

**78**

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 60970/17

In the matter between:

**HELEN SUZMAN FOUNDATION**

**1<sup>st</sup> Applicant**

**FREEDOM UNDER LAW NPC**

**2<sup>nd</sup> Applicant**

and

**THE PRESIDENT OF THE REPUBLIC  
OF SOUTH AFRICA**

**1<sup>st</sup> Respondent**

**SHAUN ABRAHAMS**

**2<sup>nd</sup> Respondent**

**DR JP PRETORIUS SC**

**3<sup>rd</sup> Respondent**

**SIBONGILE MZINYATHI**

**4<sup>th</sup> Respondent**

**THE NATIONAL PROSECUTING AUTHORITY**

**5<sup>th</sup> Respondent**

**FILING SHEET**

**DOCUMENT:**

**OPPOSING AFFIDAVIT ON BEHALF OF 3<sup>RD</sup> RESPONDENT**

**ON ROLL :**

**NOT YET ALLOCATED**

**FILED BY:** **3<sup>RD</sup> RESPONDENT'S ATTORNEY**  
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**TO:** THE REGISTRAR OF THE HIGH COURT  
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**AND**  
**TO:** **APPLICANTS' ATTORNEYS**  
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**AND  
TO:**

**1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> AND 5<sup>th</sup> RESPONDENTS' ATTORNEY**  
STATE ATTORNEY PRETORIA  
SALU BUILDING  
316 THABO SEHUME STREET  
CNR THABO SEHUME (ANDRIES) AND FRANCIS BAARD  
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**Enq:** Mr J Sebelemetsa

<b>STATE ATTORNEY</b>
PRIVATE BAG/PRIVAATSAK X91
2017-12-14
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<b>STAATSPROKUREUR</b>

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**DATE:**

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*15h:10*



**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CASE NUMBER: 60970/2017**

In the matter between:

**HELEN SUZMAN FOUNDATION**

First Applicant

**FREEDOM UNDER LAW NPC**

Second Applicant

and

**THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

First Respondent

**SHAUN ABRAHAMS**

Second Respondent

**DR J P PRETORIUS SC**

Third Respondent

**SIBONGILE MZINYATHI**

Fourth Respondent

**THE NATIONAL PROSECUTING AUTHORITY**

Fifth Respondent

---

**OPPOSING AFFIDAVIT ON BEHALF OF THIRD RESPONDENT**

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I, the undersigned,

**JACOBUS PETRUS PRETORIUS**

do hereby make oath and state as follows:



1.

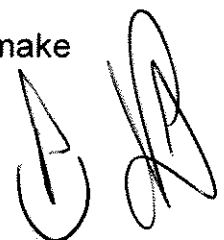
1.1. I am an admitted advocate of this Honourable Court and member of the personnel of the National Prosecuting Authority ("NPA") with offices at the Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. I am the Acting Special Director of the Priority Crimes Litigation Unit in the offices of the NPA and I am the Third Respondent in this application.

1.2. The facts contained in this affidavit are within my personal knowledge, unless it appears otherwise from the context and are both true and correct.

1.3. All legal submissions are made on the advice of my legal representatives and I accept the correctness thereof.

2.

I have read the founding papers and wish to inform the Honourable Court that I oppose the application. Before I deal with the specific allegations contained in the founding affidavit I wish to refer to certain facts and make

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certain observations that I believe will be of assistance to the Honourable Court when considering the application and to further assist the Honourable Court when adjudicating the issues raised in the application.

3.

I further wish to inform the Honourable Court that I will only deal with the facts and principles relating to my case. I will refrain from dealing with allegations against Second and Fourth Respondents and/or submissions made relating to them. I will leave it to themselves and their legal teams to deal with allegations against them which do not have a direct bearing on my case.

4.

When evaluating the application it appears that in essence the application is a review application to set aside two decisions of the First Respondent:

4.1. The decision not to institute an enquiry into our (Second to Fourth Respondents) fitness to hold office in our relevant capacities in terms of section 12(6)(a) of the National Prosecuting Authority Act, 32 of 1998 ("NPA Act").

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4.2. The decision not to provisionally suspend us from our respective offices in terms of section 12(6)(a) of the NPA Act pending the finalisation of the respective enquiry(ies).

5.

For the convenience of the Honourable Court I quote the relevant provision from the NPA Act:

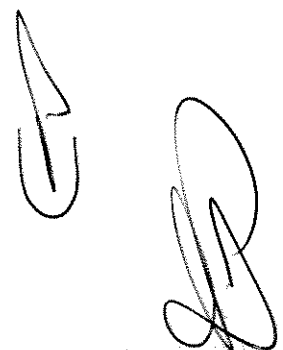
"(6) (a) The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-

- (i) for misconduct;
- (ii) on account of continued ill- health;
- (iii) on account of incapacity to carry out his or her duties of office efficiently; or
- (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned

...

(7) ..."

(My emphasis)



- 5 -

6.

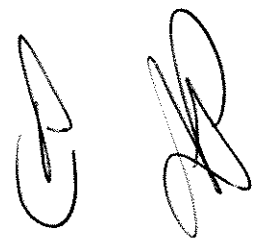
The objective facts are of course that the President (First Respondent) decided not to institute an enquiry against us as is envisaged in terms of section 12(6)(a) of the NPA Act.

7.

I am advised that it was only incumbent on the First Respondent and appropriate for him to consider the issue of suspension after he decided to institute an enquiry to be held against us in terms of this section. Even if the First Respondent may have made remarks to the effect that he will not suspend us, it could only have been based on the fact that the prerequisite for a consideration for suspension did not materialise – the decision was not to institute an enquiry.

8.

I am therefore advised and respectfully submit that the application before this Honourable Court is flawed insofar as there is an attempt to review and set aside the First Respondent's decision not to temporarily suspend me pending the finalisation of an enquiry against me.





9.

I therefore deny that the Applicant made out a proper case to justify this Honourable Court to consider our suspension under circumstances where the authority been provided with the discretion to consider such suspension did not exercise his discretion in this regard because the necessity for consideration in this regard had not arrived. In any event I submit that the Applicant did not make out a proper case for the relief sought including the request for my suspension. A decision to suspend can of course only follow after a valid decision to institute disciplinary proceedings have been taken.

10.

I am further advised and respectfully submit that the First Respondent never had the authority in terms of section 12(6) or any other section of the NPA Act or any other Act to institute an enquiry against me and/or to suspend me pending the finalisation of such enquiry against me. Further legal argument will be addressed to the Honourable Court at the hearing of this application in this regard. This was brought under the First Respondent's attention in my representations to him.





**BACKGROUND FACTS:**

11.

In order to assist the Honourable Court I will provide a summary of the facts relating to my involvement in the case that was investigated against *inter alia* the previous Minister of Finance, Mr Pravin Gordhan, and the motivation for decisions and/or recommendations that I have made in this regard.

12.

On the 18<sup>th</sup> of March 2015 two members of a secret Unit (Rogue Unit) within SARS approached the Commissioner of SARS, Mr Moyane, in order to report a sensitive issue which they regarded as unlawful conduct by members of SARS. I can disclose the identity of these members at this stage but would prefer not to do so in fear of possible prejudice for them. I, however, wish to inform the Honourable Court that I am willing to disclose their identity identities should the Court require me to do so.



