IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 333/17 and CCT 13/18

CCT 333/17

In the matter between:

CORRUPTION WATCH NPC	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Third 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

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CCT 13/18

In the matter between:

MXOLISI SANDILE OLIVER NXASANA	Applicant
CORRUPTION WATCH NPC	First Respondent
FREEDOM UNDER LAW NPC	Second Respondent

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent
SHAUN ABRAHAMS	Sixth Respondent
DIRECTOR GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Seventh Respondent
CHIEF EXECUTIVE OFFICER OF THE NATIONAL PROSECUTING AUTHORITY	Eighth Respondent
NATIONAL PROSECUTING AUTHORITY	Ninth Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Tenth Respondent

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THE HELEN SUZMAN FOUNDATION	Applicant for admission as *Amicus Curiae*

HELEN SUZMAN FOUNDATION'S WRITTEN SUBMISSIONS

INTRODUCTION

1. On 14 August 2017, the High Court ordered that the HSF be joined as an *amicus* in the matter instituted by Corruption Watch (RF) NPC ("**CW**"), Freedom Under Law (RF) NPC ("**FUL**") and the Council for the Advancement of the South African Constitution ("**CASAC**") (together, "**the Applicants**") against the President of the Republic of South Africa ("**the President**") and others under case no CCT333/17 ("**the CW proceedings**"). Judgment in the CW proceedings was delivered on 8 December 2017 and is reported at [2018] 1 All SA 471 (GP) ("**the High Court judgment**").

2. On 20 February 2018, the HSF was directed to file written submissions by 21 February 2018 and was granted leave to present oral argument on 28 February 2018. The HSF refers to the CW proceedings and the proceedings instituted by Mr Mxolisi Nxasana ("**Mr Nxasana**") against the President and others

under case no CCT13/18 ("**the Nxasana proceedings**"), collectively, as "**the proceedings**".

3. The central issue in the proceedings is what the legislative and constitutional machinery regulating the functions of the National Prosecuting Authority ("**NPA**") and its highest officer, the National Director of Public Prosecutions ("**NDPP**"), requires, and whether the current framework sufficiently insulates the NPA and its officers from undue political interference and other such threats which have the potential to undermine the structural, operational and institutional independence of the NPA and, more broadly speaking, the rule of law.

4. The HSF contends that both the legislative machinery and the exercise of public power by the President in this case fell short of the level of adequate independence demanded by the Constitution and international law.

5. The HSF submits that this Honourable Court should order the reinstatement of Mr Nxasana and should uphold the declarations of invalidity sought in the CW application. We expand on these submissions hereunder.

6. The HSF's written submissions in support of the contentions in paragraphs 4 and 5 above are structured as follows:

6.1 factual background;

6.2 the High Court's erroneous rejection of Mr Nxasana's affidavit;

6.3 constitutional and international law requirements of independence of prosecuting authorities, such as the NPA; and

6.4 the implications of the requisite independence of the NPA on the:

6.4.1 declarations of invalidity sought in the CW application; and

6.4.2 just and equitable remedy.

FACTUAL BACKGROUND

7. Mr Nxasana vacated his office as NDPP after a long standing dispute between him, the erstwhile president of the Republic of South Africa Mr Jacob Gedleyihlekisa Zuma ("**the erstwhile President**") and the then Minister of Justice and Correctional Services ("**the erstwhile Minister**").[1]

8. The dispute had its roots in a nefarious campaign by senior members of the office of the National Prosecuting Authority ("**the NPA**"), in particular the National Deputy Director, Ms Nomgcobo Jiba ("**Ms Jiba**") and the Special Director: Specialised Commercial Crime Unit, Mr Lawrence Sithembiso Mrwebi ("**Mr Mrwebi**"), to undermine Mr Nxasana's leadership, and in particular his standing with the erstwhile President ("**the campaign against Mr Nxasana**").

9. Ms Jiba and Mr Mrwebi appeared not to accept the appointment of Mr Nxasana as the NDPP and set out to poison the mind of the erstwhile President to abuse his office and to remove Mr Nxasana in order to avoid the reinstatement of charges of corruption against him.

10. Ms Jiba and Mr Mrwebi have subsequently been found to not be fit and proper persons and have been struck off the roll of advocates.[2] It cannot be seriously disputed that these individuals actively undermined the leadership of Mr Nxasana and that such conduct is a direct cause of the dysfunctional state of the office of the NPA.

