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

CASE NO: 23199/16

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant
and	
THE MINISTER OF POLICE	First Respondent
MTHANDAZO BERNING NTLEMEZA	Second Respondent
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Third Respondent
THE CABINET OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

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AIDE MEMOIRE

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INTRODUCTION AND OVERVIEW

1. This application concerns a Ministerial appointment to a high office of State of a person who has been found by the High Court to have acted without integrity and honesty. The Minister of Police ("**the Minister**") contends that such findings are either irrelevant to his decision to appoint or are matters that permit the Minister to make an appointment notwithstanding such findings. The applicants submit that adherence to the requirements of legality render the Minister's position untenable.

2. As the Constitutional Court has held last week:

> "*One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.*"[1]

3. In this application, the Minister claims that judicial pronouncements do not bind him, they are essentially irrelevant to his decision-making and their effect may be overridden by the mere say-so of the wrongdoer.

4. Yet, as the Constitutional Court also held in *Economic Freedom Fighters*, such an attitude is not open either to the National Executive or Parliament,[2] and the Minister and Cabinet's failure to give proper and due regard to the adverse findings of this Court against Maj-Gen Ntlemeza is manifest, unanswered and unanswerable. Those findings bear directly on the

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[1] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 (31 March 2016), para [1].

[2] *Ibid*, paras [75], [94] and [97].

lawfulness and rationality of Maj-Gen Ntlemeza's appointment as the National Head of the Directorate for Priority Crime Investigation ("**DPCI**") ("**National Head**").

5. The office of the National Head is critical to law enforcement. It is simply not tenable for any person who is unfit to qualify for this office and/or whose appointment is placed in serious question to continue to occupy that office, particularly when that person's integrity, and his ability to fulfil the objective constitutional requirement of fitness, propriety and conscientiousness have been found by a Court to be wanting.[3]

6. The need to protect the integrity of the office of the National Head is especially acute in view of the DPCI's constitutional mandate to fight corruption and organised crime relentlessly, independently and effectively.

7. The Constitutional Court has held, in *Glenister v the President of the Republic of South Africa and Others*,[4] that "*corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfill its obligations to respect, protect, promote and fulfill all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk*."

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[3] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) ("***Simelane***").
[4] 2011 (3) SA 347 (CC) at para [166].

8. The DPCI is an indispensable investigative organ which must be given substantial protections to carry out its mandate.[5]

9. There is thus a constitutional imperative to ensure that only those who are fit and proper to carry out the mandate of the high office of the National Head are appointed to that position, and that any appointment process is lawful. The failure lawfully to appoint gravely imperils the criminal justice system, the fulfilment of our aspirations as a nation, and the attainment of our constitutional objectives.

10. The appointment process of the National Head of the DPCI is a matter of objective constitutionality. No discretion exists to circumvent proper process, or to disregard factors which had to be considered. In accordance with the rule of law and the Constitution, such conduct is unlawful and invalid, and the Courts are the sole arbiters of that question. No separation of powers issues arise in respect of the grant of interim or final relief related to the lawfulness of the appointment, and suspension or reinstatement of a high ranking official. Indeed, interim relief of this nature has been granted by Courts, including this Honourable Court, in the past.[6]

11. This application challenges the lawfulness of the appointment of Maj-Gen Ntlemeza as head of the DPCI ("**the decision to appoint**").

12. It consists of two parts. Part A is an interim interdict to prevent Maj-Gen Ntlemeza from carrying out any further functions pending the finalisation of the review in Part B.

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[5] *Ibid* at para [166].

[6] *Freedom Under Law v National Director of Public Prosecutions* 2012 JDR 1227 (GNP) ("***Mdluli***"); *Democratic Alliance v SABC* 2015 (1) SA 551 (WCC); *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* [2015] 4 All SA 719 (SCA), paras [57]-[61]; *Pikoli v President and Others* 2010 (1) SA 400 (GNP) ("***Pikoli***").

13. This application is manifestly urgent. Upon learning of the decision to appoint, in accordance with its rights in law, the Helen Suzman Foundation ("**the HSF**") sought reasons from the decision-maker, being the Minister of Police ("**the Minister**").[7] Although the HSF considered that the decision to appoint may have been tainted with impropriety, irrationality and unlawfulness, it could not be confident of this until full reasons were furnished and the request for relevant documentation answered by the Minister. As was proper for it to do in the circumstances, it waited for the Minister's reasons and did not rush to Court based merely on a suspicion.[8] It can hardly be faulted for properly exercising its legal rights, not jumping to conclusions and waiting for the Minister's full response.

14. Upon receiving these reasons and documents (such as they were), it became clear that the decision to appoint was indeed unlawful and Maj-Gen Ntlemeza could not, properly in law, continue to act as the National Head:

14.1 The Minister had (deliberately) not taken into account final (and binding) judicial pronouncements which struck at the heart of Maj-Gen Ntlemeza's integrity, character and respect for the law;[9]

14.2 The Minister instead read these judicial findings as being irrelevant to Maj-Gen Ntlemeza's fitness and propriety for the position of National Head;[10]

14.3 Indeed, the Minister relied on a non-binding, extra-judicial two page letter[11] which "explained" and "corrected" the damning judicial

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[7] Founding affidavit ("**FA**") p 13-14 para 35.

[8] FA p 15 paras 40 and 41.

[9] Replying Affidavit ("**RA**") p 625 para 35.5; Minister's answering affidavit ("**Min AA**") p 147 para 63.3.

[10] RA p 624-625 para 35.1, 35.2 and 35.4; Min AA p 131 para 12; p 144 para 53.3; p 145 para 55; p 145 para 58; p 147 para 63.2; p 148 para 63.5.

pronouncements.[12] Not only could, as the Constitutional Court has recently affirmed,[13] such a report never "correct" or trump final and binding judicial findings (made on three occasions, no less), but the report was, in fact, entirely self-serving, being authored by Maj-Gen Ntelemeza himself and being a self-serving document whose allegations were never even interrogated. Moreover, the report speaks to but a limited portion of one of the judicial criticisms against Maj-Gen Ntlemeza - as such, even if to be believed, it does not "explain" or "correct" the majority of the damning pronouncements against Maj-Gen Ntlemeza;

14.4 In addition, the Minister failed to appreciate what the requirements were of any candidate for the position of National Head, indicating that, absent allegations of fraud or corruption against a candidate, he/she remains fit for appointment;[14]

14.5 Finally, it is not clear even that the Minister made the decision to appoint, or was not unduly influenced in such decision. It appears that the recommendations of an "interview committee", not provided for in statute, played a large part of the appointment process.[15]

15. If the appointment process is, in any way, unlawful or tainted, then the National Head is not lawfully appointed - the lawfulness of all the National Head's subsequent actions is likewise impeachable. This alone creates urgency, as the National Head is required to administer the day to day

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[11] Annex "**MN20**" p 588.
[12] RA p 626 para 40; Min AA p 135-136 para 23.
[13] *EFF v Speaker, supra*, para [99].
[14] Min AA p 137 para 27.
[15] RA p 626 para 39; Min AA p 135-136 para 23.

running of the DPCI, almost daily taking decisions of great national importance.

16. Given the nature of these decisions, it is thus imperative that they be taken by a lawfully appointed official and not by a person who should never have been appointed, not least who should never have been appointed because his integrity and fitness are in issue and cannot be assured.

17. This urgency is compounded by the fact that Maj-Gen Ntlemeza is liberally wielding the vast powers afforded to the National Head, restructuring the DPCI,[16] engaging members of the Executive with interrogatories and deadlines[17] and, as Maj-Gen Ntlemeza himself records, being centrally involved in a number of high-profile investigations.[18]

18. Any decisions which he makes are practically, however, likely to be irreversible in nature (and thus the harm occasioned by them is irreparable).[19]

19. Urgency is buttressed not only by the sheer volume and importance of these actions, but also by the manner in which Maj-Gen Ntlemeza is taking them, where a material part of his restructuring has been found to be unlawful; on at least two occasions he has made misrepresentations on oath to a Court of law; and subsequent judicial pronouncements have indicated that he acted *mala fide* and with ulterior motive in exercising his powers as National Head.

