IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION;PRETORIA

CASE NO:60970/17

In the matter between :-

HELEN SUZMAN FOUNDATION	1st Applicant
FREEDOM UNDER LAW NPC	2nd Applicant

And

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
SHAUN ABRAHAMS	2nd Respondent
DR JP PRETORIUS SC	3rd Respondent
SIBONGILE MZINYATHI	4th Respondent
THE NATIONAL PROSECUTING AUTHORITY	5th Respondent

FILING NOTICE

DOCUMENT: **1ST RESPONDENT'S RECORD OF PROCEEDINGS**

FILED BY: 1ST RESPONDENT'S ATTORNEYS
THE STATE ATTORNEY PRETORIA
SALU BUILDING
316 THABO SEHUME (ANDRIES) STREETS
Cnr FRANCIS BAARD (SCHOEMAN) AND
THABO SEHUME (ANDRIES) STREET
PRIVATE BAG X91
PRETORIA, 0001
Ref: 6580/2017/Z64/jb
Tel: 012 309 1623
FAX: (012) 309 1649/50
FAX 2 EMAIL: 086 507 1910
E-mail: rsebelemetsa@justice.gov.za
Enq: MR. R J SEBELEMETSA

TO: THE REGISTRAR OF THE
HIGH COURT
PRETORIA

AND TO:
APPLICANTS' ATTORNEYS
WEBBER WENTZEL
90 RIVONIA ROAD
SANDTON, 2196
TEL: 011 530 5000
FAX: 011 530 5111
REF: V Movshovich / P Dela
D Cron / D Rafferty/
W Timm / T Dye
3012607
C/O: HILLS INCORPORTED ATTORNEYS
835 JAN SHOBA STREET
BROOKLYN
PRETORIA
0075
TEL: 087 230 7314
REF: A ENGELBRECHT

HILLS INCORPORATED
835 JAN SHOBA STREET
BROOKLYN, PRETORIA
DATE: 28-09-2017
TIME: 10:58
SIGN: MO.P.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION;PRETORIA

CASE NO:60970/17

In the matter between :-

HELEN SUZMAN FOUNDATION	1st Applicant
FREEDOM UNDER LAW NPC	2nd Applicant

And

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
SHAUN ABRAHAMS	2nd Respondent
DR JP PRETORIUS SC	3rd Respondent
SIBONGILE MZINYATHI	4th Respondent
THE NATIONAL PROSECUTING AUTHORITY	5th Respondent

INDEX TO THE RECORD

	of RSA dated the 28 November 2016.	
5	Representations from Dr JP Pretorius to the President of RSA dated the 28 November 2016.	38 – 56
6	Representations from Adv. S Mzinyathi to the President of RSA dated the 28 November 2016.	57 – 78
7	Annexure to Representations from Adv. S Abrahams to the President of RSA dated the 28 November 2016 - Index to pleadings in the Urgent Application under Case No: 87643/16.	79 – 635
8	Letter from Webber Wentzel to the President of RSA dated the 07 December 2016	636 – 637
9	Letter from State Attorney to Webber Wentzel dated 13 December 2016.	638 – 639
10	Letter from the President of RSA to Adv. S Abrahams dated 01 March 2017.	640 – 641
11	Letter from the President of RSA to Dr JP Pretorius SC dated 01 March 2017.	642 – 643
12	Letter from the President of RSA to Adv. S Mzinyathi dated 01 March 2017.	644 – 645
13	Letter from Webber Wentzel to the State Attorney dated the 21 February 2017.	646 – 647
14	Letter from State Attorney to Webber Wentzel dated 03 March 2017.	648 – 650
15	Letter from Webber Wentzel to the State Attorney dated the 08 March 2017.	651 – 652
16	Letter from State Attorney to Webber Wentzel dated 03 April 2017.	653 – 663
17	Legal Opinion from Adv. IAM Semenya SC and AL Platt SC to the President of RSA.	664 - 711

DATED AT PRETORIA ON THIS THE **28TH** DAY OF **SEPTEMBER 2017.**

14 November 2016

Dear Adv. Abrahams,

NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO.32 OF 1998)

I have been requested by Freedom Under Law and the Helen Suzman Foundation to provisionally suspend you pending an enquiry into your fitness to hold office.

Freedom Under Law and the Helen Suzman Foundation raised concerns with the manner in which you conducted the prosecution of Minister Pravin Gordhan, Mr Visvanathan Pillay and Mr George Magashula. According to them, your conduct in relation to prosecution of the above mentioned people brought the NPA into disrepute, and consequently rendered you unfit to hold office as National Director of Public Prosecutions.

The letter from Freedom Under Law and the Helen Suzman Foundation is attached hereto.

Section 9 (1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 (the Act), provides that "*Any person to be appointed as National Director, Deputy National Director or Director must-*

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and

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

According to section 12(6) of the Act, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold office.

As you are aware, the National Prosecuting Authority is an important constitutional institution in the administration of Justice and maintaining public confidence in the institution is of necessity.

I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Advocate Shaun Abrahams
National Director of the Public Prosecutions
Private Bag X752
Pretoria
0001

cc: Minister TM Masutha: Minister of Justice and Correctional Services

14 November 2016

Dear Dr Pretorius,

NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO.32 OF 1998)

I have been requested by Freedom Under Law and the Helen Suzman Foundation to provisionally suspend you pending an enquiry into your fitness to hold office.

Freedom Under Law and the Helen Suzman Foundation raised concerns with the manner in which you conducted the prosecution of Minister Pravin Gordhan, Mr Visvanathan Pillay and Mr George Magashula. According to them, your conduct in relation to prosecution of the above mentioned people brought the NPA into disrepute, and consequently rendered you unfit to hold office as Director of Public Prosecutions.

The letter from Freedom Under Law and the Helen Suzman Foundation is attached hereto.

Section 9 (1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 (the Act), provides that "*Any person to be appointed as National Director, Deputy National Director or Director must-*

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and

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

According to section 12(6) of the Act, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold office.

The provisions of section 12(6) of the Act are *mutatis mutandis* applicable to suspension of the Director of Public Prosecutions.

As you are aware, the National Prosecuting Authority is an important constitutional institution in the administration of Justice and maintaining public confidence in the institution is of necessity.

I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Dr Torie Pretorius
Acting Special Director of Public Prosecutions
Private Bag X 752
Pretoria
0001

cc: Minister TM Masutha: Minister of Justice and Correctional Services

14 November 2016

Dear Adv. Mzinyathi,

NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO.32 OF 1998)

I have been requested by Freedom Under Law and the Helen Suzman Foundation to provisionally suspend you pending an enquiry into your fitness to hold office.

Freedom Under Law and the Helen Suzman Foundation raised concerns with the manner in which you conducted the prosecution of Minister Pravin Gordhan, Mr Visvanathan Pillay and Mr George Magashula. According to them, your conduct in relation to prosecution of the above mentioned people brought the NPA into disrepute, and consequently rendered you unfit to hold office as Director of Public Prosecutions.