11. The ongoing dispute between the erstwhile President and Mr Nxasana culminated in a settlement agreement between the erstwhile President, the erstwhile Minister and Mr Nxasana being reached and signed in May 2015 ("**the settlement agreement**").

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1 Para 12 of Mr Nxasana's explanatory affidavit in the CW proceedings (**"the EA"**).

2 *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.

12. The erstwhile President purported to act under section 12(8) of the NPA Act, 1998 ("**NPA Act**") and removed Mr Nxasana from office.

13. Section 12(8) of the NPA Act 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 [erstwhile] President deems sufficient"*. A request by the NDPP to be removed constitutes a jurisdictional fact for the removal by the President of the NDPP in terms of section 12(8)(a).

14. The erstwhile President's version in the court a quo was that that Mr Nxasana had requested to be allowed to vacate office as NDPP in terms of section 12(8)(a) of the NPA Act.[3]

15. The High Court rejected this version, and found that Mr Nxasana was persuaded to vacate the office by the unlawful payment of an amount of money substantially greater than that permitted by law in terms of the settlement agreement.[4]

THE HIGH COURT'S ERRONEOUS REJECTION OF MR NXASANA'S AFFIDAVIT

16. Mr Nxasana has felt compelled, having read and considered the respondents' answering affidavits to the CW proceedings, to provide an explanatory affidavit ("**the affidavit**") and set out the material facts (which are contradictory to those set out in the President's answering affidavits), solely for the purposes of providing a complete and true reflection of the circumstances surrounding the conclusion of the settlement agreement, and to assist the Court *a quo*.

17. The Court *a quo* refused to admit the affidavit, on the basis that Mr Nxasana's explanation for the delay in filing the affidavit was not persuasive, and that it is

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3 The High Court judgment at para 82.

4 *Loc cit.*

generally accepted that when evidence is presented so late in proceedings, there is the danger of it having been tailored to fit a particular position.[5]

18. The HSF respectfully submits that in rejecting the affidavit, the Court *a quo* was left with inadequate facts and thereby undermined its ability to reach a just and equitable remedy that is best suited to all the circumstances and the objects of the Constitution, interpreted in light of international law instruments on prosecutorial independence set out below. This is particularly clear given that Mr Nxasana's tenure was central to the consideration of an appropriate remedy.

19. Section 173 of the Constitution recognises the inherent power of High Courts to protect and regulate their own process, taking into account the interests of justice.

20. By making numerous adverse findings against Mr Nxasana, yet failing to consider the facts contained in the affidavit, it is respectfully submitted that the Court *a quo* violated the *audi alteram partem* principle ("**the *audi* principle**") which requires that no one should be condemned unheard.[6]

21. Such a violation is clearly inconsistent with the interests of justice. As held by this Honourable Court in *Psychological Society of South Africa v Qwelane and Others* 2017 (8) BCLR 1039 (CC) at paras [33] to [34], hearing the other party – the *audi* principle – is an indispensable condition of fair proceedings which both recognises the subject's dignity and inherently conduces to better justice.

22. In *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) at para [24], the Supreme Court of Appeal stated that a material fact to be taken into account by a Court in making the value judgment as to whether a party's delay in launching an administrative review was reasonable is the nature of the

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5 The High Court judgment at para 8.

6 *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) at para 27.

challenged decision, as not all decisions have the same potential for prejudice which may result from their being set aside.

23. The HSF submits that the present case requires an even more pronounced attitude to the broader public interest considerations, as the case deals with organs of state of the highest order and the Court's remedy has potential consequences for the Republic as a whole.

24. In light of the potential and actual prejudice to both Mr Nxasana and to the public at large which results from the failure to consider the relevant material facts contained in the affidavit, the HSF submits that it would clearly have been in the interests of justice for the Court *a quo* to have admitted the affidavit.

25. The HSF accordingly urges this Honourable Court to have regard to the affidavit and to all the relevant facts contained therein. The HSF submits that this will assist this Honourable Court to reach a just and equitable remedy best suited to all the circumstances and the objects of the Constitution.