13.

Commissioner Moyane was informed of the activities of what was referred to as a Rogue Unit of SARS. After obtaining the facts from the mentioned members Commissioner Moyane obtained independent legal advice regarding the institution of criminal charges and was advised to report the matter to the Directorate of Priority Crimes of SAPS.

14.

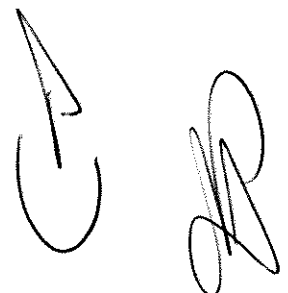
During May 2015 a Police case docket was opened at the Brooklyn Police Station with reference number CAS 427/5/2015.

15.

Thereafter a special prosecution team was appointed from the priority litigation unit of the NDPP to assist in the investigation and to ensure that the matter was properly handled. This team was led by:

15.1. Advocate Sello Maema; and

15.2. Advocate Jabulani Mlotshwa.

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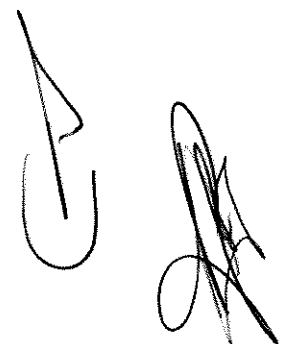
I can mention that I was not involved in any manner in the appointment of the team. These members were not part of my Unit at that stage but they were subsequently allocated to my Unit.

16.

The investigation disclosed *prima facie* the following: (I should, however, mention that the evidential material that was obtained was indeed under oath.)

16.1. In 2007 the so-called Rogue Unit was established within SARS at the request of Mr Ivan Pillay. Mr Pillay was the General-Manager of the Enforcement Unit of SARS at the time.

16.2. The request to establish the Rogue Unit was supported by Mr Pravin Gordhan, in his capacity, at that stage, as Commissioner of SARS and was subsequently approved by the then Minister of Finance, Mr Trevor Manuel.

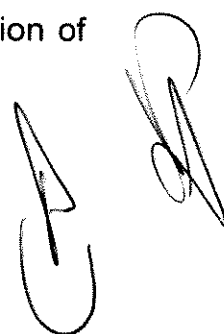
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16.3. This Unit did not operate from SARS offices but operated from their houses, guesthouses, coffee shops, etc. They were also instructed to open private companies to disguise their real activities.

16.4. During the initial stages there were attempts by the, what was later referred to as the Rogue Unit, to liaise with the National Intelligence Agency but the interactions between SARS and NIA in this respect were unsuccessful. SARS decided to continue on its own with this Unit.

16.5. SARS in the above regard operated a covert intelligence component without the approval of the State Security Agency under the stewardship of Messrs Ivan Pillay and Pravin Gordhan in contravention of section 3 of the National Intelligence Act, Act 39 of 1994.

16.6. This Unit conducted undercover operations of intercepting communications within State institutions amongst others the National Prosecuting Authority ("NPA") in contravention of the Interception of Communications Act, Act 70 of 2002.

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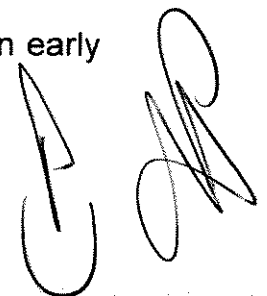
16.7. In the above regard I can mention that it was further established that Advocate Gerrie Nel, a member of the National Prosecuting Authority, and Mr Leask of the Directorate of Special Operations made contact with a member of this Rogue Unit to assist them to enhance the physical security of their offices and other offices. This was apparently used by members of the Rogue Unit to illegally monitor activities at the NPA. Mr Pillay indicated that there was approval for this unlawful project from the highest authority.

16.8. Advocate Nel obtained payment from a secret fund within the Directorate of Special Operations ("Scorpions") in the amount of R1 100 000.00 and instructed payment of the said amount into a member of the Rogue Unit's wife's account in Absa Bank.

16.9. Members of the Rogue Unit fitted covert equipment in 12 offices and some board rooms of the NPA including the office of the NDPP, at that stage Advocate Pikoli.

Two handwritten signatures in black ink, one appearing to be a stylized 'P' and the other a more complex signature.

- 16.10. Mr Pillay informed this member of the Rogue Unit to keep R100 000.00 that remained unused after installation of the equipment for his own benefit. (This clearly also constituted unlawful gratification in terms of section 3 of Act 12 of 2004.)
- 16.11. The above equipment installed in the offices of the NPA created the capability to monitor and record intrusions remotely, to record and view such intrusions on a cell phone on an ongoing basis.
- 16.12. Transcripts of the recordings were done by a member of the Rogue Unit and transcripts were given to Mr Pillay.
- 16.13. I wish to pause at this stage to emphasise that the above conduct was in my professional view totally irregular, unlawful and criminal. I can further say that I am of the view that the alleged conduct was indeed shocking to say the least.
- 16.14. During the investigation it was further established that Mr Pillay addressed an internal memo during August 2010 to Mr Magashula (the Commissioner of SARS at that time) requesting to go on early

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retirement at age 56 for personal reasons. The request was further that the penalty for early retirement in the amount of R1 258 345.99 as provided for in terms of Rule 14(3)(3)(b) of the Government Employees Pension Fund ("GEPF") Rules be paid by SARS. For the convenience of the Honourable Court I quote Rule 14(3)(3)(b) of the GEPF Rules:

"14.3 Benefits on retirement of members

Subject to rule 14.10 –

14.3.1 ...

14.3.2 ...

14.3.3 Members with 10 years and more pensionable service-

- (a) a member who retires on account of a reason mentioned in rule 14.3.1(a), (b) or (c) and who has at least 10 years pensionable service to his or her credit, shall be paid the benefits referred to in rule 14.2.1 or 14.2.2: Provided that rules 14.2.3(a) and 14.2.2 shall apply to members referred to in those rules, where applicable;





- (b) a member who retires on account of a reason mentioned in rules 14.3.1(d) or (e) and who has at least 10 years pensionable service to his or her credit, shall be paid the benefits referred to in rule (a) above: Provided, that such benefits shall be reduced by one third of one per cent for each complete month between the member's actual date of retirement and his or her pension-retirement date."

(My emphasis)

16.15. I wish to emphasise that there is no provision in the relevant legislation providing a Minister with the discretion to authorise the payment of such penalty by the employer. I further submit that the provisions of Rule 14(3)(3)(b) of the GEPF Rules are clear in this regard. The penalty is clearly for the account of the person requesting early retirement.

16.16. Apart from the above request Pillay further requested his reappointment as Deputy Commissioner on a contract basis for a period of 3 years the day following his termination of his employment with SARS.

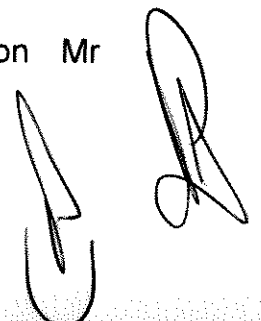
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16.17. This request was recommended by the Commissioner of SARS at the time, Mr Magashula. The memo further made provision for a signature of the then Deputy Minister of Finance, Mr Nene, but he did not endorse and/or sign the request.