20. Maj-Gen Ntlemeza is thus, quite apart from having unlawfully been appointed, acting in a manner which renders him objectively unfit to occupy

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[16] FA p 16-17 paras 44-47.
[17] FA p 17-18 paras 48-49.
[18] Ntlemeza AA pg 193 para 113.
[19] FA para 42.

the high office of National Head, or which at the very least has the real potential to imperil the proper functioning of, and public confidence in, such office and endanger the administration of justice. Tellingly, his current *modus operandi* was foreshadowed by each of the damning judicial pronouncements set forth in the applicants' papers.

21. Both the appointment process of the National Head, as well as the individual occupying the high office of National Head, must be beyond reproach. The decision to appoint fails the test of legality.

22. The lawfulness of the appointment and relief related thereto is squarely within the domain of the judiciary, as established in comparable cases which have served before the Constitutional Court: the incumbent of such office (or a comparable office) must, objectively, be fit for purpose,[20] and a rational process must have been followed.[21]

23. In this instance, it is submitted that the failure to consider the judicial pronouncements is so damning that the decision to appoint must be denuded of effect until the full review occurs.

24. Although the Minister and Maj-Gen Ntlemeza attempt to mire this Court in pages of irrelevant argument and annexes, the case is in fact a narrow one:

24.1 Is there a strong case made out that the Minister and Cabinet acted unlawfully in respect of the decision to appoint?

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[20] *Simelane* 2013 (1) SA 248 (CC).

[21] *Ibid* paras 41 - 44; para 44 in particular: "*It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not*."

24.2 If so, has a case been made out warranting the grant of urgent interim relief suspending Maj-Gen Ntlemeza as the National Head pending a review?

25. The applicants submit that both those questions should be answered in the affirmative.

CHRONOLOGY

26. On or about 10 September 2015, the Minister appointed Maj-Gen Ntlemeza as the National Head.[22]

27. On 2 November 2015, the HSF addressed a letter to the Minister requesting the reasons and documents which informed the decision to appoint. These reasons were not immediately forthcoming despite repeated requests, and were ultimately only furnished in the evening of 2 March 2016.[23]

28. On 14 December 2015, the HSF received a letter from the National Deputy Information Officer within the South African Police Service ("**SAPS**"), purportedly under the Promotion of Access to Information Act, 2000 ("**PAIA**") (despite the fact that the request for reasons was not made under PAIA), requesting an extension until 13 January 2016 to "*deal with the request*".[24]

29. On 18 January 2016, the HSF received a request (once again, purportedly, under PAIA) for payment of a fee of R35 in order to "*process [the] request*", which request further stated "*only after the deputy information officer has received the receipt, your request will be considered*".[25]

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[22] FA pg 20 para 54; Min AA pg 131 para 11.
[23] FA pg 13-15 paras 34-39.
[24] FA pg 14 para 36 read with "**FA3**" (pg 46).
[25] FA pg 14 para 37 read with "**FA4**" (pg 47).

30. Even though the request was not made under PAIA, the HSF made payment of the R35 as requested. On 22 February 2016, in a further attempt to obtain the information, the HSF addressed a letter to the Minister setting out the unwarranted delay, stressing the importance of the matter and again requesting "*all information as requested in the 2 November 2015 letter by no later than Wednesday, 2 March 2016, failing which [the HSF] will have no option but to exercise its rights in law*".[26]

31. "All" the information was received only in the evening of 2 March 2016.

32. These proceedings were launched on 16 March 2016.

CLEAR UNLAWFULNESS OF THE DECISION TO APPOINT

33. For purposes of the relief sought in Part A, it need not be demonstrated that the decision to appoint was, definitively, unlawful. Instead, a *prima facie* indication of unlawfulness would suffice. The case for unlawfulness is, however, overwhelming, and has not been rebutted in the answering papers. The stronger the right which is demonstrated, the less weight is given to the requirements of irreparable harm and balance of convenience.[27]

34. Maj-Gen Ntlemeza's appointment was made despite clear High Court pronouncements against Maj-Gen Ntlemeza, handed down by the Honourable Mr Justice Matojane in February and April 2015 ("**the Sibiya judgments**").[28] The Sibiya judgments related to the unlawful suspension by Maj-Gen Ntlemeza of Maj-Gen Sibiya.[29]

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[26] FA pg 14 para 38 read with "**FA5**" (pg 48).

[27] *Cipla Medpro (Pty) Ltd v Aventis Pharma SA* 2013 (4) SA 579 (SCA), para [61].

[28] *Sibiya v Minister of Police and Others* [2015] ZAGPPHC 135 (20 February 2015) and the leave to appeal judgment, which is annex "**FA9**" (pg 77).

[29] FA pg 20-21 para 55.

Framework Governing Appointment

35. Section 17C(1) of the SAPS Act establishes the DPCI. Section 17C(1A) provides that the DPCI will comprise a national office and an office set up in each province. Section 17C(2) of the SAPS Act sets out that there will be a National Head "*who shall manage and direct the Directorate and who shall be appointed by the Minister in concurrence with Cabinet*".

36. Section 17CA(1) of the SAPS Act sets out the requirements for the appointment of the National Head:

> "*(1) The Minister, with the concurrence of Cabinet, shall appoint a person who is-*
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> *(a) a South African citizen; and*
>
> *(b) a fit and proper person,*
>
> *with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, as the National Head of the Directorate*" (emphases added).

37. In a comparable case, the Constitutional Court was seized with a challenge to the appointment of Mr Simelane as the National Director of Public Prosecutions, the national head of the National Prosecuting Authority ("**NPA**"). The criteria for the NDPP's appointment were substantially similar to the above criteria. The Court held that the criteria are objective, constitute essential jurisdictional facts and that each appointee to the office was required, objectively and rationally, to be fit for such office.[30] The failure to

[30] *Simelane*, paras [32] - [37].

consider or give proper regard to any relevant factors or considerations renders the decision objectively unlawful and irrational.[31]

Factors Ostensibly Considered In Making The Decision To Appoint

38. As set forth in the Minister's letter of 2 March 2016, the documents considered by the Minister and Cabinet in making the decision to appoint were the CV of Maj-Gen Ntlemeza and a document containing the recommendation to Cabinet (the latter has not been made available to the applicants or to Court).

39. In the answering papers, the first and second respondents also aver that the Minister had regard to a two page memorandum, authored by Maj-Gen Ntlemeza, which dealt with limited aspects of the Sibiya leave to appeal judgment.[32]

40. Moreover, it appears that the Minister was guided by the recommendations of an "interview committee", although the precise role, composition and actual recommendation of such committee has not been set forth. Any interposition of the views of outsiders irreversibly taints the lawfulness of the process pursued by the decision-maker.[33]

41. Apparently, for a decision of this magnitude and importance, to one of the highest offices of law enforcement in the country, the Minister and Cabinet only considered the documents set out above before making the decision to appoint.

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[31] *Ibid* para [39].

[32] Ntlemeza AA pg 182 - 183 para 87.

[33] *Crouwcamp v Civic Independent and Others* [2014] ZASCA 98 (31 July 2014), paras [18] and [19].

Relevant Factors Clearly Not Considered[34]

42. The appointment of Maj-Gen Ntlemeza suffers from numerous defects. Most significantly, that decision could not lawfully or rationally have been taken without considering and taking proper account of all relevant factors which bear on the fitness and propriety of Maj-Gen Ntlemeza.[35] This, axiomatically, includes all adverse judicial pronouncements in relation to the conduct of Maj-Gen Ntlemeza prior to his appointment (ie, the Sibiya judgments).

43. The subsequent appointment thus suffers from either a failure to consider such issues at all, or an improper exercise of discretion in finding that, notwithstanding the Sibiya findings, Maj-Gen Ntlemeza could, without more, properly be appointed as the National Head, particularly so when the Sibiya judgments have not been reversed and the other parties who are centrally involved in the matter, including Matojane J, Mr McBride and Mr Sibiya did not have any opportunity to make representations to those making the decision to appoint.[36]

The Sibiya judgments[37]

44. In the judgment of the Honourable Mr Justice Matojane, handed down on 20 February 2015 (*Sibiya v Minister of Police and Others* [2015] ZAGPPHC 135 (20 February 2015)) ("**the Sibiya judgment *a quo***") the Court noted the

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[34] FA pg 27-32 paras 72 - 93.