CONSTITUTIONAL AND INTERNATIONAL LAW REQUIREMENTS OF INDEPENDENCE OF PROSECUTING AUTHORITIES, SUCH AS THE NPA

26. In determining whether to uphold the declarations of invalidity sought in the CW application, as well as when imposing a just and equitable remedy in light of the invalidity of the settlement agreement, the HSF respectfully submits that this Honourable Court is enjoined to consider South Africa's international law obligations.

27. As held by Ngcobo CJ in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ("***Glenister II***") at para [97]:

> "*Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in*

particular international human rights law... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution."

28. Section 39(1)(b) of the Constitution requires courts, when interpreting the Bill of Rights, to consider international law.

29. The HSF submits that it was necessary for the court *a quo* and is incumbent on this Honourable Court 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). It is further necessary to consider, as well, those measures that have been recognised as central to the realisation of the objectives of an international instrument.[7]

30. 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.[8] 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.

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

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7 *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].

8 *Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)* at para [227].

32. 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*"[9] 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.[10]

33. This positive obligation applies in respect of both socio-economic and civil and political rights.[11]

34. 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.

35. 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 should not be restrictively construed: a broader and more generous interpretation would be the one that accords with the injunction of section 39(1)(a).[12]

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9 *Loc cit.*

10 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 Former president of the RSA* 2001 (3) SA 893 (CC).

11 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]; *S v Baloyi (Minister of Justice and Another Intervening*) 2002 (2) SA 425 (CC) at para [11].

12 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

36. 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.

37. 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.[13]

38. Furthermore, 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 rights of access to housing, healthcare, food and water, and social security. As stated in *Glenister II* at paras 57 to 58:

> "*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*

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(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)).

[13] 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 Former president prescribed by section 87, read with item 1 of schedule 2, to "*protect and promote the rights of all South Africans"*.

confiscated inside our borders testifies to this. The sophisticated international network that is responsible for transporting these drugs requires urgent attention.

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."

39. In the Prevention 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*".

40. The Constitutional Court, in *S v Shaik,*[14] observed that corruption is "antithetical to the founding values of our constitutional order".[15] Similarly, in South African Association of Personal Injury Lawyers v Heath,[16] 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".[17]

41. The NPA is an indispensable institution in combatting and punishing acts of corruption. But it only can realistically fulfil this function if its structural independence and integrity is honoured and protected. In the earlier Supreme Court

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

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

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

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

of Appeal case of *S v Shaik*,[18] the following observations were made about the pervasive and destructive effects of corruption on the realisation of constitutional rights:

> "*[t]he 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 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:*
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> > *'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*."[19]

42. The Supreme Court of Appeal summed up the above succinctly in *S v Sadler*,[20] 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*

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18 *S v Shaik* 2007 (1) SA 240 (SCA).

19 *Ibid*, at para [319].

20 *S v Sadler* 2000 (1) SACR 331 (SCA).

sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration."[21]

43. The negative relation between corruption and organised crime, on the one hand, and the diminished capacity to protect, promote and fulfil various human rights, on the other hand, has been recognised by our government,[22] the United Nations,[23] the World Bank,[24] the Organisation for Economic Co-operation and Development ("**OECD**"),[25] the African Union,[26] and the Southern African Development Community.[27]

44. 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*

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[21] *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].

[22] 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."*

[23] 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.

[24] 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."*

[25] 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.

[26] 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.

[27] See the preamble to the Southern 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.

ethical behavior, suppression of or unfair treatment of minority groups or the less-privileged persons in the society, and inadequate or inappropriate performance of their duties by police and government officials."[28] (emphasis added)

45. 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.

46. The Republic has signed and ratified six international agreements directly relating to corruption and organised crime:

46.1 the United Nations Convention against Corruption ("**the UN Corruption Convention**");[29]

46.2 the African Union Convention on Preventing and Combating Corruption ("**AU Convention**");[30]

46.3 the OECD Convention on Combating Bribery of Foreign Public Officials in International Business ("**OECD Convention**");[31]

46.4 the United Nations Convention against Transnational Organised Crime ("**the UN Organised Crime Convention**");[32]

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

[29] See fn 23 above.

[30] 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.

[31] See fn 25 above.

[32] 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.