The letter from Freedom Under Law and the Helen Suzman Foundation is attached hereto.

Section 9 (1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 (the Act), provides that "*Any person to be appointed as National Director, Deputy National Director or Director must-*

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and

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

According to section 12(6) of the Act, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold office.

The provisions of section 12(6) of the Act are *mutatis mutandis* applicable to suspension of the Director of Public Prosecutions.

As you are aware, the National Prosecuting Authority is an important constitutional institution in the administration of Justice and maintaining public confidence in the institution is of necessity.

I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Advocate Sibongile Mzinyathi
Director of Public Prosecutions
Gauteng North
Pretoria
0001

cc: Minister TM Masutha: Minister of Justice and Correctional Services

His Excellency
President J G Zuma
Union Buildings
Government Ave
Pretoria
0001

28 November 2016

E-mail: [redacted]

Dear President,

RE: REPRESENTATIONS IN RESPONSE TO PRESIDENT'S NOTICE OF 14 NOVEMBER 2016 IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT

1 I write for myself, and on behalf of Dr Pretorius SC ("Pretorius") and Adv Mzinyathi ("Mzinyathi"), in response to your letters of 14 November 2016 (File 1: pg 333-338) addressed in the same terms to each of us. (References to *us*, we and *our* in this document should be read as encompassing Pretorius, Mzinyathi and myself).

2 You advised in your letter that two civil society organisations, *Freedom Under Law* and the *Helen Suzman Foundation* ("the Complainants"), have requested, by way of a letter dated 1 November 2016 ("the Complaint"), that you provisionally suspend us, pending an enquiry into our fitness to hold office, in terms of section 12(6)(a) read with, *inter alia*, section 14(3) of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act").

3 Pretorius and Mzinyathi, as indicated in their confirmatory letters associate themselves with the sentiments expressed in this letter, insofar as they specifically concern them. They desire that this letter also be deemed to constitute the representations requested of them in your letter of 14 November 2016.

4 We thank you for affording us an opportunity to make representations.

INTRODUCTION

5 The complaint and our responses thereto fall to be considered in light of two recently filed applications in the High Court, (Gauteng Division, Pretoria) to which extensive reference is made herein. They are:

5.1 Freedom Under Law and Another v NPA and Others (case no. 83059/16) in which the Complainants applied to review and set aside the decision to prefer charges against Minister Pravin Gordhan ("the Minister"), Ivan Pillay ("Pillay") and Oupa Magashula ("Magashula"), in connection with alleged wrongdoing arising out of the purported retirement of Pillay from the South African Revenue Service ("SARS"). That application was withdrawn following my decision of 31 October to review and withdraw the aforementioned prosecution. It was withdrawn before opposing affidavits were filed by us. A copy of the Notice of Motion and Founding Affidavit in that case was attached to the Complaint as per paragraph 4 of the Complaint. Since this application has already been furnished to you we do not attach it again.

5.2 Helen Suzman Foundation and Another v the President of the Republic of South Africa and Others, case no. *87643/16*, (Gauteng Division, Pretoria) served on 9 November 2016 in which the Complainants sought to review and set aside your purported decision to decline to invoke section 12(6) of the NPA Act, or, in the alternative, to refuse to take such a decision. A full set of the pleadings in this matter, together with the heads of argument accompany these representations in files marked "Files 1 and 2". It was in connection with this application that you elicited the representations set forth herein. The application was heard on 24 November 2016, and was struck from the roll with costs, on the basis that it was not urgent. (I return to consider aspects of this decision below.)

6 We endeavour to demonstrate herein that the Complaint is based upon speculation, a wrong understanding of the law, and a failure to appreciate both prosecutorial policy and duties. In doing so, we prefer not to react to the abusive personal attacks that mar the Complaint (as well as the founding affidavit in the two applications), and confine ourselves strictly to the substance.

7 It appears that the Complainants' motive in seeking our suspension and an enquiry is to forestall charges from being laid in connection with what has become known as "the Rogue Unit". That investigation is still pending. Whilst I have asked the Head of the Directorate for Priorities Crimes Investigations ("the Hawks") to expedite the investigation, no decision has been made as to whether charges will be brought, or if so, the nature of the charges, and against whom they will be preferred. The Complainants do not say why the Minister (or anyone

else in particular), must not be charged - if there is a case to answer. The Complainants seek to pre-empt the matter, by insisting in advance that any charges arising from the SARS rogue unit investigations will *necessarily* be unfounded. As noted in paragraph 268 of the answering affidavit (File 1: p 204), I have at no time issued a *threat* that prosecutions arising out of the Rogue Unit will be forthcoming.

8 The founding papers in the first application sent to you together with the Complaint, run to some 198 pages, which you were asked to consider together with the Complaint of 1 November, within a period of 5 days. We would hope that the Complainants, whom we understand have instructed an army of lawyers, would have appreciated that before a decision could be made, it would have been necessary for you to obtain representations from us, as you have done.

9 With respect, our view is vindicated in the above-referred decision of 24 November. The High Court held:

> "...It was ill advised and certainly unreasonable for the applicants [Helen Suzman Foundation and Freedom Under Law] to rush and launch this application, brushing aside the request for more time from the president."
>
> The relief sought has the potential for this court to stray into the executive terrain which could, if not properly considered, violate the separation of powers doctrine. This could have the judiciary straying into the terrain of the executive.
>
> We should also guard, as a court, against creating precedents where, based on insufficient grounds and inadequate foundation, to encourage ordinary citizens ... to use the courts as a platform to dictate to the executive how it should do its work."

We respectfully associate ourselves with these sentiments.

I. THE ALLEGATIONS IN THE COMPLAINT

10 The allegations made in the Complainants' letter include the following (File 1: pg 125-131):

10.1 in respect of myself, the principal allegations, *inter alia*, are:

i. that I admitted that the NPA never had sufficient evidence to prefer charges against the Minister, Pillay and Magashula. (It is noted that the letter of complaint refers to GP&M as "the accused persons". I point out that they were summoned to appear in Court. Only upon such appearance would charges have been put to them. It is then that they would have been "accused persons". We do not wish in these submissions to perpetuate the use of the collective description of them as "the accused persons" but use the acronym *GP&M*;

ii. in light of the circumstances surrounding the preferring and withdrawal of the charges, that I misconducted myself and am not a fit and proper person to hold the office of the NDPP;

iii. that I lack "the required conscientiousness and integrity to be entrusted with the responsibilities of the office of the NDPP";

iv. that I "brought the administration of justice and my High Office into disrepute";

v. that I committed serious misconduct;

vi. that I "consciously or recklessly ignored (all of these) features and proceeded to take a course of action, in the most public fashion, which I must have known would throw the South African economy into a tail spin";

vii. that I did not apply my mind to the facts or the law and that my failure to do so "at best, shows a stupefying, disabling and disqualifying lack of competence; at worst, [my] failure betrays (sic) ulterior purpose and a lack of integrity;";

viii. that the Priority Crimes Litigation Unit "was not even legislatively mandated to deal with cases of fraud and theft"; and that the fact that this unit handled the case "is irregular and confounding";

ix. that I "did not withdraw the charges as a conscientious NDPP of requisite integrity and objectively would,...";

x. that "the charges were ill-conceived and stillborn from the outset";

xi. that "this shows Mr Abrahams fundamentally misunderstood the laws applicable to his powers as NDPP, which in itself demonstrates a wanton lack of conscientiousness; at worst, this shows Mr Abrahams intentionally and unlawfully sought to prop up insupportable charges after the fact as to rescue them from review";

xii. that I have brought the NPA into disrepute and that I continue on a daily basis to erode public confidence in law enforcement institutions.