[35] *Simelane*, para [89]; *Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA), para [6]; *S v Mkhise; S v Mosia; S v Jones; S v Le Roux* 1988 (2) SA 868 (A) 875 where "fit and proper", in the context of an advocate, was applied and understood as meaning whether he is "generally a person of integrity and reliability". For the general proposition, Prof Hoexter, "Administrative law in South Africa", Juta, 2nd edition, 2012 at pg 316: "*As Henning J explained in the veritable case of Bangtoo Bros v National Transport Commission 1973 (4) SA 667 (N) at 685A-D, if a tribunal were to relegate a factor of obvious and paramount importnance to one of insignificance, and give another factor a weight far in excess of its true value, this would amount to a failure to apply the mind properly to the matter.*"

[36] Section 3 of PAJA; and *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC), para [70].

[37] FA pg 27-29 paras 75 - 80.

following with regard to Maj-Gen Ntlemeza's conduct in taking the decision to suspend Maj- Gen Sibiya, at para 31:

> "*[31] In my view, there exists no basis in law or fact for the Third Respondent to take the drastic measure of placing [the] Applicant on precautionary suspension. I agree with the Applicant that the decision by Third Respondent was taken in bad faith and for reasons other than those given. It is arbitrary and not rationally connected to the purpose for which it was taken and accordingly, it is unlawful as it violates [the] Applicant's constitutional right to an administrative action that is lawful, reasonable and procedurally fair*" (own emphasis).

45. Maj-Gen Ntlemeza launched an application for leave to appeal the findings of Matojane J. On 14 April 2015, Matojane J handed down judgment in the leave to appeal of the matter, dismissing the application for leave to appeal ("**the Sibiya leave to appeal judgment**").[38]

46. Importantly, at page 8 of the Sibiya leave to appeal judgment, Matojane stated that Maj-Gen Ntlemeza was "*biased and dishonest*", and "*lacked integrity and honour*" as Maj-Gen Ntlemeza had made false statements under oath. In addition to these serious indictments on Maj-Gen Ntlemeza's character, the Court further remarked, at page 11 of the Sibiya leave to appeal judgment, that Maj-Gen Ntlemeza has a "*contemptuous attitude towards the rule of law and the principle of legality and transparency*".

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[38] "**FA9**" (pg 77).

47. Maj-Gen Ntlemeza sought leave to appeal from the Supreme Court of Appeal in relation to the Sibiya judgment *a quo.* This application for leave to appeal was dismissed by the Supreme Court of Appeal on 26 May 2015.[39]

48. Furthermore, after Maj-Gen Sibiya's suspension was set aside by the Court, Maj-Gen Ntlemeza refused to allow Maj-Gen Sibiya to return to work. [ref] This shows a further blatant disregard for the law, which is incompatible with the office of the National Head of the DPCI.

49. These judicial pronouncements establish that Maj-Gen Ntlemeza:

49.1 acted arbitrarily and in bad faith;

49.2 refused, alternatively failed, to take the Court into his confidence and provide the true reasons for his decision in relation to Maj-Gen Sibiya;

49.3 violated constitutional rights in the process;

49.4 was biased, dishonest, lacked integrity and lacked honour;

49.5 had a contemptuous attitude towards the rule of law and the principle of legality and transparency; and

49.6 refused to abide by or implement Orders of Court, which are binding.

50. The Sibiya judgments quite clearly establish that Maj-Gen Ntlemeza is not fit and proper to hold the office of the National Head as required by section 17CA(1) of the SAPS Act.

<u>The Minister's approach to the Sibiya judgments</u>

51. What was required of the Minister and Cabinet was that they considered the full import of the Sibiya judgments. The definitive findings by Court were

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[39] "**FA10**" (pg 91).

plainly material to any consideration of fitness and propriety, the objective requirements for Maj-Gen Ntlemeza's appointment. The Minister could not have exercised his powers, nor Cabinet its powers, on a rational basis without giving proper consideration to, and in the face of, the Court's definitive findings. Moreover, to the extent that binding findings and rulings of Courts were implicated, the Minister would not simply be able to ignore them, but he or Maj-Gen Ntlemeza would have to take steps to set them aside.

52. Such an exercise was not, however, performed, as the Minister's answering affidavit concedes. The Minister instead affords no weight to the Sibiya judgments, reading them, variously, as:

52.1 not dealing "*with the fitness and propriety of the second respondent to hold any public office*" (paras 12, 53.3; 55; 58; 63.2);[40]

52.2 falling far short of what is required to serve as proof of Maj-Gen Ntlemeza's unfitness to hold office (para 53.3);[41]

52.3 capable of being disregarded due to Maj-Gen Ntlemeza allegedly not being afforded an opportunity to refute the claims (para 55; 63.2)[42] (this being despite the options of appeal; of seeking to reopen the matter to lead further evidence on appeal; of seeking to vary the order; of launching proceedings alleging a violation of Maj-Gen Ntlemeza access to court and *audi* rights: none of which has been successfully invoked by Maj-Gen Ntlemeza);

[40] Min AA pg 131, 144, 145, 145,147.
[41] Min AA pg 144.
[42] Min AA pg 145, 147.

52.4 not amounting to allegations that Maj-Gen Ntlemeza was unfit to hold office (para 63.5);[43] and

52.5 most tellingly, that "*it would be irrational of me as the Minister to take a decision on a matter which has not been properly ventilated. I cannot rely on remarks made in the course of [a] judgment in the exercise of my discretion*" (para 63.3).[44]

53. This last recordal puts paid to any suggestion that the decision to appoint could have been lawful. It not only shows a disregard for section 165(4) of the Constitution,[45] but makes it transparent that not only did the Minister not consider the Sibiya judgments, but that he consciously chose to ignore them (or believed it was his duty to do so), as he would ignore all judicial pronouncements.

54. Moreover, there is no evidence that the Sibiya judgments even served before the Minister or the interview committee.

55. It also appears that the Minister may unlawfully have delegated his decision-making powers to an "interview committee" (para 23).[46]

56. At best, the Minister argues that he considered Maj-Gen Ntlemeza's two-page self-serving memorandum, in his application for the position of National Head, as sufficient evidence to overrule three final findings of Court. Remarkably, the Minister states that he accepts Maj-Gen Ntlemeza's correction of the factual issues which informed the criticism of Judge

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[43] Min AA pg 148.

[44] Min AA pg 147.

[45] Section 165(4) of the Constitution requires the Minister and Cabinet to take positive steps to promote, assist and support the courts, so as to ensure their dignity and effectiveness. *Nyathi v MEC for Department of Health, Gauteng and another* 2008 (5) SA 94 (CC) para [43] and *MEC for Health, Eastern Cape, & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) para [82].

[46] Min AA pg 135-136.

Matojane in the Sibiya judgments (para 23).[47] This acceptance alone renders the decision to appoint plainly unlawful:

56.1 It was never open to the Minister to "accept" Maj-Gen Ntlemeza's self-serving memorandum as supplanting judicial pronouncements which were final and binding. Maj-Gen Ntlemeza had sought, and failed, to appeal the Sibiya judgment, with the High Court and the SCA denying leave.[48] Were there factual errors or aspects requiring correction, it was incumbent upon him to seek to vary the judgment and order; to seek to reopen the case or to pursue an application for leave to appeal to the Constitutional Court.[49]

56.2 The entirety of the judgment (order and the underlying decision) of a Court must be respected and adhered to by all parties to whom such judgment may relate.[50] This is especially so given the high public offices occupied by these individuals.[51] As members of the executive and administrative branches of the State, the Minister (and Maj-Gen Ntlemeza) are thus held to an even higher standard in relation to implementing judicial findings.[52]

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[47] Min AA pg 135-136.

[48] "**FA10**" (pg 91).

[49] *Economic Freedom Fighters*, *supra*, paras [75] and [97]. See also, generally, *Stopforth Swanepoel and Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd* 2016 (1) SA 103 (CC).