46.5 the Southern African Development Community ("**SADC**") Protocol Against Corruption, 2001 ("**SADC Corruption Protocol**");[33] and

46.6 the SADC on Combating Illicit Drugs ("**SADC Drugs Protocol**").[34]

47. In 2004, Parliament enacted PRECCA, giving effect to UN Corruption Convention and the SADC Corruption Protocol.[35] It also appears that PRECCA covers South Africa's obligations under the OECD Convention.[36]

UN Corruption Convention

48. Article 11 of the UN Corruption Convention imposes an obligation on South Africa to guarantee the independence of all bodies tasked with combatting corruption. 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 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*."

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

34 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.

35 See Preamble to PRECCA.

36 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

49. 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:

> "1. *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*."

50. 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 the Constitution. Where it appears that the section 12 mechanisms are employed for ulterior purposes, involving removing a credible and competent NDPP (under the pretence of settling a suspicious dispute), there is a violation of the Constitution and South Africa's international law obligations.

51. Independence does not merely envisage bodies acting separately from the judicial, executive and legislative arms of government. The guarantee must include a duty on the state to prevent undue interference by all third parties with the functions and

processes of such bodies.[37] The need for safeguards is especially acute in the context of potential undue influence by the National Executive.

The AU Convention

52. 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*".

53. 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*."

The OECD Convention

54. 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-corruption agencies is their independence, specialisation, adequate training and resources.[38]

55. 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,*

[37] 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.

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

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 society and businesses are important factors to ensure their effective operations".[39] (emphasis added)

56. 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-*

[39] The OECD Report, at page 12.

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 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".[40]

"*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 erstwhile 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 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*

[40] *Ibid*, at page 27.

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".[41] (emphases added)

UN Organized Crime Convention

57. 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*".

The Southern African Development Community Protocols

58. 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.

<u>The SADC Drugs Protocol</u>

59. Under Article 8 of the SADC Drugs Protocol[42]:

"1. *Member States shall institute appropriate and effective measures for co-operation between enforcement agencies to curb corruption, resulting from illicit drug trafficking.*

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41 *Ibid*, at page 28.

42 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.

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".

The SADC Corruption Protocol

60. 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."

61. The aforementioned international instruments demonstrate the significance attached to independence of bodies 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. The NPA must further be shielded from undue interference by individuals and/or organisations which it intends to prosecute, could prosecute or is prosecuting and from the undue interference from government.

CORE REQUIREMENTS FOR INDEPENDENCE

62. 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 any body tasked with combatting corruption and organised crime, must possess. 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:

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

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

62.3 have structural and operational autonomy.

63. 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*".[43]

64. In *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) ("***Helen Suzman Foundation v President***"), 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 they have 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

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

must ensure that such bodies are in fact adequately independent and that they are also reasonably perceived by the public as being adequately independent.[44]

65. In relation to the independence of the DPCI, this Court states 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*."[45]

66. In the case of *McBride v Minister of Police and others*[46] ("***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[47] and the root of this mandate is section 206(6) of the Constitution.

67. The Constitutional Court thus held:

> "I*t 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*

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44 *Glenister II* at paras [175]-[207]. See also *Justice Alliance of South Africa v Former president of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) ("***JASA***") at para [68].

45 *Glenister II* at paras [248]-[250].

46 2016 (2) SACR 585 (CC).

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

undertake this daunting task without any interference, actual or perceived, by [the relevant executive authority, in this case] the Minister."[48]

68. 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 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*."**[49]**

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48 *Mcbride* at para [41].

49 *McBride* at paras [30] – [31].

69. 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 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.*"[50]

70. The above principles should apply with equal or greater force to the NPA, the ultimate authority upon which the decisions on whether a prosecution for charges of corruption should be brought.

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[50] *McBride* at paras [38] – [39].

THE IMPLICATIONS OF INDEPENDENCE UNDER THE CONSTITUTION AND INTERNATIONAL LAW

The declarations of invalidity sought in the CW application

71. In light of the above, it is clear that the statutory framework in place must ensure that the NPA is sufficiently independent; and that it has adequate structural and operational autonomy to mitigate undue political interference.

72. For the reasons set forth below, the HSF supports the third applicant's challenge to the constitutionality of two provisions of the NPA Act.