11 In regard to Pretorius and Mzinyathi the principal allegations are that:

12.1 prosecution of the charges was pursued "either for ulterior purposes or in a breathtakingly reckless fashion, without proper investigation or any regard to the evidence and proper legal analysis";

12.2 they failed in their fundamental constitutional and statutory duty to ensure that charges were properly grounded, and to take an impartial, independent and objective view of all the facts;

12.3 had they applied their minds to the facts and the law, they would have realized that there was no basis in law or in fact for the charges;

12.4 they failed to take account of the "most basic" legal requirement for a successful prosecution of fraud or theft fraudulent or furtive intention;

12.5 their "bungling of this matter" has severely undermined public confidence in the integrity of the NPA;

12.6 that as prosecutors they "misconducted (themselves) and lack the conscientiousness (including competence) and integrity to continue to serve their official functions".

12 The aforementioned is an encapsulation of the accusations made in the letter of complaint and not an attempt to repeat every statement and allegation made.

II. CHRONOLOGY

13 It is useful to present the most signal events and items of correspondence in tabular form.

TABLE		
1.	Tuesday, 11 October 2016	Summons served on the Minister, Pillay and Magashula to appear in the Regional Division, Tshwane District on 2 November 2016. (File 1: pg 75-84).
2.	Friday, 14 October 2016	Webber Wentzel writes to the NDPP and Pretorius calling upon NDPP to withdraw charges (File 1: pg 89-116)
3.	Monday, 17 October 2016	Magashula and Pillay make oral representations to the NDPP in terms of section 179(5)(d) of the Constitution and section 22(22)(c) of the NPA Act.

4.	Monday, 17 October 2016	NDPP responds to letter from Webber Wentzel advising that Pillay and Magashula have made representations which he is considering; Cordhan to make representations by 17h00 on 18 October 2016. (File 1: pg 341)
5.	Tuesday, 18 October 2016	Pillay and Magashula submit written representations (File 1: pg 418 - 423)
6.	Tuesday, 18 October 2016	Webber Wentzel refuses to make further representations on behalf of Minister. They again invite the NDPP to withdraw the charges by 21 October. (File 1: pg 140-142)
7.	Friday, 21 October 2016	NDPP responds to letter from Webber Wentzel of 18.10.16, stating he had been requested by Pillay and Magashula to review the decision in terms of section 179(5)(d); he had directed further investigations to be conducted; he regarded the matter as urgent; and would be in communication with legal representations of Pillay and Magashula to advise them of the outcome of their representations once in receipt of additional information, and has considered same. He reaffirmed that he is attending to the matter urgently. A copy of that letter is at page 143-144 to the application attached to the complaint.
8.	Sunday, 23 October 2016	Urgent application served by Helen Suzman Foundation and Freedom Under Law seeking order declaring unlawful the decision to charge the Minister. Application set down for 8 November 2016. This is the application attached to the Complaint).
9.	Monday, 31 October 2016	Charges withdrawn by NDPP.

10.	Tuesday, 1 November 2016	Webber Wentzel writes to President demanding he suspend the NDPP, Pretorius and Mzinyathi pending enquiries. President was given until Monday, 7 November 2016 to make decision. This is the complaint of 1 November 2016 also at File 1: pg 125-131
11.	Monday, 7 November 2016	President responds to Webber Wentzel requesting extension until 21 November 2016 (File 1: pg 132-135)
12.	Monday, 7 November 2016	Webber Wentzel advises they will be launching urgent proceedings to secure suspension and have enquiries instituted. (File 1: pg 134-144)
13.	Wednesday, 9 November 2016	HSF and FUL launches urgent application, set down for 22 November 2016 for order directing the President to institute an enquiry and suspend prosecutors. (This is the application in files 2 and 3).
14.	Monday, 14 November 2016	President writes to the NDPP, Pretorius and Mzinyathi affording them opportunity to make representations. (File 1: pg 333-338)
15.	Thursday, 24 November 2016	Pretoria High Court strikes application lodged by Freedom Under Law and Helen Suzman Foundation, with costs.

III. STRUCTURE OF THE NPA

14 The structure of the NPA is set out in paragraphs 75 - 81 of the Answering Affidavit (File 2: pg 227 - 230) . Details of my power to review prosecutions are set out in paragraphs 82 - 85 of the Answering Affidavit (File 2: pg 230 - 231).

IV. UNLAWFUL CONDUCT OF THE MINISTER, PILLAY AND MAGASHULA

15 The Complainants allege that –

15.1 the charges were "ill-conceived and stillborn from the outset";

15.2 the charges were "insupportable";

15.3 "The prosecutors clearly failed in their fundamental Constitution on statutory duty to ensure that the charges were properly grounded…";

15.4 "… Had the prosecutors applied their minds to the facts and law relevant to the charges… they would have realised that there was no basis, in law or in fact for the charges".

16 Contrary to these contentions, there was indeed a proper basis for the charges. It was proper to infer from the facts intent to act unlawfully. It was only on production of the oral representations and documents, furnished for the first time upon review, that I was able to conclude that it would be difficult to prove intent beyond a reasonable doubt.

17 During September 2016, Sello Maema ("Maema"), a Deputy Director of Public Prosecutions in the National Prosecutions Authority ("NPA"), who is responsible for providing guidance for the investigation of the so-called Rogue Unit, briefed the NPA management on the alleged involvement of the Minister in the allegedly unlawful manner in which Pillay's retirement had been handled. I should mention that the latter irregularity came to light during the course of the separate

investigation into the Rogue Unit. Relevant particulars of the briefing are set forth in the answering affidavits in paragraphs 120 – 123.

18 It was ultimately based upon Macma's briefing, *inter alia*, that Pretorius, in consultation with Mzinyathi, preferred the impugned charges.

SYMINGTON MEMO

19 That Pillay was fully aware of the implications of his decision to take early retirement is apparent from the contents of the so-called *Symington memorandum*, dated 7 March 2009. (File 1: pg 98-99; paras 128-131, pg 250-251)

20 Discussion of the relevant document is to be found at paragraphs 122-145. (File 1: pg 242-262).

21 At the time when the prosecutors decided to charge GP&M, they did not have the Symington memorandum in their possession (as noted in paragraph 131 of the answering affidavit). It was received by me only when the applicants wrote to me on 14 October 2016, and attached it as an annexure (File 1: pg 98-99). Perusal of the memorandum led me to believe that it was unlikely that a conviction could be obtained - not because the other elements of the offences alleged could not be proven - but specifically because the element of intent would be very difficult to prove beyond a reasonable doubt (File 1: pg 89-116).