16.18. The request was approved by Minister Pravin Gordhan on the 18<sup>th</sup> of October 2010 without the recommendation from the then Deputy Minister Nene.

16.19. I was at that stage and still am of the view that this conduct was unlawful and in contravention of the relevant Legislation and Rules governing same. It also clearly amounted to material fruitless and wasteful expenditure. I may mention that unauthorised, irregular and fruitless expenditure constitute a criminal offence in terms of section 1, read with sections 34 and 81(1) of Public Finance Management Act, ("PFMA").

16.20. Minister Gordhan further approved the reappointment of Mr Pillay for a contract period of 3 years following directly the termination of his employment with SARS. Without any explanation Mr

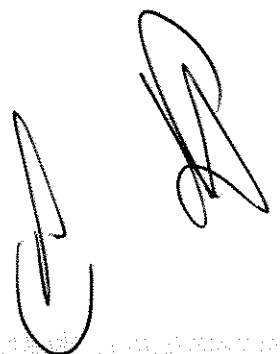


Magashula and Pillay signed a contract of employment for Mr Pillay for a period of 5 years despite the approval for 3 years.

16.21. On the 26<sup>th</sup> of March 2014, one year prior to the expiry of the 5 year agreement referred to above, Mr Gordhan signed a further agreement for a further 5 years of employment for Mr Pillay. This was at the time when Mr Gordhan was already informed of his re-deployment as a Minister of Co-Operative Governance and Traditional Affairs.

17.

Advocates Maema and Mlotshwa were appointed as the prosecution team at an early stage to oversee the investigation and eventually act as the prosecution team in this matter. As mentioned above they later became members of the Priority Crimes Litigation Unit at the NPA. I may add that I in my capacity as acting Special Director: PCLU was their supervisor at the relevant stage.

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- 17 -

18.

They presented the Fourth Respondent and I on the 6<sup>th</sup> of September 2016 with a slide presentation of their investigation. Present during the slide presentation were also Second Respondent and other senior members of the NPA management.

19.

On the 7<sup>th</sup> of September 2016 they further presented the Fourth Respondent and I with a written internal memo marked "TOP SECRET" relating to this issue.

20.

Their recommendation after the provisional completion of their investigation was the following:

"In respect the first leg regarding the establishment of the Rogue Unit, the investigations are still proceeding and a further communication will be sent to you once sufficient progress has been made.

In regard to the second leg relating to the payment of the early retirement penalty of Mr Pillay, it is recommended that: -

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**Messrs Oupa Magashula, Ivan Pillay and Pravin Gordhan** must be arraigned in the Regional Court, Pretoria for the following offence as outline in the attached charge sheet.

- Fraud alternatively theft
- Contravention of section 86 of the PFMA, Act 1 of 1999."

21.

I made the following remarks on the 15<sup>th</sup> of September 2016 relating to the recommendation:

"The recommendations are supported however there are a couple of statements I still require before a final decision is made."

22.

Fourth Respondent made the following comment:

"The matter was discussed with Dr Pretorius and I confirm his remarks."

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a final flourish.

23.

I wish to inform the Honourable Court that the internal memo referred to above was accompanied by various affidavits obtained from witnesses together with annexures that substantiated their recommendations.

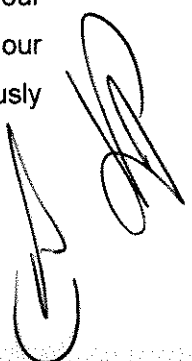
24.

Mr Gordhan chose not to participate in the process and refused to provide the investigating team with a warning statement despite requests in this regard. His attorneys did send a letter relating to this issue to Major General Ledwaba, the Head: Organised Crime Directorate for Priority Crime Investigations Head Office of SAPS dated the 24<sup>th</sup> of August 2016.

25.

After obtaining further statements and doing further investigations the prosecution team made the following recommendations on the 3<sup>rd</sup> of October 2016:

"It is submitted that there is enough evidence to warrant the addition of count 3 of fraud against Messrs Oupa Magashula, Ivan Pillay and the addition of count four (4) of fraud against Mr Ivan Pillay and Minister Pravin Gordhan, and it is our recommendation that counts three (3) and four (4) be added to the previously authorised charges. The proposed charge sheet is enclosed herewith."

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26.

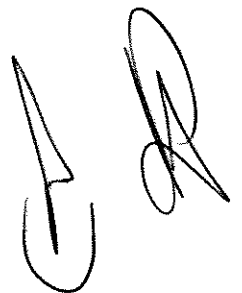
I signed the recommendation on the 4<sup>th</sup> of October 2016 and Fourth Respondent also signed the recommendation on the 4<sup>th</sup> of October 2016.

27.

A full summary of the case, together with the recommendations signed by the Fourth Respondent and I, was provided to the Second Respondent. This was *inter alia* done in order to enable the Second Respondent to comply with his obligations in terms of section 33(2)(a) of the NPA Act. This section provides for the furnishing of a report on a case to the Minister of Justice in order to enable the Minister to exercise his/her final responsibility over the Prosecution Authority as is envisaged in section 33 of the NPA Act.

28.

To the best of my knowledge Second Respondent then subsequently provided the Minister of Justice with a report.

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29.

The objective facts are that this report had been provided to the relevant Minister by the Second Respondent and indeed signed by the Minister of Justice already on the 4<sup>th</sup> of October 2016. This is of course prior to any formal steps taken in the prosecution of *inter alia* Mr Gordhan and/or the public announcement that there was a decision to prosecute the mentioned individuals.

30.

On the 11<sup>th</sup> of October 2016 the Second Respondent addressed a Press conference and announced the decision to prosecute *inter alia* Mr Gordhan.

31.

On the same date a summons under case number 574/16 was served on *inter alia* Mr Gordhan. I may add that this summons was already issued the previous day, the 10<sup>th</sup> of October 2016, by the Clerk of the Criminal Court.

A handwritten signature in black ink, consisting of a large, stylized initial 'A' followed by a series of loops and flourishes.



32.

I am aware of the fact that Messrs Pillay and Magashula subsequently made representations to the Second Respondent. I was, however, not present and I am not in position to comment on these representations.

33.

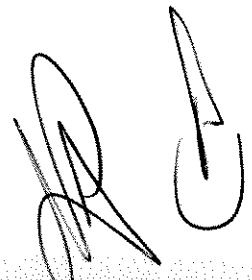
To my knowledge Mr Gordhan did not make any representations to the Second Respondent.

34.

I was subsequently requested, on more than one occasion, for further information by the Second Respondent. I was also part of a number of meetings that he had with the senior management of the NPA relating to the future of this case.

35.

I am also aware of a letter addressed to the Second Respondent (I was copied with this letter) on the 14<sup>th</sup> of October by the First Applicant. Annexed to this letter was *inter alia* a memorandum from one Mr

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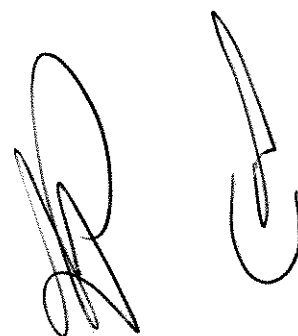
Symington expressing his views on the lawfulness of the alleged conduct by the accused.

36.

