 179(4) of the Constitution provides that national legislation must ensure that the prosecuting authority exercises its function without fear, favour or prejudice.

56. Section 233 of the Constitution provides that:

> *"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".*

57. Similarly, section 39(2) of the Constitution provided that:

> *"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."*

58. Accordingly, we submit that section 12(8) of the NPA Act must be interpreted in light of the principles of independence as discussed above, not only to give effect to section 179(4) of the Constitution, but so as to give effect to the rights enshrined in the Bill of Rights and South Africa's international law obligations.

59. It is submitted that the manner and circumstances with which the NDPP is removed must withstand sufficient scrutiny to give confidence to the public as to the independence of the NPA and the integrity of persons who occupy the office of the NDPP. We echo the sentiments of the Constitutional Court that a corruption-fighting entity, such as the NPA, will have the requisite independence if it can be established that the '*reasonably informed and reasonable member of the public will have confidence in an entity's*

autonomy-protecting features. *Both the independence and appearance of an independent NPA are central to this matter."*[62] The society has an important role in establishing and developing a culture that seeks to protect the structural integrity and independence of this important institution. Without enjoying the confidence of the public, this important institution will not be able to function efficiently, and the rule of law to which the public is bound, is at the risk of being destroyed.

60. In this respect, it is clear that the provisions relating to the removal of the NDPP cannot be interpreted to give the President an unduly subjective and broad discretion. This is unacceptably vague and not objectively verifiable, particularly because a removal of the NDPP under section 12(8) is without Parliamentary oversight, in contrast to a removal envisaged under section 12(6)(a). Under that provision of the NPA Act, the President may remove the NDPP on the listed ground but must further communicate to Parliament the removal and the reasons within 14 days after such removal. In terms of section 12(6)(c), Parliament retains a right to pass a resolution to recommend whether the NDPP removed by the President can be restored to its position or not. This critical oversight is not available in instances where the NDPP is removed under section 12(8). Another instance where the NDPP can be removed is under section 12(7) which is a removal initiated by Parliament itself.

61. Of the three instances, a section 12(8) removal is the only case where Parliamentary oversight is not catered for. However, under section 12(8), Parliament has no power to intervene precisely because section 12(8)

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62 *McBride v Minister of Police* 2016 (2) SACR 585 (CC) at paras 37 and 43

contemplates that the NDPP shall himself or herself, request to vacate the office.

62. In the present case, Mr Nxasana did not request to vacate or be removed from office. His removal is other than in terms of section 12(8). But the manner in which he was removed, and the reasons advanced by the President have effectively bypassed the crucial Parliamentary oversight that is required for a legitimate removal of the NDPP.

63. Indeed, for the President purportedly to act under section 12(8) of the NPA Act in a manner which seeks to circumvent the objects of section 12 of the NPA Act, and consequently diminish the independence of the NPA, by unduly influencing the circumstances under which the NDPP vacates the office, is clearly unconstitutional. In any event, in the absence of Mr Nxasana's request, there appears to have been no cogent or sufficient reason to remove him from office. We turn to this point.

WAS THERE SUFFICIENT REASON TO REMOVE MR NXASANA

64. The President's stated reason for removing Mr Nxasana was that Mr Nxasana was concerned about (a) discord between himself and other members of the NPA; and (b) the enquiry instituted against him by the President under section 12(6) of the NPA Act. The President appears to have considered these reasons to be sufficient for purposes of section 12(8). But we submit that on any basis thee are not sufficient reasons, considering that -

64.1 As to reason (a), the President himself failed to take steps to discipline the persons who were the cause of any discord between Mr Nxasana and senior members of the NPA. The President's failure was despite

numerous requests from Mr Nxasana, a legal opinion from senior counsel, a report by a Constitutional Court Judge and memoranda that demonstrated conclusively that Adv Jiba and Adv Mrwebi and Adv Mzinyathi were damaging the functioning and compromising the interests of the NPA.

64.2 In those circumstances, it is difficult to believe that the President genuinely wished to bring certainty and preserve the dignity of both the NDPP and the NPA, as it is recorded in the settlement agreement.