LEGAL CONSIDERATIONS

53. Fundamentally, the basis for the charges was that, upon consideration of the available evidence, it became clear that the manner in which Pillay was able to obtain an unlawful benefit at the expense of SARS was through a series of transactions that were *in fraudem legis*. This is discussed in the answering affidavit at paragraphs 182 – 184. (File 1: pg 275)

54. At various times, attempts have been made to defend the transactions by reference to miscellaneous provisions that it is alleged provide warrant for the manner in which Pillay's purported retirement, and the benefits that flowed to him in the course thereof, was handled. Examination of these provisions revealed that in fact none, either alone or read in conjunction, can justify either the R1,2 million effectively paid to Pillay by SARS, or his reappointment to precisely the same position that he had occupied with immediate effect.

The Employee Initiated Severance Package does not apply

55. The response from the Acting Director-General of the Department of Public Service and Administration is (File 1: pg 390-392). Because Magashula did not ask whether it was lawful for SARS to pay Pillay's penalty to the GEPF, the ADG did not address it. What he was asked about was the so-called Employee Initiated Severance Package, which is irrelevant. Pillay did not request such a package.

56. This Employee Initiated Severance Package, and why it does not in any event apply, is discussed in paragraphs 152 – 153 of the answering affidavit. (File 1: pg 266)

The Public Service Act

57. In his memorandum dated 27 November 2009, Pillay requested that his approval be granted in terms of section 16(6)(b) of the Public Service Act, 1994.

58. That provision and why it does not apply is discussed in the answering affidavit at paragraphs 155 – 159 (File 1: pg 267-268)

The GEPF Rules

59. In his letter to the Minister, Mageshula relied on Rule 14.3.3(b) of the Rules of the GEPF.

60. These Rules, and why they do not apply, are discussed in the answering affidavit at paragraphs 159 – 168 (File 1: pg 268-271)

Section 17(4) of the GEPF Law, 1996

61. This deals with a situation where the employer, or any legislation adopted by parliament, places an additional financial obligation on the GEPF.

62. Why it does not apply *in casu* is discussed in the answering affidavit at paragraphs 170 – 174 (File 1: pg 271-272).

Rule 20 of the GEPF

63. Why this has no application is discussed in the Answering Affidavit at paragraphs 175 – 177 (File 1: pg 273).

The Guide

64. Likewise, the reliance on the Government Employees Pension Members Guide is completely unfounded, for the reasons discussed in the Answering Affidavit at paragraphs 178 – 181 (File 1: pg 273-274).

THE PROSECUTION

65. As noted in paragraph 186 of the Answering Affidavit (File 1: pg 276-277), it is common practice that the charge of theft is always preferred as an alternative to a charge of fraud. The fact that the charges were not a model of clarity does not mean that they were politically motivated or that there was no basis for them. The Accused themselves can always raise lack of clarity as an issue at the trial. Lack of clarity does not form a basis for the impeachment of the prosecutor, let alone the NDPP.

Intention

66. It is trite that intention as an element of a criminal offence falls to be inferred from an overall conspectus of the alleged facts. Reasonable minds can differ, especially before evidence is heard, as to whether the facts, if true would support

an inference of intent. The relevant legal authority is discussed in the heads of argument.

67. It has already been stated that the actual decision to prosecute was taken by Pretorius in consultation with Mzinyathi. (I refer to paragraph 229 of the Answering Affidavit). Any suggestion that I in some sense unfairly shifted responsibility for the initiation of the charges to Pretorius and Mzinyathi is meritless. I reiterate that Pretorius took the decision to institute the charges in consultation with Mzinyathi. I was briefed on this by Pretorius and Mzinyathi and agreed with the decision. (I refer to paragraph 373 of the Answering Affidavit – File 1: pg 322).

68. It is undeniable that Pretorius' decision to prosecute was unpopular, but he was duty bound by the considerations set out above. My decision to review same was also controversial. Fortunately Pretorius and I do not exercise our duties in the hope or expectation of garnering popularity. We simply do our jobs without fear, favour or prejudice, in accordance with our duties to the best of our ability. In this regard I refer to paragraphs 237 – 239 of the Answering Affidavit. (File 1: pg 278).

69. I arrived at the conclusion that intention could not be proved beyond a reasonable doubt having been sent the memorandum of Symington on 14 October 2016, which memorandum was expressly addressed by the representatives of Pillay and Magashula, when they made representations to the NDPP on Monday, 17 October 2016. Pretorius and Mzinyathi were not

possessed of the Symington memorandum when the decision was taken to prosecute.

Correspondence with attorneys and Representations

70. This subject matter is discussed in the Answering Affidavit at paragraph 194 (File 1: pg 278-279).

71. The allegation that anyone *reneged* on an undertaking to the Minister is not correct. I refer in this regard to paragraphs 193 and 303 of the Answering Affidavit (File 1: pg 278 and 302-303 respectively)

72. As noted in the paragraph 194 of the Answering Affidavit (File 1: pg 278), in contending that the Minister was entitled to make representations prior to the institution of charges, the Applicants are effectively contending that high government officials deserve special treatment from the NPA. The Minister was afforded an opportunity to make a warning statement, which he declined. It is exceedingly rare for such an opportunity to be afforded to those who are subject to NPA investigation. In addition, it is exceedingly rare for such an opportunity to be afforded to those who are subject to NPA investigation. There is no reason to treat the Minister any differently.

73. In a 14 October 2016 letter (File 1: pg 95), the Applicants wrote:

> *"Should you not unconditionally withdraw the charges against the Minister or furnish the information sought [by 16:00 on 21 October 2016], our clients will assume that no reasons for the decisions, and no documents other than the*

documents annexed to this letter, exist in support of the charges". (I refer to paragraph 195 of the Answering Affidavit) (File 1: pg 279).

74. Once again, the inarticulate premise is that a high office holder is entitled to impose special conditions that would not be available to any ordinary citizen subject to prosecution. This is antithetical to the principle of equality before the law as enshrined in section 9 of the Constitution. This subject matter is dealt with in paragraphs 55 – 63 of the Answering Affidavit (File 1: pg 220-223).

75. The applicants' added:

"In respect of both charges, even if it is assumed (contrary to the dispositive analysis above) that the conduct of the minister of finance was not strictly in accordance with the law. There is no basis for imputing a fraudulent or furtive intention to him and none has been suggested."

Further:

"The main reason for his decision [not to make representations] is that he does not have any confidence in the NDPP's ability or willingness to afford him a fair hearing.

First, we repeatedly asked the NPA to afford the Minister an opportunity to make representations to them before they decided whether to prosecute the Minister but they spurned our request.

Second, the NDPP's conduct at his press conference announcing the decision to charge the Minister made clear his commitment to the prosecution.