[50] Section 165 (5) of the Constitution of the Republic of South Africa, 1996. *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229. *Pheko and others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as amicus curiae) (No 2)* 2015 (5) SA 600 (CC) par [1], [26], [27] and [47]; *Victoria Park Ratepayers Association v Greyvenouw CC* [2004] 3 All SA 623 (SE) par [23].

[51] *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA) para [8].

[52] Section 165(4) of the Constitution states that *"[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts*." See also *Nyathi v MEC for Department of Health, Gauteng and another* 2008 (5) SA 94 (CC) par [43] and *MEC for Health, Eastern Cape, & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) par [82].

56.3 The duties on "organs of state" go even further. The Constitutional Court has pronounced that: "*The Constitution imposes a positive duty on organs of state to assist courts and to ensure their effectiveness*."[53]

56.4 It was thus incumbent upon the Minister and Maj-Gen Ntlemeza either properly to challenge the Sibiya judgments or to accept the binding nature of the findings therein.

56.5 Not only was the Minister a party to the Sibiya judgments, but Maj-Gen Ntlemeza himself alluded to these judgments in his application - as such, the Minister could never disregard them. Such complete disregard undermined the efficacy, and diluted the weight, of the judicial findings of Matojane J, and was contrary to the administration of justice.

56.6 It was thus never open to Maj-Gen Ntlemeza simply to "explain away" or "correct" damning judicial pronouncements, which he was unable to disturb on appeal.[54] Similarly, it was never open to the Minister simply to "accept" any such explanations, in the light of final orders of this Court, tacitly endorsed by the SCA. It especially was not open to the Minister blindly to accept Maj-Gen Ntlemeza's say-so that the judgments were, in essence, incorrect. This is particularly so when the Minister was a party to the proceedings which resulted in the Sibiya judgments. The Minister and Maj-Gen Ntlemeza are, on any version, bound by the findings in those Judgments. The Minister, Maj-Gen Ntlemeza and all public officials have an especial constitutional duty to

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[53] *Zulu and Others v eThekwini Municipality* 2014 (4) SA 590 (CC) at paras [70] - [71]. This arises by virtue of section 165(4) of the Constitution and section 7(2) of the Constitution.
[54] *Economic Freedom Fighters*, *supra*, paras [75] and [97].

uphold the rule of law and the sanctity of judgments, and to promote and support the judiciary and administration of justice.[55]

56.7 Maj-Gen Ntlemeza asserts in his answering affidavit (para 87) that he filed the two page memorandum to explain away criticisms arising in the Sibiya leave to appeal judgment (and not the scathing findings of Matojane J in the Sibiya judgment *a quo*). The Minister's acceptance of Maj-Gen Ntlemeza's explanations thus could never disturb the Sibiya judgment *a quo* findings, which clearly were not considered.

56.8 In any event, the explanation provided speaks mainly to some confusion in interacting with the Honourable Mr Justice Matojane. Mr Justice Matojane's criticisms of Maj-Gen Ntlemeza, however, were not limited to this aspect. As appears from page 8 of the Sibiya leave to appeal judgment, however, Maj-Gen Ntlemeza was held, in numerous respects, to have been dishonest, biased and to have lied on oath. The limited "explanations" relate, in any event, only to:

56.8.1 interaction with the Honourable Mr Justice Matojane which interaction the Judge himself records, in no uncertain terms, to have been contemptuous and malicious and prejudicial to the administration of justice;

56.8.2 the fact that a subsequent report by Werksmans attorneys somehow whitewashed Maj-Gen Ntlemeza's cherry picking of one IPID report over the other. Again, the Judge remarked that Maj-Gen Ntlemeza's failure to disclose to the Court the existence of a second and contradictory IPID report was improper and reflected

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[55] *Pheko and others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC), para [49]; *Nyathi*, *supra*, para [43]; and *Kirland*, *supra*, para [82].

poorly on Maj-Gen Ntlemeza's character. In any event, a report from an attorneys' firm, commissioned by the Minister himself,[56] cannot subvert findings in a High Court judgment; the report itself was not attached to the answering papers; and no confirmatory affidavit was deposed to by the author of any report.

56.9 There is no warrant for the Minister to prefer Maj-Gen Ntlemeza's self-serving explanations over judicial pronouncements which have tacitly been endorsed by the SCA.

56.10 Indeed, the Constitutional Court, last week, affirmed that binding findings cannot be ignored by virtue of other reports[57] (particularly where, in this case, the report was by the very person against whom the findings were made). This has long been the case with the judgments of courts.[58]

56.11 There is no evidence, in any event, that the Minister and Cabinet interrogated Maj-Gen Ntlemeza's explanations and version at all - no supporting documents are annexed to his explanatory 2 page memorandum, and there is no evidence that, for example, the allegedly vindicating Werksmans report ever served before, or was properly considered by the Minister (or the interview committee). Indeed, the evidence suggests that the Minister and interview committee instead

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[56] Thus being comparable to the President's commissioning of a competing extra-judicial report in the *EFF* matter.

[57] *Economic Freedom Fighters v Speaker of the National Assembly*, *supra*, paras [75] and [99].

[58] In particular see paragraphs 56.2 to 56.6 above, and the footnotes referenced therein, as well as *Tasima (Pty) Ltd v Department of Transport* (792) [2016] 1 All SA 465 (SCA) para 16. This renders the Minister's conduct potentially even more egregious than the President's in the Nkandla saga, where at least the status of the public protector's report was subject to some uncertainty in law - here no such uncertainty existed in relation to judicial findings.

simply blindly accepted Maj-Gen Ntlemeza's explanation, and used this explanation to ignore damning judicial findings.

56.12 Matojane J, Mr McBride and Maj-Gen Sibiya were clearly not given an opportunity to comment on Maj-Gen Ntlemeza's comments and glosses on Matojane J's judicial pronouncements.

57. The Minister elevates to a decisive factor the alleged fact that no-one, not even the applicants, have accused Maj-Gen Ntlemeza of fraud or corruption. This is further indicative of the misplaced understanding the Minister has of the qualities a National Head is required to embody. It is not only fraud or corruption which disqualifies a candidate from being considered for appointment to such high office, but, axiomatically, one's integrity, honesty, competence, respect for the law and character.

58. The Minister's failure to appreciate the qualifying criteria compounds the unlawful nature of the appointment, as clearly the Minister did not even appreciate the enquiries he was obliged to make, or the factors which informed the exercise of his discretion.

59. In addition, it is noteworthy that the respondents' case is inherently self-defeating. In arguing against urgency, both the Minister and Maj-Gen Ntlemeza indicate that all that was required to challenge the decision to appoint was the Sibiya judgments. In so doing, however, they implicitly concede that these judgments are fatal to their case.

Comparable provisions of the Simelane judgment

60. It is apposite to compare the reasoning of the Constitutional Court in assessing a similar case where the President of the Republic ("**the President**") and the Minister defended the appointment of Mr Simelane as head of the NPA, to the Minister's actions and reasoning in this matter.

61. In *Simelane*, the President appointed Mr Simelane notwithstanding, *inter alia*, criticisms by a commission of inquiry (the Ginwala Commission) that Mr Simelane's testimony was contradictory, not credible, *mala fide* or dishonest.

62. The Supreme Court of Appeal was of the view that the fact that the Ginwala Commission's comments were not taken into account was in itself enough to set aside the appointment as irrational.[59] Here an exact parallel emerges, where the Minister has confirmed that he (deliberately) did not consider the Sibiya judgments in making the decision to appoint.

63. It was also argued before the Constitutional Court that the Ginwala Commission findings fell to be disregarded as Mr Simelane had not been afforded an opportunity to address them and that the Ginwala Commission was not appointed to investigate Mr Simelane. This was soundly rejected, with the Court holding that:

> "*Dishonesty is dishonesty wherever it occurs. And it is much worse when the person who had been dishonest is a senior government employee who gave evidence under oath. Although not a court, the Ginwala Commission was about as important a non-judicial fact-finding forum as can be imagined.*
>
> *The difficulties concerning Mr Simelane's evidence that appear from a study of the records of the Ginwala Commission were and remain highly relevant to Mr Simelane's credibility, honesty, integrity and conscientiousness. The Minister's advice to the President to ignore these matters and to appoint Mr Simelane without more was unfortunate. The material was relevant. The President's decision to*

[59] *Simelane*, para [7].

ignore it was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational."[60]

64. Our courts have thus recently held that dishonesty is inconsistent with the hallmarks of integrity and conscientiousness, the essential prerequisites to the proper execution of responsibilities of high offices such as (but not limited to) the office of NDPP.[61] The same applies to the National Head of the DPCI. In the circumstances, a decision to ignore relevant indications of dishonesty, bad faith or impropriety that could detract from the credibility, integrity and conscientiousness of a potential appointee would, in the circumstances, be irrational unless there were a proper reason for ignoring it.[62]

65. The Constitutional Court adopted the following test to determine whether the decision to appoint was irrational by virtue of a failure to consider the Ginwala Commission's findings:

65.1 Were the factors ignored relevant?

65.2 Was the failure to consider the material concerned rationally related to the purpose for which the power to appoint was conferred?