64.3 In respect of the section 12(6) enquiry, Mr Nxasana expressed a desire to participate and go through with the enquiry. Yet, whilst this process was ongoing, the President continued to negotiate a settlement with Mr Nxasana, under the guise of invoking the section 12(8) provision.

65. Being a man that is disposed to the truth, as he has shown in these proceedings, Mr Nxasana clearly did not fear the prospects of participating in the enquiry. It is up to the court to accept or reject the President's factual version in this regard. However, it appears that even on his version, the discord between Mr Nxasana and other members of the NPA were in fact caused by the President's inaction with respect to disciplining Adv Jiba, Adv Mrwebi and Mzinyathi, on the basis of the legal opinions, reports and memoranda received by the President. Instead, the President decided to discipline Mr Nxasana.

66. Further, it is clear from the record that Mr Nxasana was not prepared to resign unless he received a pay-out of approximately R17 million, which is not an amount due to him under section 12(8) of the NPA Act. As made clear by Mr Nxasana's attorneys in a letter to the President:

> *"In the circumstances, our client will only consider the option of leaving office, as the President would want him to, if he is fully compensated for the remainder of his contract."*[63]

67. It was ultimately on these terms that the settlement agreement was reached and concluded, despite pushback on this condition from the President's personal lawyer.[64]

68. On objective facts, it is submitted that Mr Nxasana was not so unhappy at the NPA that he would leave his job, or at the very least, leave for less than the amount of R17 million. It seems then that Mr Nxasana's willingness to leave was premised on financial gains, as the decisive reason. Whilst this is not a stated reason for Mr Nxasana's removal, it is clear that it was essential to Mr Nxasana's removal, and the President was aware of this.

69. Thus, the key reasons for Mr Nxasana's removal were in fact:

69.1 The President's section 12(6) enquiry against him and the consequences thereof;

69.2 The promise of financial gain for Mr Nxasana.

70. Both of these reasons strike directly at the principles of independence set out above.

71. Whether or not the President had any intention to do so when initiating the section 12(6) enquiry against Mr Nxasana, the President clearly understood that such an enquiry had the effect of intimidating Mr Nxasana and could

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63 See Mr Nxasana's attorneys letter of 10 December 2014, as quoted at para 30.11.5 of the applicants' HOA.

64 See correspondence from Mr Hulley in this regard, summarised at para 30.20 of the applicants' HOA.

ultimately cause him to consider leaving his office. This inappropriate use of the section 12(6) provision is unacceptable and abusive of the NPA Act.

72. Moreover, as we have stated above, there was no basis for the President to accept Mr Nxasana's resignation when both the President and Mr Nxasana maintain that he is fit and proper to hold office. If resignations are accepted on this basis, this would allow the executive simply to intimidate the NDPP into resignation by initiating section 12(6) processes, and by-passing the need to obtain a finding of unfitness and impropriety at the end of such processes. This, we respectfully submit, strikes at the heart of prosecutorial independence.

73. In addition, to accept a resignation on the basis of undue financial gain is nothing less than inducing a resignation of the NDPP by offering an undue benefit. This is an anathema to prosecutorial independence in that it allows the executive to simply buy out an NDPP that they wish to replace. We respectfully submit that in all such cases, but particularly where public funds are concerned, this conduct must be discouraged and vilified.

74. To accept either of the reasons advanced by the President as sufficient reason under section 12(8) undermines the NDPP's security of tenure.[65] Even if the request is in fact made by the NDPP, such a request would be on the basis of undue intimidation or gratification. Such bases make the NDPP vulnerable and threaten his ability to hold the office, and make decisions, without fear, favour or prejudice.

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[65] It was precisely this lack of security of tenure which the Court in *Glenister II* found to be unacceptable (at paras [220] and [249]).

75. While the President may have considered these reasons sufficient for the purpose of section 12(8) of the NPA Act, they could not possibly have been sufficient for the purposes of section 12(8) when interpreted consistently with section 179 of the Constitution, the Bill of Rights and South Africa's international obligations.

76. Accordingly, it is submitted that the President's exercise of section 12(8), on his own version of the facts, is unconstitutional and stands to be set aside.

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21 August 2017