Third, having now had an opportunity to study the charges against the Minister, it is also clear to us that they manifest a resolute and not well

founded determination to prosecute the Minister at all costs. Any representations to the NDPP would accordingly be pointless."

76. The conclusion that it would be futile for the Minister to offer representations is ill-founded. I refer to paragraph 202 of the Answering Affidavit (File 1: pg 281). No reasons are offered for the Minister's lack of confidence in me.

77. I could of course be swayed by representations. The charges were preferred by Pretorius, in whom I have every confidence. But I am always open to persuasion. (Regarding my confidence in my colleagues, I refer to paragraphs 336 and 337 of the Answering Affidavit. (File 1: pg 308-309).

78. I responded to the applicants' letter on 17 October 2016, (File 1: pg 414-415) confirming that the decision to prosecute was taken by Pretorius, not by myself; that I considered myself empowered to review the decision; that I had received representations from Pillay and Magashula; and that the Minister should make representations by 18 October 2016. I refer to paragraphs 204 and 205 of the Answering Affidavit (File 1: pg 281-282).

79. On 17 October 2016 Magashula and Pillay, through their legal representatives, made representations to me in which they requested me to review the decision to prefer charges. On 18 October 2016 those verbal representations were reduced to writing.

80. Counsel on behalf of Pillay, Advocate Nazeer Cassim SC raised the opinion by Symington dated 17 March 2009 in the following context:

"The purpose of this note is to crisply record the grounds whereupon where respectfully submit, Pillay did not have any intention to commit the offences in respect of which he now stands arraigned. In essence, Pillay was guided by the opinion of Vlok Symington ("Symington") a respected legally trained official of SARS at the material time which advised that Pillay's contemplated early retirement from the GEPF, in his application to the Minister of Finance to waive early retirement penalty and is requested to be appointed on contract after his early retirement from the GEPF were technically possible under the rules of the GEPF read together with the employment policies of SARS." I refer to paragraph 208 of the Answering Affidavit.

81. A copy of these written representations is in File 1: at pp 419-420. (The Symington memorandum is discussed in paragraphs 127 - 131 of the Answering Affidavit - (File 1: pg 249 -252).

82. On 18 October 2016 Magashula's legal representatives, Advocate PJJ De Jager SC also reduced Magashula's representations to writing (File 1: pg 421-424. He states the following concerning the Symington memorandum in particular:

"It is true that Mr Magashula promoted and supported Mr Pillay's request for early retirement. He was afforded a memorandum from the Legal and Policy Division (Mr Vlok Symington) and he followed all procedures to the letter. He sent a memorandum on 12 August 2010 to accused NO. 3 who approved. With all due respect, any reasonable employer would under the circumstances have approved. However, even if you doubt the correctness of the Minister's exercise of his discretion, that is still a far cry from any criminal charge, let alone fraud, theft or otherwise." I refer to paragraph 210 of the Answering Affidavit (File 1: pg 283).

83. As a result of these representations, I authorized further investigation of the matter, in particular because the import of the Symington memorandum was that Pillay, Magashula and similarly the Minister, lacked the necessary intention to commit an unlawful act. To that end, further statements were taken. I refer to paragraph 211 of the Answering Affidavit (File 1: pg 283).

84. The Complainants' suggestion that I should not have conducted further investigation in the course of review is perverse. No doubt, had I failed to pursue relevant matters upon review, I would equally have been accused of dereliction in my duties.

85. The Minister did not make representations, as had Pillay and Magashula. (The Minister, however, subsequently indicated that he aligned himself with representations that had been included in the letter of the applicants of 14 October.) I refer to paragraph 212 of the Answering Affidavit (File 1: pg 283-284).

Withdrawal of the charges

86. After affording all interested parties including the Complainants in this matter, the DPCI, SARS, Pillay, Magashula and the Minister, an opportunity to make representations, and considering the representations that were made by those who elected to do so, I then took the decision to review and set aside the charges on 30 October 2016. I refer to paragraph 213 of the Answering Affidavit (File 1: pg 284).

87. As noted above, my decision was taken on the premise that it would be difficult to prove the requisite intention to act unlawfully beyond a reasonable doubt. This was on the strength of the new information that was provided and which was not before the prosecutions team when the third respondent took the decision to prosecute.

88. I announced my decision at a press conference on 31 October; a copy of the statement is attached to the Answering Affidavit. (File 1: pg 427-434).

89. In my statement I said, *inter alia*:

a. That the Complainants had requested me to withdraw the charges, and that Magashula and Pillay had requested a review

b. Magashula had supported Pillay's application and relied on Symington's advice;

c. I was distressed that Gordhan believed that he would not receive a fair hearing;

d. The Symington memorandum came to the attention of the prosecutors by way of the FUL and HSF submissions;

e. I had directed further investigations following the representations and submissions;

f. Gordhan and Magashula had been uncertain as to whether Pillay's request had been approved. Gordhan should in hindsight have consulted the Deputy Minister of Finance;

g. In light of the above it would be difficult to prove the requisite *animus;*

h. In the circumstances I decided to withdraw the charges

90. The Complainant's allegation (at paragraph 7.3 of the complaint), that I admitted that I had not applied my mind to the charges prior to 11 October, is nonsensical.

91. The essence of the Complaint is not so much that I decided to withdraw the charges, but the manner in which I made that decision known. My assessment was that, in light of the wide publicity the charges had attracted, coupled with the fact that they had been initially announced at a public event, it was appropriate that the discontinuation of the prosecution be similarly made known to the public and the media.

92. The applicants disingenuously suggest that the withdrawal of the charges somehow vindicated their position and constituted an admission that the institution of the charges was a mistake. But the withdrawal of the charges pursuant to the review is an instance of the system working precisely as envisaged by the NPA Act. The initiation of the charges elicited representations, which in turn facilitated further consideration and uncovered material suggesting

that the three individuals may not have acted with a criminal intention required for the offences of fraud and theft.

THE ALLEGATIONS AGAINST US

Misconduct

22 The Complainants' attempt to persuade you that we have committed misconduct, while denying us our opportunity to state our case, is illustrative of the fact that the Applicants wish to deprive Pretorius, Mzinyathi and me of an opportunity to ventilate our version. They have simply decided on this without having it tested.

23 The Complainants argue specifically that Pretorius and Mzinyathi, like myself, failed to ensure that the charges were properly grounded and that, had applied their minds to the facts and law, they would not have preferred the charges. It is alleged further that Pretorius and Mzinyathi failed to take account of the *animus* element of fraud or theft. (Paras 11-13 of complaint).

24 I have already stated that, given the relevant facts and circumstances, as well as the applicable law, these allegations are fundamentally misconceived. They reflect a deep misunderstanding of the prosecutorial process.