73. HSF submits that the following provisions are plainly inconsistent with the independence of the NPA:

73.1 section 12(4), which empowers the President to retain a NDPP beyond the age of 65 years if the President is of the opinion that such is in the public interest, the NDPP wishes to continue to serve in such office, and the NDPP's mental and physical health enables them to continue; and

73.2 section 12(6), which *inter alios* permits the President to suspend the NDPP unilaterally, indefinitely and without pay.

74. The President's open-ended power to extend the NDPP's term of office under section 12(4) of the NPA Act is inimical to the independence of the NDPP. As we have demonstrated above, the NDPP must both be independent and be seen to be independent. The President's unilateral power to extend the NDPP's tenure under section 12(4) may reasonably be seen as the granting of a benefit by the President, and may undermine public confidence in the NDPP and harm its credibility.

75. Further, section 12(4) of the NPA Act creates the opportunity for undue political interference to be exerted on a person holding office as NDPP who wishes to retain their position beyond the age of 65. In doing so, section 12(4) of the NPA Act

creates the spectre for pre-emptive obedience by the NDPP and diminishes the NDPP's institutional autonomy. This clearly violates South Africa's international law obligation to guarantee the independence of all bodies tasked with combatting corruption.

76. In addition, the ability of the President to suspend the NDPP indefinitely and without pay under section 12(6) of the NPA Act creates the unacceptable risk that the NDPP may be subjected to severe sanction by the President without sufficient oversight. This risk may create the perverse incentive for the NDPP to avoid acting against the President's personal interests and/or the interests of persons associated with the President where the NDPP would otherwise have done so.

77. Such power further contains the mechanism for political abuse, as the suspension is not subject to sufficient scrutiny.

78. Section 12(6) of the NPA Act accordingly does not adequately safeguard the independence of the NDPP, and is inconsistent with South Africa's constitutional and international law obligations.

The just and equitable order

79. The High Court in the CW proceedings held that if the invalid settlement agreement cannot be wholly undone, respect for the rule of law requires that it nonetheless must be undone in such a manner that the result still projects respect for the Constitution and the rule of law.[51] According to the High Court, this requires a result that "*underscores the imperative of non- interference in the independence of the NPA and its National Director*."[52]

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[51] High Court judgment at para [96].

[52] Loc cit.

80. The High Court accordingly held that it would not be just and equitable to "*leave Adv Abrahams untouched in the office*" as NDPP.[53] The High Court reasoned that such would allow the President to "*achieve, through unlawful means, precisely what he had wished to attain all along*."[54]

81. Further, the High Court emphasised the crisis facing the NPA's credibility as a direct consequence of Mr Abrahams' egregious conduct. The Court held that Mr Abrahams had associated himself on all material issues in that litigation with the position of the President, and that such was inconsistent with the imperative of prosecutorial independence.[55]

82. Such unconstitutional conduct is reinforced by the findings of the Supreme Court of Appeal in *Zuma v DA; Acting NDPP v DA,*[56] in the following terms:

> "*it is difficult to understand why the present regime at the NPA considered that the decision to terminate the prosecution could be defended*"*; and that "[t]he manner in which the affidavits were drawn and the case conducted on behalf of the NPA was inexcusable*".[57]

83. Given the pivotal role of the NDPP and the importance of prosecutorial independence as set out above, Mr Abrahams' conduct is in breach of the rule of law and his legal obligations.

84. In the CW proceedings, the High Court made a further finding that Mr Abrahams had attacked the applicants' case, as well as the court judgments referred to therein, in disconcerting language which, on the face of it, suggested that Mr Abrahams lacked an "*appreciation for whether or not the complaints that were raised for instance*

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53 Ibid at para [95].

54 *Loc cit.*

55 Ibid at para [97].

56 [2017] ZASCA 146 (13 October 2017) at para [3].

57 *Ibid* at para [94].

against Adv Jiba were meritorious, irrespective of their source."[58] As emphasised by the Court, the judgments attacked by Mr Abrahams were judgments of the High Court, and Mr Abrahams was bound to act in accordance with those judgments. This is reinforced by the requirements of section 165(4) of the Constitution. By attacking the High Court judgments in the disconcerting manner identified by the Court, Mr Abrahams confirmed, yet again, that he is not fit and proper for the high office of the NDPP.