With reference to the internal memorandum by Mr Symington I can inform the Honourable Court that we were not previously aware of this memorandum. I can further indicate that I disagree with the content insofar as the opinion is expressed that the Rules of the GEPF provides for a discretion by the Minister of Finance to waive the early retirement penalty. I will not deal in detail with this memorandum as it was not part of the material before me when I made the recommendation for prosecution.

37.

On the 31<sup>st</sup> of October 2016 the Second Respondent indeed made known his intentions to withdraw the charges against all three accused persons. I was not part of this decision, although I was present at consultations when the question was discussed by the senior management of the NPA.

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**AD: FOUNDING AFFIDAVIT:**

38.

Before dealing with the specific allegations contained in the founding affidavit I wish to mention at the outset that I deny all allegations contained in the founding affidavit insofar as it is not in accordance with what I have stated above.

39.

I will now deal with the specific allegations contained in the founding affidavit.

40.

**AD PARAGRAPHS 1 TO 4 THEREOF:**

Apart from denying that all the facts contained in the founding affidavit are true and correct in all respects and that the legal submissions are correct, I take note of the allegations contained in these paragraphs.

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41.

**AD PARAGRAPH 5 THEREOF:**

It is correct that the Second Respondent announced on the 11<sup>th</sup> of October 2016 during a press conference that the NPA decided, after conclusion of an investigation, to prefer *inter alia* fraud and theft charges against certain individuals including the then Minister of Finance, Mr Pravin Gordhan.

42.

**AD PARAGRAPH 6 THEREOF:**

Although it is correct that the announcement was regarded as very serious I deny that it had the dramatic consequences set out in this paragraph.

43.

**AD PARAGRAPH 7 THEREOF:**

I confirm that the charges were subsequently withdrawn by the Second Respondent but I deny that the charges were never sustainable in law. I refer to what I have stated above and submit that there was a *prima facie* case against the individuals who were charged.



44.

**AD PARAGRAPH 8 THEREOF:**

I take note of the allegations contained in this paragraph but repeat what I have stated in the paragraph above. I further refer the Honourable Court again to what I have stated in the introductory part of this affidavit.

45.

**AD PARAGRAPHS 9 AND 10 THEREOF:**

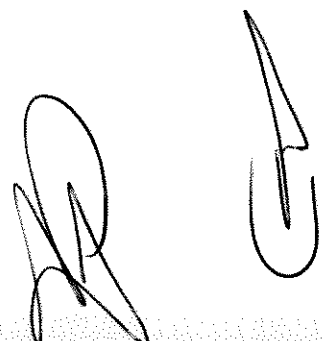
45.1. I take note of the allegations contained in these paragraphs but in view of the fact that it only deals with the conduct of the Second Respondent I will refrain from commenting thereon.

45.2. I, however, again deny that the charges were and had always been baseless as alleged. I refer the Honourable Court again to what I have stated above in this regard.

46.

**AD PARAGRAPHS 11 AND 12 THEREOF:**

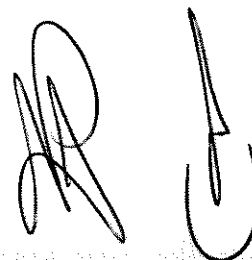
46.1. I deny every allegation contained in these paragraphs.

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46.2. I refer the Honourable Court again to what I have stated above and again confirm that there was indeed a *prima facie* case of unlawful conduct made out against the accused mentioned in the charge sheets.

46.3. I therefore deny that any conclusion to the effect that I am incompetent as alleged or at all, can be drawn from the facts, or any conclusion that I am not fit to hold my present position within the NPA. I also vehemently deny that I at any stage did not act independently or contrary to the Constitutional mandate of the NPA and/or in a manner which amounts to a gross abuse of public power. I again refer the Honourable Court to what I have stated with reference to the investigation done and what led to my conclusion that there was indeed a *prima facie* case of unlawful conduct by the accused persons.

46.4. I deny that the First Respondent is empowered and/or that it is constitutionally required from the First Respondent to institute enquiries into my fitness and/or to suspend me pending an enquiry against me under section 12(6) of the NPA Act.

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47.

**AD PARAGRAPHS 13 TO 14 THEREOF:**


I confirm that First Respondent refused to institute any enquiry against Second to Fourth Respondents but I deny that his conclusion was incorrect particularly insofar as it is relevant to me. I further deny that the First Respondent had been presented with a wealth of *prima facie* evidence warranting an enquiry against me and/or justifying my suspension. I therefore deny that the First Respondent's failure to institute an enquiry against me and/or suspend me was irrational and/or unlawful and/or falls to be set aside.

48.

**AD PARAGRAPHS 15 TO 17 THEREOF:**

48.1. I take note of the relief sought by the Applicants in this application.

48.2. I deny that they are legally entitled to the relief sought and/or that they have made out a proper case for the relief sought.

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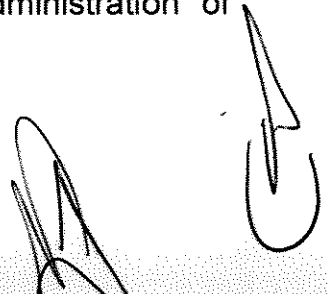
48.3. With reference to the failure by the First Respondent to provisionally suspend me from office under section 12(6)(a) of the NPA Act I again deny that the First Respondent was legally empowered to do so and/or that the issue of suspension was duly considered by the First Respondent in view of the fact that he refused to institute an enquiry. As mentioned, I again submit that the question of suspension could only arise after a decision to institute an enquiry had been taken.

49.

**AD PARAGRAPHS 28 TO 37 THEREOF:**

49.1. I agree that the NPA is enjoined to act lawfully and to fight all crime relentlessly, independently and effectively.

49.2. I further agree that all citizens of the Republic of South Africa have a Constitutional right to an independent and functioning criminal justice system where public power will be mobilised rationally and lawfully. I also agree that the Institution's task with implementing the criminal justice system such as the NPA should act responsibly, independently and in the best interests of the administration of

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justice and that the public office bearers should act lawfully and rationally in the best interests of our country and its citizens.

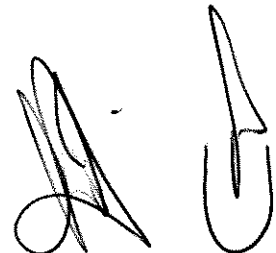
49.3. I deny the further allegations contained in these paragraphs and in particular deny that there is any evidence that I have been unduly influenced and/or that I acted irrationally and/or arbitrarily in a manner which constitutes a gross abuse of public power.

50.

**AD PARAGRAPHS 38 to 40 THEREOF:**

50.1. It is correct that a summons had been served on Mr Gordhan with charges that included theft and fraud in relation to the payment of Mr Pillay's early retirement pension deduction.

50.2. It is not correct that these allegations were not properly investigated and I refer the Honourable Court to what I have stated above in this regard.

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50.3. I cannot comment on the alleged secret discussions by the Second Respondent. I was not part of any such secret discussions alleged in these paragraphs.

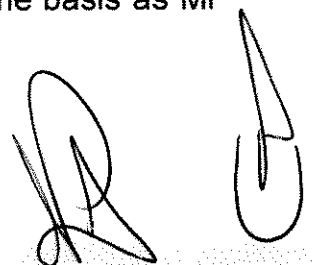
51.