65.3 If 65.2 is answered in the negative, then whether ignoring relevant facts is of a kind that colours the entire process with irrationality, thus rendering the entire decision irrational.[63]

66. It was, moreover, held that any factors which spoke to a candidate's credibility or conscientiousness were plainly material and had to be

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[60] *Ibid*, paras [84] and [85].
[61] *Ibid* para [49].
[62] *Ibid* para [74].
[63] *Ibid* para [39].

considered; and a failure to do so was not rationally related to the purpose for which the power to appoint was granted.

67. In this instance, there are damning pronouncements by a Court on two occasions (and then tacitly endorsed by the SCA) that speak to Maj-Gen Ntlemeza's suitability to hold office as National Head, yet such pronouncements have completely been ignored, alternatively usurped by Maj-Gen Ntlemeza's self-serving memorandum. This material is plainly relevant, and a failure to consider it properly must, it is submitted, render the decision to appoint irrational and unlawful. A consideration of these findings was clearly required in order to wield the power to appoint rationally, and, in any event, a failure to consider these findings taints the entire appointment process to the extent that it is irredeemable. Moreover, there was nothing in the record of documents before the Minister (including the two page memorandum) which could have assuaged the concern about the suitability of Maj-Gen Ntlemeza. In this regard, final and binding court findings cannot simply be negated on the basis of Maj-Gen Ntlemeza's *ipse dixit*.

68. The *Simelane* judgment held that the purpose of appointing an office bearer (the NDPP in that instance) who was "fit and proper" was to ensure, among other things, honest and fair decisions are taken, fair administration of justice, and the prevention of improper interference.[64]

69. The independence of the institution itself is therefore connected to the integrity of the "fit and proper" official.

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[64] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at para 49

70. The Constitutional Court held in *Glenister*, that when determining the adequate independence of the DPCI the public perception of independence was an additional factor to consider beyond the actual structural and operational autonomy of the institution. To this end, the court held that "*public confidence that an institution is independent is a component of, or is constitutive of, its independence*," and that "*public confidence in mechanisms that are designed to secure independence is indispensible*."[65]

71. We submit that the *Simelane* judgment makes clear that the requirement that an appointee be "fit and proper" is one such mechanism designed to secure independence.

72. The test in determining the public perception of independence is an objective one of whether a reasonable, informed member of the public may have misgivings about the DPCI's independence.[66] Following Matojane J's findings in the *Sibiya* judgments we submit that no public confidence in the independence of the Head of the DPCI can exist and that the continued appointment of Maj-Gen Ntlemeza pending part B of this application will further erode public confidence not just in his office but in the institution of the DPCI and the administration of justice.

Consideration by Cabinet

73. There is no evidential basis to conclude that Cabinet ever considered or was apprised of any of the issues surrounding the Sibiya judgments (or any other

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[65] *Glenister v the President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para [207] citing *S and Others v Van Rooyen and Others* 2002 (5) SA 246 (CC) at para [32].

[66] *Glenister, supra* at para 210. This test has been endorsed in the context of judicial independence and impartiality in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at para [48]; *Van Rooyen*, *supra,* at para [33]; and *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) at para [75].

relevant factors pertaining to Maj-Gen Ntlemeza's appointment). Cabinet has not opposed the relief sought and the Minister has steadfastly refused to furnish the Cabinet memo which was the document which allegedly served before Cabinet for the purposes of approving the appointment of Maj-Gen Ntlemeza.

74. Like the Minister, Cabinet needed to be apprised of all the relevant factors and cannot simply rely on the fact of a recommendation by the Minister or the "interview committee".[67]

75. In the absence of lawful consideration of Maj-Gen Ntlemeza's appointment by the Cabinet, no lawful concurrence by it could have taken place, and the decision to appoint is thus unlawful on this further basis.

Conclusion

76. As is evident from section 17CA(1) of the SAPS Act, the core consideration which must be satisfied on an objective basis is whether the candidate is a fit and proper person that can be entrusted with the responsibilities and duties that are core to the office of the National Head. This is essential to ensure that the DPCI is capable of performing its mandate and to do so with independence and integrity.

77. The Sibiya judgments contained findings of dishonesty and *mala fides* that, due to the fact that they were made by way of judicial pronouncements, are binding rulings that Maj-Gen Ntlemeza lacks the requisite honesty, integrity and conscientiousness to hold any public office, let alone an office as crucial to our constitutional democracy as that of the National Head, where independence, honesty and integrity are essential characteristics (particularly

[67] *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC), paras [68] and [69].

to the fight against corruption and other priority offences) and not merely desirable ones.

78. The findings made in the Sibiya judgments thus have direct relevance to the question of whether Maj-Gen Ntlemeza is fit and proper, taking into account his "*conscientiousness and integrity",* or the lack thereof, as these requirements disqualify him completely from holding such office. The judicial findings in the Sibiya judgments are final and have not been disturbed on appeal.

79. On an objective consideration of the judicial findings in the Sibiya judgments and the Minister's failure to deal with those findings appropriately in the appointment process, the Minister could not lawfully or rationally have effected the appointment of Maj-Gen Ntlemeza.

80. Moreover, the public perception created by the Sibiya judgments as to the propriety of Maj-Gen Ntlemeza as a suitable National Head would also require to be considered before any appointment. The perception that it is acceptable for such damning judicial pronouncements to be ignored greatly undermines the sanctity of the institution of the DPCI.

IMPORTANCE OF THE DPCI AND, IN PARTICULAR, ITS HEAD

81. The above flaws are heightened in the context of the importance of the DPCI and its head. The DPCI is an institution which is vital to our constitutional democracy and its sanctity and functioning must be carefully safeguarded.

82. The Constitutional Court held that "*[o]ur ability as a nation to eradicate corruption depends on the institutional capacities of the machinery created to*

that end" and that the DPCI is the "*agency dedicated to the containment end eventual eradication of the scourge of corruption*".[68]

83. The National Head must be above reproach; must personify the institution and the values it upholds and must, above all, be a person of independence and integrity. It is constitutionally untenable to maintain in office a person whose appointment was plainly unlawful, or to allow an actor to exercise the vast powers of National Head where proper questions as to his appointment persist.

84. This is particularly so in circumstances where the functionary in question wields enormous power and discretion, which:

84.1 can change the face of law enforcement in South Africa, including effecting dozens of appointments within the DPCI (in terms of Chapter 6A of the South African Police Service Act, 1995 ("**SAPS Act**") and directing or discontinuing investigations;

84.2 can direct, alter or prevent investigations of priority offences, and can define what crimes or types of crimes should be investigated; and

84.3 may have implications for the entirety of the Republic.

85. The Constitutional Court's recognition of the importance of the head of the NPA is comparable in this regard:

> "[we emphasise] [th*e importance of this portfolio in the context of our democracy. It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that*

[68] *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) para [106] and [2] respectively.

prosecution policy is complied with are, as I have said earlier, fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice."[69]

86. Under the SAPS Act, it is the National Head who, *inter alia*:

86.1 manages and directs the DPCI, including its members and the conduct of investigations under the DPCI's auspices (sections 17C(2)(a) and (3) of the SAPS Act);

86.2 is in control of the DPCI's funds and expenditure (section 17H(6) of the SAPS Act);

86.3 appoints the staff of the DPCI (sections 17C(2)(b) and 17DB(b) of the SAPS Act);

86.4 determines the number and grading of posts in the DPCI (section 17DB(a) of the SAPS Act);

86.5 has a *veto* power on the transfer or dismissal of any Deputy National Head, Provincial Head or administrative staff of the DPCI (section 17CA(20) of the SAPS Act) - any disciplinary steps against members of the DPCI are, in any event, to be finalised under the auspices of the National Head within the DPCI's structures (section 17CA(19) of the SAPS Act);

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[69] *Simelane*, para [26].