Ulterior Motive

93. For the reasons set out above, based on the circumstances which led to the charges being brought, the decision to prosecute is eminently justified when tested against the prospects of success. The Complainants say that the

prosecution was animated by improper purpose. They speculate that it would appear that the alleged purpose was to serve the interests of the political function within the ruling party who are aligned against the Minister, and wish to see him removed from the Cabinet. All of this is expressed in oblique and indeterminate language by the Complainants; it is respectfully submitted that you can attach no weight whatsoever thereto.

94. And even if the prosecution was animated by an improper purpose, that would not suffice to render the prosecution bad in law. What is required is that the prosecution has used its powers for ulterior purposes.

95. I take umbrage at the allegation that I was implacably committed to pursuing the prosecution, and relented only in the face of external pressure. In point of fact, as I told Parliament in my 4 November briefing, at the time I considered whether or not to withdraw the charges, I encountered resistance from Lieutenant-General Ntlemeza ("Ntlemeza"), Head of the Directorate for Priorities Crimes Investigations ("the Hawks") who strongly contended that the charges should not have been withdrawn. As reflected in the documentation (File 1: pg 343-351), I advised Ntlemeza that the determination as to whether or not to review and withdraw the charges fell within my sole remit.

Bringing the NPA into disrepute

96. The Complainants say that even if my conduct was a *bona fide* blunder, I brought the NPA into disrepute (para 8 of complaint). But, as shown above, the conduct

was not a blunder at all. There were good grounds upon which to charge the Minister, Pillay and Magashula, especially if one considers the relatively low standard for prosecution. The fact that a prosecution is reviewed in terms of section 179(5)(d) of the Constitution and section 22(1)(c) of the NPA Act does not imply that the prosecution was flawed *ab initio*. The reviewed provisions provide a process for a prosecution to be re-evaluated after representations have been made to the NDPP. Representations may include matter which was never placed before the prosecutors and which could only have been known by the accused.

Allegation based on my withdrawal of Charges against Ms Jiba

97. In the founding affidavit in support of an application to compel the President to take steps against us (case no. 87643/2016) (which as noted was struck from the roll on 24 November 2016), the Complainants argued that my withdrawal of the charges against Adv Jiba, arising out of the decision of Gerven in the Booysen matter, was further evidence on my unfitness for office. (I refer to paragraph 356 of the Answering Affidavit). As noted in the aforementioned paragraph, the deponent in the supporting affidavit in case no. 87643/2016 did not disclose that the High Court in the aforementioned General Council of the Bar matter had exonerated Jiba. (I refer to paragraphs 357 - 365 of the Answering Affidavit.)

98. The judgment of the Full Court in the General Council of the Bar of South Africa v Nomcqobo Jiba & Others (Case No. 23578/2015, GDP), Legodi J said at para [68]:

"You do not want members of the prosecution authority to unduly watch their backs for fear of being dismissed or removed from the roll of advocates every time when they make mistakes at prosecuting and presenting cases in court, or every time where an application for authorisation is made in terms of section 2(4) of POCA. An overriding factor for them for consideration should be to adhere to the rule of law and the Constitution...".

Allegations re Role of Priority Crimes Unit (PCLU)

99. The Complainants are mistaken in alleging that the PCLU is not mandated to deal with fraud and theft cases (para 7.8 of the complaint).

100. In terms of section 24(3) of the NPA Act, a Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director: provided any of the powers, duties and functions referred to in section 20(1) shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned. I refer to paragraph 375 of the Answering Affidavit in this regard.

101. As for the Complainants' suggestion that the PCLU lacks the necessary mandate with respect to the impugned charges, that is incorrect. It is true that the PCLU is mandated to manage investigations and prosecutions of crime that impact on the security of the country. However, the NDPP may determine matters as priority

crimes and refer them to the PCLU. The latter is mandated also to render advice or assistance as required by the NDPP in the carrying out of his duties, exercise of his power and performance of his functions as conferred or imposed or assigned by the Constitution or other laws. The NDPP retains the discretion to refer matters to the PCLU.

Allegation that Independence and Integrity of the NPA was compromised

25 It is trite that the NPA and high level officers therein must be, and must be perceived to be, independent of executive and political interference.

26 But the Complainants' contention that whenever the fitness and propriety of a senior office bearer is placed in doubt, the integrity of the entire institution is cast in doubt, is unsustainable. One need only consider the case of Mzinyathi. (I refer in that regard to paragraph 274 of the Answering Affidavit). He was accused of serious impropriety, only to have an application to strike him from the roll dismissed. The public may be presumed to be aware that serious allegations against senior office holders are not uncommon; they cannot be presumed to lose all faith in an institution of state whenever allegations against its officers, which may or may not be justified, are raised.

Allegation of Incompetence

27 We have taken note of the allegation of the Complainants that the manner in which the impugned charges was handled reflected our collective incompetence. That is denied, for the reasons reflected above.

28 In particular, the institution of the charges by Pretorius and Mzinyathi in no way manifested incompetence. When Pretorius decided to bring charges, he took into account ample documentary evidence that there was no authorisation in law for SARS to pay the penalty, effectively financing Pillay's retirement and education of his children and the persons within SARS expressed grave misgivings. He was influenced by the fact that the "departure" was in fact not an "early retirement" at all. Pillay did not intend to retire, as noted in paragraph 166 of the Answering Affidavit. Both the Minister and Magashula were aware of that. In the light of the above, the prosecutors were quite correct in bringing the charges against the three individuals.

29 Given the offensive charges of incompetence, I would mention that, since my appointment as NDPP, the NPA has notched up significant achievements. I mention only a few of them hereunder.

30 As reflected in the 2015/16 Annual Report of the NPA, it achieved a total number of 289 245 guilty verdicts, with a remarkable overall conviction rate of 93%. I refer in this regard, and with respect to the figures below, to the NPA Annual Report 2015/2016.

31 In the high courts, prosecutors maintained a conviction rate of 89.9% with 910 guilty verdicts, exceeding the target by 2.9%. Prosecutors in the regional courts

attained a conviction rate of 78.4%, representing the highest conviction rate in this forum in the past decade, with 24 958 guilty verdicts. In the district courts, prosecutors achieved a conviction rate of 94.7%, exceeding the target by 6.7% with 263 377 guilty verdicts.

32. The Specialist Commercial Crime Unit (SCCU) and the Sexual Offences and Community Affairs Unit (SOCA) achieved remarkable results. The SCCU maintained a high conviction rate of 94.1% by obtaining guilty verdicts in 951 cases against a target of 93% and 928 cases. The SCCU increased the number of convictions of government officials on charges of corruption to 104 as compared to 47 during the previous year, with an increase of 121.3%.

33. In respect of matters investigated by the Anti-Corruption Task Team (ACTT), a Presidential initiative in which the NPA participates, the SCCU exceeded its target of convicting 20 persons of corruption where the amount involved is more than R5 million, by obtaining 25 convictions.

Alleged Responsibility for Destruction of Economy

102. The exaggerated accounts of the effect of the initial prosecution are dealt with in paragraphs 23, 58 – 59, 245 and 253 of the Answering Affidavit, where it is noted that dire predictions of the Complainants as to future developments, and economic impact, are entirely speculative. It is noted further that it would be improper for a prosecutor to take such speculative allegations into account when determining whether or not to prosecute.