**AD PARAGRAPHS 41 TO 55 THEREOF:**

51.1. I note that the allegations in these paragraphs are substantially levelled against the Second Respondent. I will therefore not deal with these allegations apart from commenting briefly insofar as there is any suggestion that I acted improperly and/or unlawfully in any respect.

51.2. I deny any allegation to the effect that the institution of criminal proceedings against *inter alia* Mr Gordhan was unlawful and/or without any legal basis. I also deny any suggestion that it was done with an ulterior motive. In this regard I again refer the Honourable Court to what I have stated in this regard above.

51.3. The allegation that there were 3000 other cases of early retirement in the 5 years prior to Mr Pillay's retirement on the same basis as Mr

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Pillay is very vague and unsubstantiated and is to the best to my knowledge not correct. I invite the Applicant to present the necessary detail with reference to the identity of the 3000 persons, their employer's details as well as the date of their retirement and their ages at the time of the retirement. I also request the Applicant to provide the date of the commencement of the respective persons' employment as well as the amounts that had been paid by their respectively Departments to the Pension Fund. During our investigation we indeed found that in all other instances in SARS, employees who went on early retirement were held liable for the penalty provided for in the GEPF. In the event that the Applicant is unable to provide the information referred to above I request them to withdraw the allegation *alternatively* an application for the striking out of this allegation will be brought prior to the hearing of this application.

51.4. I deny all allegations in these paragraphs insofar as it referred to me and insofar as it has been contradicted by what I have stated above.

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52.

**AD PARAGRAPHS 56 to 57 THEREOF:**

52.1. It is correct that the Applicants demanded the withdrawal of the charges during mid-October 2016 and that the request was refused.

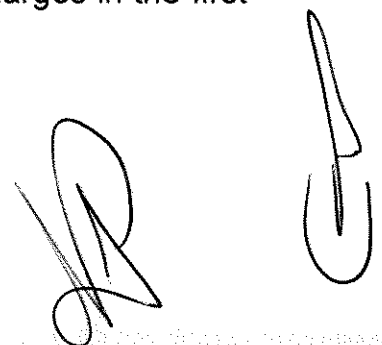
52.2. It is further correct that Applicants then approached this Honourable Court on an urgent basis to set aside the charges as being unlawful. The position is of course that this Honourable Court refused the Application and ordered the Applicants to pay the costs of the Application.

53.

**AD PARAGRAPHS 58 AND 59 THEREOF:**

53.1. It is correct that the investigation was an ongoing process and that the investigating team proceeded to procure information relevant to the prosecution.

53.2. I deny, however, that this is out of the ordinary and/or an indication that there was insufficient evidence to sustain the charges in the first

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place. As mentioned that is the normal procedure of any investigating team in the normal course.

54.

**AD PARAGRAPH 60 THEREOF:**

54.1. I deny that there was no evidence which warranted the continuation of any prosecution based on the charges.

54.2. In the above regard I also wish to refer the Honourable Court to the fact that Mr Gordhan refused to co-operate with the investigating team. He for instance refused requests to provide a warning statement to the investigating team explaining for instance the allegation that he acted *bona fide* as was subsequently alleged.

54.3. I respectfully submit that the failure by Mr Gordhan, in his position as a Minister of the Central Government, to co-operate with the investigating team and provide his version of events is regrettable. This is specially so under circumstances where his defence subsequently appeared to be one of a lack of knowledge of

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unlawfulness. I still maintain that his conduct remained objectively speaking unlawful in this matter.

55.

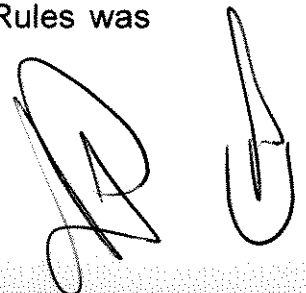
**AD PARAGRAPHS 61 TO 64 THEREOF:**

55.1. It appears that the Applicants fail to understand that an investigation is an ongoing process.

55.2. At the time when the decision was taken there were more than sufficient evidential material available to justify a prosecution against the accused persons.

55.3. In law and in practice the decision to prosecute does not have the effect to stop the investigation. I can inform the Honourable Court that it is the daily practice in our criminal system that investigations are ongoing even after a trial already commenced in Court.

55.4. The issue pertaining to the alleged 3000 incidents where Government employees were allowed to take early retirement without having to pay the penalty in terms of the GEPF Rules was

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quite an important issue. The investigations by the Investigating Team showed that those allegations were *prima facie* untrue. All facts relating to this issue showed that employees who were allowed to take early retirement were indeed obliged to pay the penalty. Affidavits in this regard had been presented to me at the relevant stage.

55.5. This was clearly a further step by the Investigating Team to obtain further and decisive evidential material to disprove beyond any doubt whatsoever this apparent defence that the accused persons may have relied on during trial. My understanding was that officials of SARS were not co-operative in this regard.

56.

**AD PARAGRAPHS 65 TO 80 THEREOF:**

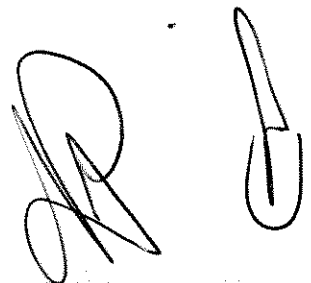
56.1. These allegations are again in substance against the Second Respondent and I will refrain from commenting on the allegations apart from instances where it may be construed to refer to me as well.



56.2. I again refer the Honourable Court to what I have stated above with reference to in investigation and the final decision to prosecute in this matter.

56.3. With reference to the so-called Symington memorandum I wish to inform the Honourable Court that this memorandum was not available at the time when I decided to recommend criminal charges against the accused in this matter. It only became available subsequently on the 14<sup>th</sup> of October 2016.

56.4. I further wish to inform the Honourable Court that I do not agree with the correctness of the legal opinions and inferences contained in the Symington memorandum. I maintain that the GEPF is clear in that it states that a person who requests early retirement is obliged to be penalised in the prescribed formula. I maintain that if one reads all the relevant provisions relating to this issue there can be no other interpretation as the one set out above. In the event that an employee requests early retirement (like Mr Pillay), he, not the State, has to be penalised by forfeiting a part of the benefits.

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56.5. I deny all further allegations contained in these paragraphs insofar as it is not in accordance with what I have stated above.

57.

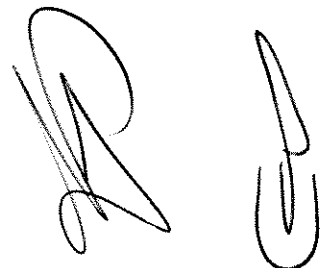
**AD PARAGRAPHS 81 TO 95 THEREOF:**

These allegations are made against the Second Respondent and I will refrain from commenting thereon.

58.

**AD PARAGRAPHS 96 TO 103 THEREOF:**

I confirm that the Applicants approached this Honourable Court on an urgent basis on the 22<sup>nd</sup> of November 2016 in order to review and set aside the President's failure to take decisions to institute an enquiry against *inter alia* myself and to suspend me pending the finalisation thereof. I further confirm that the Application was struck for lack of urgency and that the Applicants were ordered to pay the costs of the Application.



59.