86.6 determines which national priority offences (and other crimes) are to be addressed by the DPCI (section 17D(1)(a) and section 17D(2) of the SAPS Act);

86.7 determines under whose mandate (the DPCI or other parts of the SAPS) a particular crime falls and designates who is to investigate that crime (sections 16(3) and (4)(c) of the SAPS Act); and

86.8 heads the Operational Committee established under section 17J of the SAPS Act.

87. The National Head is thus at the very heart of the DPCI's ability to function effectively and to fulfil its constitutional mandate. The National Head makes dozens of critical operational, institutional and financial decisions which may have a substantial bearing on on-going, sensitive and high profile investigations and pending cases, the rights and expectations of members of the public, and the very structure and operational integrity of the DPCI, which would be difficult or impossible to reverse.

88. The Act expressly provides that certain critical decisions are to be made entirely in the discretion of the National Head.

88.1 "*The functions of the DPCI are to prevent, combat and investigate national priority offences which in the opinion of the National Head of the Directorate need to be addressed…*" (Section 17D(1)(a)) (emphasis added);

88.2 "*If, during the course of an investigation by the Directorate, evidence of any other crime is detected and the Head of the Directorate considers it in the interest of justice, or in the public interest, he or she may extend the investigation…*" Section 17D(2) (emphasis added);

88.3 "*The National Head of the Directorate may, if he or she has reason to suspect that national priority offence has been committed, request the National Director of Public Prosecutions to designate a Director of Public Prosecutions to exercise the powers of section 28 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998)*" (Section 17D(3) (emphasis added).

89. It is evident that the National Head is vested with far-reaching discretionary powers which heightens the imperative for the incumbent to have good judgment and integrity. If an unlawfully appointed National Head is retained in office, then this has the very real potential to compromise ongoing investigations, risk instability and engender dysfunctionality within the DPCI, thereby not only imperilling the criminal justice system, but also creating a perception among the public and members of the DPCI that the DPCI is vulnerable to executive interference or political influence.

URGENCY AND THE NEED FOR INTERIM RELIEF

90. Both the Minister and Maj-Gen Ntlemeza argue that the matter cannot be urgent given that the Sibiya judgments were handed down months ago. This fundamentally misconstrues the applicants' case.

91. The applicants have acted in the most prudent manner in launching this litigation. The applicants have followed all the correct legal procedures to vindicate their rights and ascertain what the Minister and Cabinet did and did not do.

92. Section 7(1)(b) of PAJA provides that:

"Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after

the date… on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons." (emphasis added)

93. The reasons for decision are contained in the 2 March 2016 letter. . It is that letter which established the unlawful nature of the decision to appoint and showed that the "*decisional referents which ought to have been taken into account*"[70] were not properly considered. It is axiomatic that, in a rationality review, an applicant cannot allege a disconnect between the means the decision-maker chose and the end sought to be achieved[71] in the absence of the reasons for the decision.[72] Until the applicants could determine the merits of the planned review, it was premature to approach the Court for temporary relief. This application was thus launched as soon as possible after receiving the letter of 2 March, March.

94. It is trite that a party must properly plead its case - the applicants were only placed in a position to do so from 2 March 2016.

95. As Megarry J observed in a well-known dictum in *John v Rees* [1970] Ch 345 at 402:

"*As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained;*

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[70] *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA), para [5].

[71] *Affordable Medicines Trust and others v Minister of Health and others* 2006 3 SA 247 (CC) at para [78]; *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 3 SA 293 (CC) at para [51]; *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) at para [32].

[72] The right to reasons is a fundamental right of every citizen and is critical to the justifiability and rationality of the decision in the constitutional era: *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA), paras [44] to [46].

of fixed and unalterable determinations that, by discussion, suffered a change."

96. Alive to the political, practical and, potentially, economic sensitivities of the matter, the applicants first afforded the Minister the opportunity to explain the decision to appoint before launching this application.

97. The respondents' argument amounts to imposing a penalty on a person for exercising its constitutional right to reasons and for exercising prudence in requesting information and reasons before launching any proceedings to challenge the decision. If this approach were to be adopted, it would undermine the rule of law and sections 33 and 34 of the Constitution; would cast a long shadow over every potential litigant with the government; and would essentially allow the National Executive, through its own dilatoriness in furnishing reasons for public decisions, to defeat the urgency of matters of fundamental national importance.

98. As per *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*:[73]

> "*The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. <u>If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application</u>*" (emphasis added).

[73] 2011 JDR 1832 (GSJ) para [9].

99. In the absence of urgent interim relief, the applicants will not be afforded substantial redress in due course. Although the decision to appoint may, eventually, after years-long gauntlet of appeals, be set aside, until such time Maj-Gen Ntlemeza will be permitted to make decisions daily of great national importance which are pivotal to the Republic's fight against corruption and the DPCI's ability to wage such fight.

100. As is borne out by his conduct in the position of National Head, his actions are such that they:

100.1 are jeopardising the DPCI's integrity, structure and ability to discharge its mandate; and

100.2 illustrate his objective unsuitability for the high office of National Head.

101. Quite apart from the *prima facie* case of unlawfulness (detailed above) and the resultant irreparable harm of all of Maj-Gen Ntlemeza's actions (detailed below), Maj Gen Ntlemeza has, since being appointed National Head:

101.1 fundamentally restructured the DPCI, appointing (or attempting to appoint) new Provincial Heads of the DPCI for all nine provinces in South Africa as well as a Deputy National Head of the DPCI.[74] In so doing, however, this restructuring has, on at least two occasions, been declared unlawful, with it being indicated that Maj-Gen Ntlemeza was acting *mala fide* and for ulterior purpose;[75]

101.2 twice deposed to factually incorrect versions on oath, making misrepresentations to Court;[76]

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[74] FA pg 16 para 45 read with "**FA6**" (pg 57).
[75] FA pg 32-34 para 95 - 99, read with the Sibiya judgments.
[76] Supplementary FA pg 106-107 paras 6 - 11; FA pg 28 para 78.

101.3 improperly engaged the Minister of Finance in a very public and far-reaching dispute; and

101.4 sought the urgent arrest of Ms Breytenbach and her attorney, in circumstances described below.

102. Such fundamental and unlawful restructuring of the DPCI by Maj-Gen Ntlemeza necessarily affects the proper functioning and integrity of the DPCI. This is particularly so when Maj-Gen Ntlemeza has, on at least one previous occasion, acted in a manner unbefitting the office of the National Head, as held by the Honourable Mr Justice Matojane in the Sibiya judgments; and in the case of Maj-Gen Booysen, Maj-Gen Ntlemeza's conduct has been declared unlawful by the court.[77]

103. Moreover, Maj-Gen Ntlemeza's attitude towards presenting evidence on oath is inadequate and contemptuous of the courts; his conduct in matters of high public importance is, at best, grossly negligent and poses a risk to the administration of justice. This is particularly so given the oath which is required of any deponent before he or she deposes to an affidavit.

104. Given the position occupied by Maj-Gen Ntlemeza, he is seized with especial duties requiring the utmost integrity and respect for the law. His conduct in the Booysen matter illustrates neither.

105. Maj-Gen Ntlemeza's conduct in the Booysen matter reinforces the applicants' primary contention in the founding affidavit that Maj-Gen Ntlemeza is, in fact, and when assessed objectively, not fit and proper to hold the office of the National Head, and poses a serious threat to the stability, reputation and

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[77] *Booysen v National Head of the Directorate for Priority Crime Investigation and Another* (9799/2015) [2015] ZAKZDHC 86.

lawful conduct of the criminal justice system. The risk of further harm should be mitigated without any further delay.