103. It is pertinent to mention that the Pretoria High Court, in its dismissal of the application under case no. 87643/2016 on 24 November 2016, did so, notwithstanding wholly speculative attributions of responsibility for economic trauma from the preferment of the charges.

CONCLUSION

104. We humbly submit that for all of these reasons, the Complainants' request that you take steps against us in terms of section 12(6) of the NPA Act should be refused.

Yours faithfully,

S K ABRAHAMS

Office of the State Attorney
Pretoria

PRIVATE BAG X 91
PRETORIA
0001

SALU BUILDING
316 THABO SEHUME STREET (ANDRIES)
CNR THABO SEHUME AND FRANCIS BAARD
STREET (SCHOEMAN)

TEL: (SWITCHBOARD): (012) 309 1500
(DIRECT LINE): (012) 309 1563
(SECRETARY): (012) 309 1520
FAX: (012) 309 1649/50
086 507 0909
DOCEX: 298

28 NOVEMBER 2016

ENQ: J MEIER
EMAIL: eturner@justice.gov.za

MY REF: 8530/2016/Z49
YOUR REF: Letter dated 14 Nov'16

HIS EXCELLENCY
PRESIDENT J G ZUMA
UNION BUILDINGS
GOVERNMENT AVENUE
PRETORIA

BY HAND

By E-mail: geofrey@presidency.gov.za

Dear President

RE: REPRESENTATIONS IN RESPONSE TO PRESIDENT'S NOTICE OF 14 NOVEMBER 2016 IN TERMS OF SECTION 12(6)(A) OF THE NATIONAL PROSECUTING AUTHORITY ACT

1. Writer hereof is acting as attorney on behalf of Dr Pretorius in the above matter.

2. Please find attached hereto Dr Pretorius' reasons as to why he should not be suspended.

3. We trust that you will find the above in order.

Yours Faithfully

J MEIER
FOR STATE ATTORNEY PRETORIA

ACKNOWLEDGE RECEIPT HEREOF:
DATE: 28/11/2016
TIME:
NAME: Geofrey Mphahlele

His Excellency
President J G Zuma
Union Buildings
Government Ave
Pretoria
0001

28 November 2016

E-mail: ntoeng@presidency.gov.za

Dear President,

RE: **REPRESENTATIONS IN RESPONSE TO PRESIDENT'S NOTICE OF 14 NOVEMBER 2016 IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT**

Introduction:

1. Two Civil Society Organisations, Freedom Under Law (FUL) and the Helen Suzman Foundation (HSF) have, by way of an application and a letter dated the 1st of November 2016, requested His Excellency the President to provisionally suspend me and two colleagues pending an enquiry into our fitness to hold office.

2. FUL and HSF raised concerns with the manner in which myself, Acting Special Director of Public Prosecutions and head of the Priority Crimes Litigation Unit (PCLU), the National Director of Public Prosecution (NDPP), Adv. Shaun Abrahams, and the North Gauteng Director of Public Prosecution, Adv. Sibongile Mzinyathi, conducted the intended prosecution of Minister Pravin Gordhan, Mr. Ivan Pillay, and Mr. George (Oupa) Magashula. According to the allegations by FUL and HSF, our conduct in relation to the charging of the abovementioned people brought

the National Prosecuting Authority (NPA) into disrepute, and consequently rendered us unfit to hold our respective positions.

3. The Presidency afforded us an opportunity to make written submissions why we should not be placed on suspension pending the outcome of an enquiry into our fitness to hold office in terms of section 12(6)(a) read with section 14(3) of the National Prosecuting Authority Act, Act 32 of 19888 ("the NPA Act"), for which I am grateful.

4. In compiling these submissions to the Honourable President and in an attempt not to unduly burden this representation I accept the following: (I have arranged with my attorney to provide the documentation referred to hereinafter to the Honourable President in the event that it is not available.)

4.1. The Honourable President is indeed in possession of and will consider the content of the Application heard and dismissed by the Gauteng High Court on the 24th of November 2016. This of course includes the opposing affidavits filed by Second to Fourth Respondents (the officials relevant to these representations).

4.2. The Honourable President is in possession of the heads of argument filed on behalf of Second to Fourth Respondents in that mentioned Application.

4.3. The Honourable President is in possession of the representations filed on behalf of Advocate Abrahams and Advocate Mzinyathi.

GENERAL REMARKS:

5. It appears that the complaint by FUL and HSF and their request for an enquiry and suspension are based upon a complete wrong understanding of the legal principles, a failure to appreciate prosecutorial policy and duties and by enlarged upon speculation.

6. Their lack of objectivity and ulterior motive are clearly illustrated by the abusive language and personal attacks that mar the founding affidavit in the Application referred to and the letter dated the 1st of November 2016.

7. Their irrational approach is apparent from the replying affidavit that they filed in the application mentioned above:

> *"87. The test is not whether the NPA officers are in fact exercising their power unlawfully; instead, the test is whether the public may perceive the exercise of their power to be unlawful. This clearly is the case here – as such, in order to protect at least the perception of independence of the NPA, an immediate suspension of the NPA officers is warranted."*

8. It appears from the above that their approach is that the true and/or objective facts should be disregarded in these very important decisions, to order an enquiry and suspend senior officials of the NPA – Once a negative perception is created by the media it is enough to justify the infringement of basic fundamental rights of these officials and have them suspended. The fact that these perceptions may have been created by people ulterior political motives should, according to their approach not be investigated – It should be disregarded.

9. This approach will, with respect, lead to a situation that the President becomes the mere rubberstamp of the media. The President is accused of acting irrational insofar as he indicated any need to investigate the true facts before he exercises his discretion in terms of the Constitution and relevant Legislation.

10. The motives of the complainants are unclear and their attempt to infringe on the power of the Executive is undesirable. In the above regard I fully align myself with the finding by the Gauteng High Court when striking the application from the roll on the 24th of November 2016:

> *"...It was ill advised and certainly unreasonable for the applicants [Helen Suzman Foundation and Freedom Under Law] to rush and launch this application, brushing aside the request for more time from the president,"*
>
> *The relief sought has the potential for this court to stray into the executive terrain which could, if not properly considered, violate the separation of powers doctrine. This could have the judiciary straying into the terrain of the executive.*
>
> *We should also guard, as a court, against creating precedents where, based on insufficient grounds and inadequate foundation, to encourage ordinary citizens ... to use the courts as a platform to dictate to the executive how it should do its work."*

Approach:

11. I respectfully submit that the suspension of senior officials of any governmental department and in particular of the NPA is a very serious matter. It should clearly only be considered in exceptional circumstances and only in the event that there are at least clear indications, based on objective facts, not mere speculation, of serious misconduct by the relevant officials. The principle of a presumption of innocence should surely also apply in these circumstances. Only in the event that there is evidence of a danger of prejudice to the office of the NPA and/or the administration of Justice and our criminal Justice system should suspension not be ordered will it be justifiable.