**AD PARAGRAPHS 104 TO 111 THEREOF:**

I was not involved in the exchange of the correspondence mentioned and take note thereof. I, however, confirm that the First Respondent, after considering the relevant facts, which included an address on my behalf, decided that there was no basis for an investigation against me.

60.

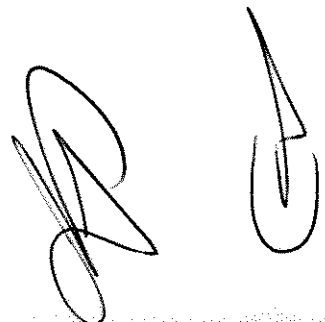
**AD PARAGRAPH 112 THEREOF:**

I again confirm that I indeed submitted a separate representation with the First Respondent for consideration in the above regard. I refer the Honourable Court to the record presented by the First Respondent in this regard which include my representations.

61.

**AD PARAGRAPHS 113 TO 115 THEREOF:**

The allegations contained in these paragraphs deals with Second and Fourth Respondents and I will refrain from commenting thereon.

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62.

**AD PARAGRAPH 116 THEREOF:**

I deny the allegations contained in this paragraph. I submit that the First Respondent's decision in this regard was the proper and correct decision under the circumstances at least insofar as it refers to my position.

63.

**AD PARAGRAPHS 117 TO 123 THEREOF:**

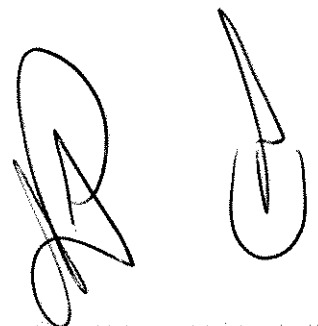
The allegations in these paragraphs deal with the Second Respondent and I will not comment thereon.

64.

**AD PARAGRAPHS 124 TO 130 THEREOF:**

64.1. I deny that the prosecution of the charges was pursued as gross abuse of public power or in a reckless and incompetent fashion without proper investigation either as alleged or at all.

64.2. I refer the Honourable Court to what I have stated in the above regard.

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64.3. With reference to the decision to prosecute I refer the Honourable Court to what I have stated above.

64.4. I also specifically deny that my conduct illustrates that I failed in my fundamental constitutional and statutory duty to ensure that charges were properly grounded and to take an impartial, independent and objective view.

64.5. I submit that it is important to mention that the three accused in the relevant prosecution are not above the law and should be dealt with as any other citizen. In this regard I submit that it is ludicrous to suggest that in instances where prosecution is instituted against an accused person and he is subsequently found not guilty and/or where a case is withdrawn that illustrates incompetence and/or untoward behaviour by the relevant prosecutor. This indeed occurs in thousands of instances on a daily basis in our Courts.

64.6. I deny any allegation of untoward conduct by myself relating to the proceedings against the accused persons. I also deny that my



conduct in any way undermined public confidence in the integrity of the NPA.

64.7. I wish to mention that I am a member of the NPA for the past more than 40 years and deny that I at any stage acted without integrity and/or with a lack of conscientiousness and/or competence.

65.

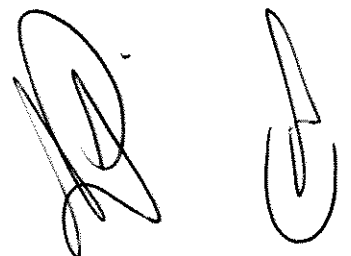
**AD PARAGRAPHS 131 TO 135 THEREOF:**

I deny the correctness of the summary of the legal framework set out in these paragraphs. I refer the Honourable Court to what I have already stated in this regard hereinbefore. Further legal argument will be addressed to the Honourable Court at the hearing of this application.

66.

**AD PARAGRAPHS 136 TO 140 THEREOF:**

66.1. I deny the correctness of the summary of the "narrow issues" set out in these paragraphs.

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66.2. There is certainly further the question whether the First Respondent had the authority to exercise the mentioned powers in terms of the relevant legislation.

66.3. There is also further the question whether the First Respondent had indeed considered the issue of provisional suspension following his decision that the facts of the case did not warrant an enquiry (enquiries) into my fitness and propriety for the office that I hold.

67.

**AD PARAGRAPHS 141 TO 142 THEREOF:**

I have no quarrel with the allegation that integrity, impeccable honesty, dignity, respect for legal order and a sense of fairness are all important qualities that a lawyer should possess to be a fit and proper person in general to practice as a lawyer but also to hold the post that I do.

68.

**AD PARAGRAPHS 143 TO 144 THEREOF:**

I take note of the reference of the relevant directors of the Code of Conduct for Prosecutors and do not dispute any of the directives and/or the



correctness thereof. I, however, deny that I contravened the Code of Conduct in any manner either as alleged or at all.

69.

**AD PARAGRAPHS 145 TO 154 THEREOF:**

69.1. I do not dispute the allegations that persons occupying the office of senior positions in the NPA wield material public power and that they should be fit and proper persons to hold such office.

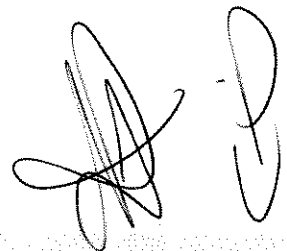
69.2. I, however, deny that a proper case was made out before the First Respondent to justify the institution of an enquiry against me. I refer to what I have already stated in this regard hereinbefore.

69.3. I therefore also deny that the First Respondent acted irrationally when taking the decision not to institute proceedings against me.

70.

**AD PARAGRAPHS 155 TO 166 THEREOF:**

70.1. As already mentioned I do not dispute allegations to the effect that persons in high level positions in the NPA wield substantial public

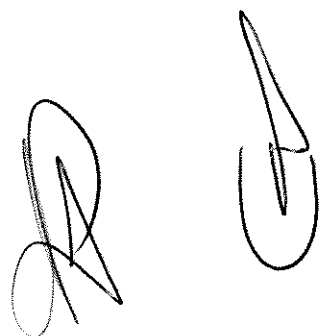
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power and should be fit and proper persons who will act with the necessary integrity and competency. I also do not dispute that the NPA has an important role to play in the protection of our constitutional democracy.

70.2. I, however, again submit that the issue of suspension was not and could not be considered by the First Respondent for *inter alia* the reason that he decided that there was not a proper case made out for an enquiry.

70.3. I therefore again deny that this Court has the power to "review" the decision of the First Respondent not to suspend me (*inter alia*) because that decision was never considered and/or could never be considered by the First Respondent. I refer to what I have already stated in this regard hereinbefore.

70.4. I further deny that First Respondent was in any event presented with any facts justifying a suspension against me.

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70.5. I deny all further allegations in these paragraphs insofar as it is contradicted by what I have stated above.

71.

**AD PARAGRAPHS 167 TO 175 THEREOF:**

71.1. I take note of the submissions on behalf of the Applicants relating to the remedy that they suggest would be appropriate under the circumstances.

71.2. I, however, deny the correctness of the submissions in this regard and refer the Honourable Court to what I have already stated in this regard hereinbefore.

72.

**AD PARAGRAPH 176 THEREOF:**

72.1. I deny that the Applicants made out a proper case for the relief sought and beg the Honourable Court that the application, at least insofar as it refers to me, be dismissed with costs.