106. Aside from the apparent political abuse of his office for ulterior purposes and the judicial criticism of his conduct in the suspensions of Maj-Generals Sibiya and Booysen, the above is also indicative of the far-reaching ambit of the National Head's powers and the potential for irreparable harm should the powers be exercised by someone who is not fit for office as required under the legislation and the Constitution, or who abuses his/her discretion.

107. Any abuse would have consequences at a national level, striking at the heart of the Constitution of the Republic of South Africa, democracy as a whole, the National Executive and the economy.

108. Accordingly, urgent interim relief is required to guard against irreparable harm.

***PRIMA FACIE* RIGHT**[78]

109. The applicants, and, indeed, all citizens of the Republic, have a clear constitutional right to an independent and functioning criminal justice system. A core tenet of this right is the establishment of an independent corruption fighting unit, the DPCI, and the lawful appointment of its National Head.

110. The Constitutional Court itself has recently (again) affirmed the need for the independence of this organisation.[79]

111. Similarly, this Court has recognised that "*[e]very South African has a right to vindicate the ability of the police service to fulfil those objectives [being the ability of SAPS as an organisation to carry out its objectives as set out in*

[78] FA pg 35-36 paras 105 - 109
[79] *Helen Suzman Foundation, supra.*

section 205 of the Constitution]."[80] The DPCI is housed within the SAPS; as such, similar considerations apply in establishing a right for every South African to have an independent DPCI, characterised by integrity and led by a National Head who gives effect to its mandate.

112. The applicants, and all citizens, have a right to have a National Head appointed who is fit for office.

113. It is plain that the Minister (and Cabinet) have not complied with the requirements of the Constitution and section 17CA of the SAPS Act. As the Constitutional Court held in *Simelane*, a failure properly to consider and address findings of impropriety made against a candidate in Maj-Gen Ntlemeza's position is fatal to the lawfulness of any decision to appoint him/her.[81] This must be particularly so where the findings are made by members of the judiciary.

114. The applicants thus have a clear, let alone *prima facie*, right to review the decision and have the appointment set aside.

IRREPARABLE HARM[82]

115. The enormous powers wielded by the National Head have been alluded to above and Maj-Gen Ntlemeza has sought to exercise these powers liberally. If, as the applicants argue, he has been appointed improperly, then he wields such powers unlawfully.

116. Moreover, as appears from the Sibiya and Booysen judgments, in so wielding such powers the National Head can, if left unchecked, restructure the DPCI to his own end. He can also investigate matters which should not be

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[80] *Freedom Under Law v National Director Of Public Prosecutions* 2012 JDR 1227 (GNP), para [18].
[81] *Simelane*, paras [49] and [89].
[82] FA 36 paras 110 - 113.

investigated (and, more importantly, take intrusive steps to further such investigations), or pend or quash matters worthy of further, immediate investigation.

117. The use of such enormous powers has implications at a national level, and in many instances an abuse cannot be undone once it is performed. Such irreversible consequences alone constitute irreparable harm.[83]

118. Particularly given Maj-Gen Ntlemeza's well-publicised attempts fundamentally to restructure the DPCI, combined with the Sibiya and Booysen judgments and the improper appointment of Maj-Gen Ntlemeza, there is a very real apprehension of irreparable harm to the administration of justice, the DPCI, the national economy and the Republic's constitutional democracy.

119. Moreover, given the nature of Maj-Gen Ntlemeza's actions, these actions are likely not reversible in nature. If every decision taken by Maj-Gen Ntlemeza and/or by those he has appointed during his tenure as National Head were to be set aside or revisited, there exists scope to create a crisis in the investigation and combatting of corruption - it would, quite plainly, be untenable to revisit all these decisions with a view to reversing them, or cherry picking the good from the bad.

120. In considering interim relief against the exercise of a statutory power, the Constitutional Court has previously noted that irreparable harm results where an action has "*irreparable consequences and an immediate and final effect in the sense stated in* Metlika Trading".[84]

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[83] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) ("***ITAC***") para [58].

[84] *Loc cit.*

121. *Metlika Trading*[85] held that orders that were "*intended to have immediate effect, they will not be reconsidered at the trial and will not be reconsidered on the same facts by the court a quo…are in effect final orders*." Whilst dealing primarily with whether an interim order was nonetheless appealable, the pronouncements are useful as to what constitutes irreparable harm.

122. If the actions result in irreparable consequences, which will or cannot be reconsidered, then this renders such irreparable consequences a class of irreparable harm. The Constitutional Court has held that, even where judicial intervention may intrude into the domain of the executive, a Court may do so "*when irreparable harm is likely to ensue if interdictory relief is not granted*".[86]

123. Where an actor who is tainted (whether through an unlawful appointment process or due to his actions / unsuitability for office) is permitted to continue acting in a high office, this alone suffices to establish a reasonable apprehension of irreparable harm. As held in *Mdluli*, "*[t]he continuing public controversy and its effect on the integrity of SAPS and its ability to fulfil the constitutional mandate, coupled with the risk that the fifth respondent [the then suspended Head of Crime Intelligence] may at any time be permitted to resume his duties are sufficient to found a reasonable apprehension of irreparable harm*."[87]

124. Here the decisions of Maj-Gen Ntlemeza as National Head are taken daily, have immediate effect and themselves lead to a multiplicity of further decisions (by his appointees, for example). It is not practically possible to revisit, review and set aside these hundreds, if not thousands, of decisions

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[85] *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005 (3) SA (1) (SCA), para [24].

[86] *ITAC*, para [101].

[87] At para [19].

without bringing the DPCI to an absolute standstill, creating administrative chaos and prejudicing the fight against corruption, which is ongoing.

125. Accordingly, Maj-Gen Ntlemeza's decisions are causing irreparable harm to the Republic and the DPCI, and interim relief is urgently required to mitigate such harm going forward.

NO ALTERNATIVE REMEDY[88]

126. In light of the harm traversed above, there is clearly no alternative remedy.

127. Maj-Gen Ntlemeza contends, remarkably, that the Minister should have been approached to suspend him. The Minister contends that Parliament ought to have been approached to establish a Parliamentary committee to investigate the allegations and, if necessary, suspend Maj-Gen Ntlemeza.

128. Importantly, there is no ministerial (or any executive or legislative) power to suspend pending a principle of legality or PAJA challenge (which is what part B of this application seeks to achieve) in respect of the decision to appoint.

129. Any power to suspend is only activated in disciplinary proceedings to remove Maj-Gen Ntlemeza for misconduct in office (and not a challenge to the lawfulness of the antecedent appointment decision), and then only if the parliamentary disciplinary proceedings have been initiated. No such proceedings have commenced.

130. **I**n any event, having regard to the contents of the Minister's answering affidavit and his glowing endorsement of Maj-Gen Ntlemeza, it is plain that he has closed his mind on the matter and would not suspend Maj-Gen Ntlemeza even if disciplinary proceedings commenced before Parliament.

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[88] FA pg 37 para 114.

131. And, in any event, the existence of any power by the Minister to suspend does not oust the jurisdiction and power of this Honourable Court to interdict Maj-Gen Ntlemeza *pendente lite*.

BALANCE OF CONVENIENCE[89]

132. Although the interim relief prayed for by the applicants may result in a situation where there is no functional, permanently appointed National Head, any adverse effect of this situation is negated by section 17CA(12)(a) of the SAPS Act which states that "*[w]henever the National Head of the Directorate is absent or unable to perform his or her functions, the Minister shall appoint the Deputy National Head of the Directorate as the acting National Head of the Directorate.*"

133. The DPCI had previously operated under an acting National Head for many months.

134. Should the interim relief not be granted, however, then the harm identified herein may become irreversibly entrenched, and the corruption fighting capacity of the DPCI may be greatly diminished or even itself corrupted.

135. The necessity for the interim relief, in light of the potential risk to the proper functioning of the DPCI, outweighs any potential adverse effects on the functioning of the DPCI or Maj-Gen Ntlemeza should Part A of this application be granted.

136. In the circumstances, I respectfully submit that the strength of the applicant's right, the limited impact on the respondents should the relief be granted, and the devastating and irreparable harm that will be suffered by the applicants

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[89] FA pg 37-38 para 115 - 119.

and the public should it not, all point to the need for the relief sought to be granted. The applicants therefore submit that the balance of convenience favours the granting of the relief sought in this application.