85. The HSF submits that it would clearly not be just and equitable to retain Mr Abrahams in the position of NDPP. The general principle in fashioning a remedy is that the effects of unlawful conduct must be reversed or corrected where they can no longer be prevented.[59]

86. Once it is conceded, as it has been, that Mr Nxasana's removal was unconstitutional, it is axiomatic that Mr Abrahams could not lawfully be appointed as the NDPP. Legality must thus be restored in this respect, at least prospectively.

87. The HSF submits that the above principles of prosecutorial independence require no less. If an unlawfully appointed NDPP is allowed to continue in office for one day longer, the public confidence in this important institution will be further diminished. Also, this high office cannot be entrusted to a person who has not been lawfully appointed. The factors set forth in the High Court judgment simply reinforce the need for removal.

88. For reasons of the high value which our Constitution and international law place on prosecutorial independence, HSF submits that this Court should not interfere with the tenure of the lawfully appointed and unlawfully removed NDPP, Mr Nxasana.

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58 Ibid at paras [98] and [99].

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

89. Despite, however, concluding that the agreement was invalid, the High Court held that it would not be just and equitable to reinstate Mr Nxasana as NDPP as Mr Nxasana must have known that the agreement was unlawful and must not be rewarded by "*achieving for him what he had wanted all along: back in the saddle, with no unjustified threat from the President*."[60]

90. The HSF respectfully submits that the High Court erred in drawing any adverse inference in respect of Mr Nxasana on the basis that he wanted to perform his duties as the NDPP, without any "*unjustified threat from the President.*"

91. The HSF further points out that the High Court based its finding that Mr Nxasana knew that the agreement was unlawful on his:

91.1 unpreparedness to confirm when he realised that the settlement agreement was unlawful. Mr Nxasana, on his version, consented to the settlement agreement only when he considered the dispute between him and the erstwhile President to be intractable and that the dispute was interfering with the integrity and the functionality of the NPA.[61] Mr Nxasana's version is confirmed by documents belatedly filed by the erstwhile President to supplement the record;[62] and

91.2 awareness of the NPA Act's provisions constructively by virtue of his position as NDPP and his attorney's letter of 10 December 2014, which evinces that he was "*fully aware of the specific statutory provisions relative to his financial entitlement; but that he thought that since he was not offering voluntarily to resign, they did not apply to him - the President was at large to agree to his*

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60 Ibid at paras [85] and [92].

61 EA para [27].

62 As summarised by the applicants at paras 37 to 37 of the applicant's heads of argument in the CW proceedings dated 18 February 2017.

demands."[63] There is nothing, however, in the settlement agreement which indicates that Mr Nxasana requested to vacate his office. Mr Nxasana understood that the settlement agreement was nothing more than the settlement of contractual and litigious disputes.[64]

92. The HSF submits that none of the premises in paragraph 91 above confirms that Mr Nxasana knew that the agreement was unlawful and none of those factors warrants the effective removal of Mr Nxasana. Section 12 of the NPA Act regulates the circumstances under which the NDPP may be removed and what (rigorous) processes should be followed in this respect. It is unclear why the High Court should be at liberty simply to obviate those statutory processes.

93. The HSF submits that there is no basis in justice and equity to avoid the default position that follows, as a matter of logic, from the High Court's finding that the settlement agreement is invalid. Mr Nxasana must be reinstated and Mr Abrahams' tenure ended.

94. The Constitution and international law, and with them, the imperative of prosecutorial independence, must be vindicated. This is only achieved by restoring the position that pertained had the agreement not been performed or existed.

95. It is respectfully submitted that the Court a quo erred in ordering an effective removal of Mr Nxasana (a duly appointed NDPP) from office.

96. The legislative scheme creates a mechanism for the removal of a duly appointed NDPP which involves the exercise of powers by the President and Parliament (section 12 of the NPA Act). In ordering that it is not just and equitable to reinstate Mr Nxasana, it is respectfully submitted that the High Court unjustifiably intrudes into the domain of other branches of government who are tasked with holding the NDPP

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63 The High Court judgment at para [79].

64 EA para [26].

to account and usurped the powers specifically allocated by the NPA Act to the President and Parliament.

97. It is essential that this Honourable Court restores the status quo immediately prior to the settlement agreement coming into force. For reasons of legal certainty, this need not necessarily invalidate all decisions taken by Mr Abrahams to the date of this Court's final judgment.

Counsel for the *amicus curiae*

BL MANENTSA

Sandown, Sandton

21 February 2018