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72.2. I again deny all allegations suggesting that I acted unlawfully and/or improperly and/or that the First Respondent was justified to order an enquiry against me and/or order my suspension. In this regard I therefore also deny that the First Respondent acted unlawfully in refusing the request on behalf of the Applicants. I again refer to what I have already stated in this regard hereinbefore.

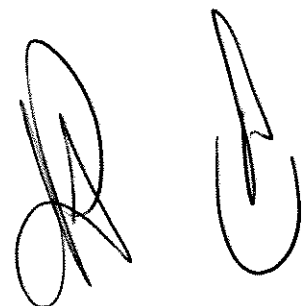
73.

I will now deal with the supplementary affidavit that was filed on Respondents subsequently. At the outset I wish to emphasise that I deny any allegation in this supplementary affidavit in so far as it is inconsistent with what I have stated above.

74.

**AD PARAGRAPHS 1 TO 5 THEREOF:**

Apart from denying that all the facts contained in this affidavit are true and correct in all respects and that the legal submissions are correct, I take note of the further allegations in these paragraphs.



75.

**AD PARAGRAPH 6 THEREOF:**

I deny that the mentioned documents bolster the Applicants' case for review. In this regard I submit that Applicants did not have a case for review with or without these further documentation.

76.

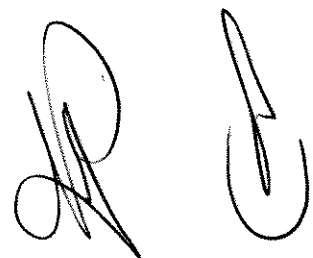
**AD PARAGRAPHS 7 TO 10 THEREOF:**

I deny that my representations to the First Respondent confirm that there was insufficient evidence to bring the charges or that the charges had been brought in bad faith. I take note of the further allegations in these paragraphs.

77.

**AD PARAGRAPHS 11 AND 12 THEREOF:**

I was not aware of the opinion obtained by the First Respondent and I am advised that my views on the opinion are not relevant for purposes of this application.

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78.

**AD PARAGRAPH 13 THEREOF:**

I am advised that the developments in subsequent cases are not relevant for purposes of this application. I am advised that in a review application the Applicants are certainly bound to the material that was before the decision maker at the time when the decision was taken. The attempt by Applicants to bolster their case with information not available to the First Respondent at the time of the decision should, with respect, not be allowed at this stage.

79.

**AD PARAGRAPH 15 THEREOF:**

I again deny that the charges were brought without sufficient evidence and/or in bad faith. I refer the Honourable Court to what I have already stated in this regard hereinbefore.

80.

**AD PARAGRAPHS 16 TO 18 THEREOF:**

80.1. I confirm the correctness of the quote from my representations to the First Respondent.

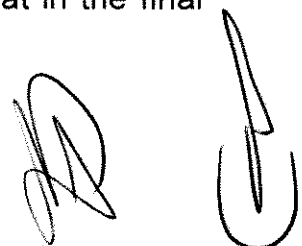
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80.2. I, however, deny the correctness of the inferences and/or the conclusions that the deponent seek to draw from the mentioned statement.

80.3. It appears that the deponent to this affidavit failed to understand the required approach to be followed by the Prosecuting Authority when evaluating to establish whether the required element of *dolus* and more in particular criminal intent (knowledge of unlawfulness) can be established in a trial.

80.4. The starting point is of course that no one is able to read the mind of the suspect in order to establish objectively whether he or she had the necessary intent which of course includes the knowledge of unlawfulness in the present situation.

80.5. The correct approach, in my submission, is then to have regard and evaluate all the evidential material available in order to conclude whether the required element can be proved on the required standard. It must also, of course, be borne in mind that in the final



analysis the decision in this regard will be the Trial Courts. The duty of the relevant prosecutor will be to conclude whether he or she holds the view that a *prima facie* case can be established in this regard.

80.6. One of the issues to be considered, more in particular where one deals with an alleged offence where more than one person were involved in the commitment thereof, is the question whether a specific suspect and/or suspects indeed also had the required *dolus* to commit the alleged contravention. It is therefore correct that I specifically enquired *inter alia* into the question whether there was a *prima facie* case against the relevant suspect relating to the element of *dolus* (including knowledge of unlawfulness).

80.7. In the above regard and after various consultations with the prosecuting team and the investigating team, I was persuaded that there was indeed a *prima facie* case against Minister Gordhan in this regard and that the matter should proceed to Court for trial. In this regard I can inform the Honourable Court that I *inter alia* had regard to the following:



80.7.1. The fact that I was convinced that the conduct pertaining to the instructions that SARS had to pay the penalty of Mr Pillay in terms of the GEPF Rules was not permitted in terms of the relevant Rules or Legislation and therefore *prima facie* unlawful.

80.7.2. The appointment of Mr Pillay on a contractual basis in the very same post after he was allowed to prematurely retire was clearly a material and substantial wasteful expenditure of public funds. This was, in my mind, even more so considering the fact that the motivation for the early retirement was personal financial reasons and the fact that the penalty in terms of the GEPF Rules was also paid from public funds.

80.8. The further extension of Mr Pillay's contractual relationship with SARS some years later in the very same post was also relevant in this regard.

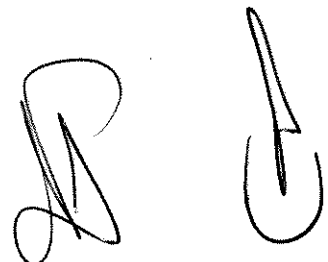
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80.9. The fact that Minister Gordhan refused, despite requests in this regard from the Investigating Team, to provide a statement in order to explain his position also played a significant role in the above decision. In this regard I can inform the Court that in most instances, where a defence of the absence of knowledge of unlawfulness is part of the defence of an accused person, the opportunity to provide an explanation in a statement or warning statement, is usually used by such suspect. In this regard I again have to refer the Honourable Court to the fact that we did not at that stage have access to the so-called Symington statement or opinion that was later provided to Second Respondent after the decision to prosecute had already been taken and made public.

81.

**AD PARAGRAPH 19 THEREOF:**

81.1. I repeat what I have stated above and wish to again emphasise that I always apply the relevant legal principles, including the principle of fairness of the criminal procedure alike to all persons. The financial means of a suspect and/or race and/or gender and/or political standing in society do not play a role in my decision.





81.2. I therefore reject the criticism levelled against me on the basis that I did not take undue consideration of the fact that the suspect in this case was a high levelled political figure.

81.3. Our decision was in any event conveyed to Second Respondent who in turn had the duty in terms of the Constitution to the Minister of Justice is also important in this regard. My view was that if there were any further considerations, apart from the relevant legal principles, that should be taken in consideration, it was for them to consider and come to a final decision.

82.

**AD PARAGRAPHS 21 TO 29 THEREOF:**

82.1. I refer the Honourable Court to what I have stated above, more in particular relating to the element of *dolus* (including knowledge of unlawfulness) that is a required element for the charges in question.

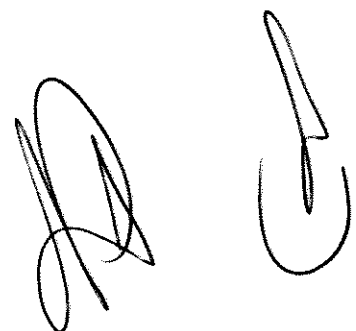
82.2. I submit that the deponent again emphasised a portion or portions of my representations out of context.