SEPARATION OF POWERS

137. There is some suggestion that,

137.1 as the Act vests the Minister with the power to appoint and in certain circumstance suspend the National Head, his decision is one which vests solely in the Executive and the judiciary has no warrant interfering therein; and that

137.2 as the Act vests Parliament with an oversight role in general and the power in particular to suspend and remove of the National Director from office, the judiciary would be usurping Parliament's role should it suspend the National Director.

138. The power to suspend or remove the National Head from office is governed by section 17DA of the SAPS Act. Subsections 3 and 4 of that section provides as follows:

> *"(3)(a) The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.*
>
> *(b) The adoption by the National Assembly of a resolution calling for that person's removal from office.*
>
> *(4) A resolution of the National Assembly concerning the removal from office of the National Head of the Directorate shall be adopted with a supporting vote of at least two thirds of the members of the National Assembly.*
>
> **(***5) The Minister-*

(a) may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and

(b) shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal."

139. Accordingly,

139.1 the Minister has no powers of removal or suspension, save that he may suspend the National Director after the start of removal proceedings of a Committee of the National Assembly in terms of section 17DA(5); and

139.2 These removal proceedings are, however, limited in scope, and find no application in this case. Parliament is authorised remove (and not suspend) the National Head in terms of section 17DA(3) and (4), once the National Head is lawfully appointed. Parliament may only remove the National Head on the ground of misconduct, incapacity or incompetence in the performance of his or her functions - there is no jurisdiction to review or revisit the antecedent appointment process.

140. Neither Part A nor Part B of this application requests the Court to remove (or even suspend) the National Head on the basis of misconduct, incapacity or incompetence in the performance of his functions. This application seeks to suspend (and ultimately set aside) the appointment of the National Director because the original appointment was unlawful.

141. That is a power that lies in the exclusive domain of the judiciary. Neither the Minister nor Parliament is empowered to suspend or remove the National Director on the basis that he was unlawfully appointed to office. Indeed, should either the Executive or Parliament want to set aside the appointment

of the National Head on that basis, they would be obliged to approach the Court for the appropriate order.

142. As addressed above, the Constitutional Court, in the *Simelane* matter, comprehensively addressed the issue of the separation of powers in respect of the Court's powers to set aside the appointment of, in that case, the NDPP. We refer in this regard to paragraph 22 above, and the footnotes therein.

143. There are no separation of powers concerns pertaining to a decision of this nature. It entails judicial control over a quintessentially justiciable exercise of power governed by objectively verifiable requirements, which is far removed from polycentric socio-economic decisions of government. In this case, there is nothing further that any of the parties (including government) can do than to approach court for appropriate relief, whether on an interim or final basis. The court's ruling on the interdictory relief thus does not cut across any power to be exercised by the other branches of government, as contemplated in *Outa*.[90]

144. The courts have not hesitated to suspend or interdict public officials from carrying out their duties pending the outcome of a review or another process to remove them. These include this Court's pronouncements in the cases of Mr Mdluli, the former high ranking national intelligence official, and Mr Pikoli, the former NDPP.[91]

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[90] *National Treasury And Others v Opposition To Urban Tolling Alliance And Others* 2012 (6) SA 223 (CC)

[91] *Freedom Under Law v National Director of Public Prosecutions, supra; Pikoli v President and Others, supra*.

145. Most recently, the SCA had ordered the suspension of the CFO of the SABC, Mr Motsoeneng.[92]

146. But even in the case of high end policy decisions such as was entailed in *Outa* (which is not the case here), the Constitutional Court held that temporary restraining orders may be granted in the clearest of cases in accordance with the usual test for interim relief, but subject to constitutional considerations.[93]

147. The Court adopted and brought in line with the Constitution the decades-old test formulated in *Gool*,[94] which it described as follows:

> "*The common-law annotation to the* Setlogelo[95] *test [as formulated in* Gool*] is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out*." [96]…
>
> "*However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution*."[97]…

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[92] *Democratic Alliance v SABC, supra; South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others, supra.*

[93] *National Treasury And Others V Opposition To Urban Tolling Alliance And Others* 2012 (6) SA 223 (CC) paras [43] - [47]

[94] *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C). The Court also sited *Molteno Brothers and Others v South African Railways and Others* 1936 AD 321.

[95] *Setlogelo v Setlogelo* 1914 AD 221.

[96] *Outa* para 44.

[97] *Outa* para 45.

"*While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.*"[98]

148. On the facts of that case, the Court declined to grant the interim interdict largely on the basis that the decision in issue was policy-laden as well as polycentric, concerning as it did fiscal management.[99] The Court emphasised, however, that even in such case, "*this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control*".

149. We submit that the HSF has satisfied even the test set forth in *Outa, as read with the* test formulated *Setlogelo* and *Webster*[100].

150. Importantly, and unlike the decision at issue in *Outa*, the decision to appoint the National Head is not is not a policy-laden or polycentric one. Instead, it is a decision with what the *Simelane* Court recognised as strict objective criteria, where the law requires a proper process to result in a justifiable decision. The Constitutional Court has accepted that objectively ascertainable criteria, such as being fit and proper for a high office, are safeguards to the independence of the office and the institution it heads.[101]

151. Of course, provided the candidate is, rationally, fit for office, and all relevant factors were properly considered and a lawful process followed, the Court is

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[98] *Outa* para 47.
[99] *Outa* para 73.
[100] *Webster v Mitchell* 1948 (1) SA 1186 (W).
[101] *Helen Suzman Foundation v President of the Republic of South Africa, supra*, paras [71]-[76]..

not at liberty to set aside the appointment as it would have preferred a different candidate.

152. This is not the case here, however. As was the case in *Simelane*, the decision-maker has failed to consider material facts and circumstances, which failure itself is so material to the process and the decision, that it renders the decision to appoint unlawful and irrational. When faced with this clear evidence, then, on any test, the applicants have established the clearest right[102] that the decision to appoint was unlawful and this Court should not sanction the perpetuation of this wrong. In any event, the Courts have not shied away from ordering suspensions of high ranking public officials in such circumstances.[103]

COSTS

153. The applicants have pursued these proceedings with the objective of ensuring compliance with the rule of law and fundamental constitutional principles. The applicants submit that, should they be substantially successful in this application, they are entitled to a costs order in their favour against the first and second respondents– including the costs of two counsel.

154. If unsuccessful, then on the accepted constitutional basis no costs should be awarded against the applicants, it being clear that the application has not been brought vexatiously or frivolously,[104] and has been advanced in the public interest in vindication of the rule of law and the proper administration of justice.

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[102] Even if this were a case which implicated high-end separation of powers concerns (which it does not): *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC), para [47].

[103] *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others, supra,* paras [57]-[61].

[104] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

CONCLUSIONS

155. The decision to appoint is clearly, but at least *prima facie*, unlawful. The Minister has deliberately chosen to ignore judicial pronouncements which speak to the objective suitability of Maj-Gen Ntlemeza for the high office of National Head, and instead preferred Maj-Gen Ntlemeza's self-serving two page memorandum as being completely exculpatory and trumping the findings of three courts.

156. Maj-Gen Ntlemeza's contentions that the judgments are incorrect is not sustainable; yet this amounts to the entirety of the respondents' defence on the merits.

157. The Minister has thus failed in his constitutional duty to protect the independence of the DPCI and uphold the rule of law in South Africa.

158. The National Head's role and functions mean that his actions have an impact on the administration of justice, the realisation of rights and the public at large. This is a high office which wields enormous power and is charged, as its core mandate, with the combatting of corruption and other priority offences, which are, by their very nature, of great public import and central to the administration of justice. Incidental to this mandate is the concomitant requirement that any incumbent of such office not only be lawfully appointed and act lawfully (which is trite), but that the incumbent must also exhibit, and be seen to exhibit, the utmost independence, integrity and respect for the law.

159. As such, every day Maj-Gen Ntlemeza continues to act as National Head he does so unlawfully. Given that he was, and is, not suitable to be National

Head, this calls for the Republic and the DPCI immediately to be safeguarded from his influence and his actions.

DAVID UNTERHALTER SC
CAROL STEINBERG
Chambers, Sandton
4 April 2016