82.3. I also wish to emphasise that motive is not a required element of the charges relevant to this application.

82.4. The possible existence of a motive is, however, one of the factors to be considered when evaluating whether a case can be made out against a particular suspected person more in particular relating to the element of *dolus*. In that sense I did have regard to a possible motive. The facts pertaining to this issue may therefore be considered as part of the circumstantial evidence available to the matter as a whole when considering the possible prosecution of a person.

82.5. The allegation to the effect that my approach was that I would regard prove of involvement in another criminal matter as proof of criminal intent in a subsequent matter is totally unfounded and absurd to say the least. I have explained to the Honourable Court what my approach was and what the relevance of Mr Gordhan's involvement in the so-called Rogue Unit was.

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82.6. The allegation that I confirmed that there was simply no evidence beyond the mentioned suspicion that Mr Gordhan had any criminal intent under these circumstances is again completely incorrect and again demonstrates a complete failure to understand the approach when considering a prosecution. The Applicants completely disregard *inter alia* the objective basic fact i.e. that Mr Gordhan agreed to the instruction to pay the penalty of Mr Pillay contrary to the specific legal provisions in this regard. I also refer the Honourable Court to what I have said in this regard hereinbefore.

83.

**AD PARAGRAPHS 30 TO 40 THEREOF:**

83.1. At the outset I have to inform the Honourable Court that the presentations to the First Respondent was not and never purported to be a complete and detailed summary of all the available evidential material against the accused persons. The attempt by the Applicants to scrutinise these representations and draw the inference that there was a lack of evidence because certain aspects were not pertinently mentioned is clearly wrong.

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83.2. In the above regard I have to inform the Honourable Court that there was a full investigation by the Hawks assisted by the Prosecution Team and that a large volume of evidential material was presented to us when the decision was made to institute a prosecution.

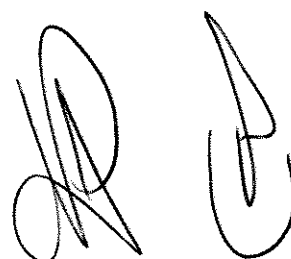
83.3. I again confirm that there was sufficient evidential material available to justify the prosecution of all the accused persons.

84.

**AD PARAGRAPHS 41 TO 44 THEREOF:**

84.1. I maintain that Applicants approach appears to be that the true and objective facts should be disregarded in this case. They themselves are *inter alia* responsible for any negative perception created in the media and now wish to rely on such alleged negative media perception to assist them in this application.

84.2. I deny that there are any objective facts that create a *prima facie* case or any case at all against me as alleged in this application.



84.3. I again deny that I created and/or allowed a perception through my conduct that I am not independent or impartial as alleged or at all.

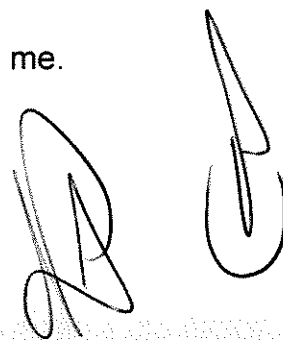
84.4. I further deny that there are any facts justifying my suspension and further again wish to inform the Honourable Court that the First Respondent does not have the authority to suspend me in terms of the Act.

85.

**AD PARAGRAPHS 45 TO 50 THEREOF:**

85.1. I do not understand the relevance of the allegation and/or rather the submissions in these paragraphs to the present application. It appears that the Applicants attempt to justify themselves in approaching this Honourable Court on an urgent basis previously. That is, however, not the issue to be adjudicated upon this Honourable Court at this stage.

85.2. I deny any allegation and/or suggestion to the effect that I conducted myself improper and/or in any manner justifying my suspension and/or the institution of disciplinary proceedings against me.

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86.

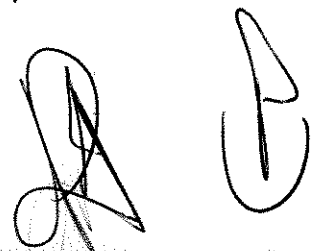
**AD PARAGRAPHS 51 TO 70 THEREOF:**

86.1. As already mentioned I have not seen this opinion until it was filed in this application.

86.2. I am advised that the criticism levelled against the opinion is not relevant for purposes of this application. I am advised that this Court is not called upon to give judgement on the quality of the opinion. The opinion was disclosed by the First Respondent as part of the material that he considered when taking the decision relevant to this application.

86.3. I am advised that the Applicants completely overemphasise the value of this document. On all the material before the First Respondent the First Respondent was clearly justified in taking the decisions that he did.

86.4. I again wish to inform the Honourable Court that this opinion in any event is not relevant to my case as the First Respondent did not

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have the authority in terms of the Act to make the decisions requested in the notice of motion against me. Legal argument will be addressed to the Honourable Court at the hearing of this matter in this regard.

87.

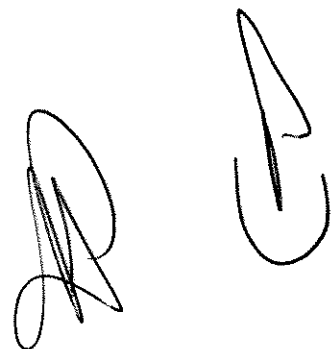
**AD PARAGRAPHS 71 TO 78 THEREOF:**

The allegations in these paragraphs are clearly not relevant for the adjudication of the application against me. I am, however, advised that these new issues raised by the Applicants are not relevant for purposes of this application.

88.

**AD PARAGRAPHS 79 TO 81 THEREOF:**

I am advised that the Applicants do not make out a proper case for the condonation requested. I, however, leave it in the hands of the Honourable Court to decide on this issue.

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89.

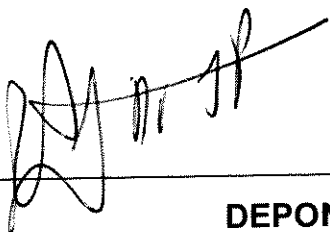
**AD PARAGRAPHS 82 TO 85 THEREOF:**

I deny the allegations in these paragraphs to the effect that the alleged new material available bolstered Applicants case and/or that they indicate that I was in any way influenced in an improper manner to take the decisions that I have taken.

**CONCLUSION:**

90.

I submit that Applicants failed to make out a proper case for the relief sought and I request the Honourable Court to dismiss the application with costs for two counsel.

  
\_\_\_\_\_

**DEPONENT**

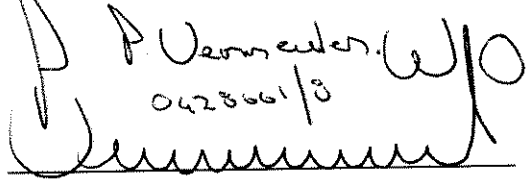
SIGNED and SWORN to at PRETORIA on this 7<sup>th</sup> day of  
DECEMBER 2017 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;





And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

P. Vermeulen. W/O  
0428661/8  


COMMISSIONER OF OATHS

**FULL NAMES:** Pierre Vermeulen  
**BUSINESS ADDRESS:** Cross Border Ops, no 821 Arcadia st  
**AREA:** Arcadia, Pretoria.  
**DESIGNATION:** W/O