12. I also have to emphasise with respect that suspension is a serious infringement of the fundamental constitutional rights of the relevant officials and can only be justified under very serious circumstances when the facts dictate the necessity of a suspension.

13. I further respectfully submit that very careful consideration is necessary in this instance where there are no objective facts that substantiate the request for suspension apart from the media perception created. It is notable to refer to the fact that the Full Bench of the Gauteng High Court in striking the application with costs on the 24th of November 2016 indeed found that there was no factual basis for the application apart from the media perception relied upon by the Applicants.

14. It is further respectfully submitted that it should be borne in mind that this matter actually deals with disputes on a political level and that this request for our suspension is apparently used as a method to contribute to this political dispute.

Preliminary procedural issue:

15. I was appointed by the Minister of Justice as the ***Acting*** Special Director of Public Prosecutions in terms of section 13(3) of the National Prosecuting Authority Act 32 of 1998 (NPA Act). The provisions of section 12(6) of the NPA Act, allowing the President to provisionally suspend the NDPP or a Deputy National Director from his or her office pending an enquiry into his or her fitness, is thus not applicable to me. Notwithstanding the aforementioned, I will address the concerns regarding my fitness to hold office.

Structure:

16. By and large the attack on me (as well as Abrahams and Mzinyathi) turns on – and the crux of the matter is – whether there was a basis in law and fact to institute criminal proceedings against the abovementioned persons. From the content of the mentioned letter it appears as if the complainants actually only based their request for an enquiry and our suspension on the prosecution against Minister Gordhan. I will firstly address whether there was sufficient evidence to prefer charges against Gordhan and whether those charges were sustainable in law. Secondly, I address the specific paragraphs of the letter addressed to the President in sequence. The allegations contained in FUL and HSF's application have been addressed in the litigation papers referred to above.

Mandate to deal with the case:

17. I manage and direct criminal prosecutions as stipulated in the mandate of the Priority Crimes Litigation Unit ("PCLU"), which broadly handles matters concerning state security, international crimes, and other priority crimes. The "other priority crimes" are ***"determined by the National Director"*** [own emphasis].

18. In November 2015, a number of prosecutors were transferred to the PCLU. They handled some sensitive matters like the Cato Manor (Booysen) matter, the McBride matter, and the South African Revenue Service (SARS) Rogue Unit matter (which includes the Gordhan, Maghashula and Pillay charge). Inevitably, I had to manage and direct the investigations that these transferred prosecutors were involved in. As stated above, the NDPP determines "other priority crimes" and this case was specifically referred to PCLU.

19. The PCLU was therefore legislatively mandated to deal with this case. Therefore, there is nothing irregular and confounding, as claimed in paragraph 7.8 on page 4 of the letter from FUL and HSF.

Factual basis:

20. Early September 2016, I perused the SARS Rogue Unit docket and acquainted myself with direct and hard evidence relating to *inter alia* 1) the "bugging" of twelve offices in the NPA Head Quarters on instruction of SARS officials; and 2) an early retirement irregularity. The facts of these separate but related issues are set out below.

21. In the first matter, Pillay, a former SARS official, gave instructions to "bug" (plant wiretaps) offices of the top structures of the NPA. Mr Pillay claimed his instruction came from sitting President of the Republic at that time, Mr. Thabo Mbeki, with the aim to find information on the saga between the Scorpions and Jackie Selebi matter. In excess of one million Rand was obtained from a secret fund to pay for the wiretapping devices and there is evidence that the operator involved in planting these devices could profit from the operation. This was done under the watch of the sitting Commissioner of SARS, Gordhan.

22. The second matter dealt with Pillay's request to take early retirement at the age of 56, citing personal reasons, but also requested to be reappointed in the same position and not be penalised for his early retirement. Chrisna Visser, heading Executive Remuneration, objected to this as Pillay's reasons for retirement were personal; no business reason existed to approve such a request and no such case was approved in the past. Visser was however instructed to continue with a memorandum citing personal reasons for retirement. Nico Coetzee, a senior SARS employee in the human resources department, stated that Pillay applied for pension as he wanted to pursue "other interests".

23. A second revised memorandum from Magashula, the sitting SARS Commissioner at the time, contained a different reason for Pillay's retirement. The reason cited on this memorandum was to provide for Pillay's children's education. Nico Coetzee, a senior official in the employ of SARS in the Human Resources Department, raised further concerns through e-mails, stating that if Magashula or Gordhan (then sitting Minister of Finance) approved such a request it would set a bad precedent. He also raised concerns about the reappointment. He specifically indicated that

two similar requests were not approved by the Minister of Finance. Coetzee feared that the retirement (and later reinstatement) could be construed as SARS contributing towards Pillay's children's education, which would put the Minister and Magashula in difficult position. Coetzee clearly stated that such a retirement and reinstatement could only be done if sufficient reasons exist and strongly advised not to proceed, since the stated retirement reasons were personal.

24. Notwithstanding Visser and Coetzee's objections, Pillay was allowed to take an early retirement, accessed his pension funds early, paid no penalty for that, and was reappointed in exactly the same position. Whereas Gordhan only approved a three-year contract, Pillay was appointed for 5 years. Just before Gordhan left the specific Ministry (and was appointed to a new portfolio), he concluded another contract with Pillay (while his previous contract was still valid and extant).

25. On the 6 September 2016 the prosecutors in this matter, Deputy Directors Sello Maema and JJ Mlotsha, did a presentation to the NPA management regarding their investigation. They presented the hard evidence on the wiretapping and proof of Pillay's involvement, as well as Pillay's retirement.

26. From the evidence presented to management that day, I came to the *prima facie* conclusion that a case could probably be made out that Pillay and Magashula were warned by the experts in the HR department and they had the requisite intent to act unlawfully. Furthermore, Gordhan and Pillay's involvement in the wiretapping matter was sufficient to create a suspicion and prove a possible motive to provide Pillay with an unlawful retirement package. The investigation into the wiretapping is still ongoing,

but I believed, in good faith, that the prosecutors had sufficient evidence regarding the retirement matter.

Legal basis:

27. Despite the evidence the prosecutors presented, I did question Gordhan's criminal intent. Since the Annexures annexed to of the Second Retirement Memorandum were not be provided, I questioned whether Gordhan was not "duped" by Magashula and Pillay. Deputy Director Sello Maema assured me that Gordhan was the SARS Commissioner for 10 years and that he was approached about the matter before the "final" memorandum was submitted to him. I did see a memorandum that was addressed to Gordhan before he approved the final application. The prosecutor was confident that he could prove the intent, and thus guilt, of Gordhan. I also questioned Deputy Director Jabulani Mlotswa separately and he assured me that he had the firm believe that there was an unlawful scheme that could not be achieved without Gordhan's participation.

28. It is of material importance to emphasise that the empowering legislation does not provide for a discretion to the Minister to waive the penalty clause. For convenience and in view of the importance of this issue I quote Rule 14.3.3.b of the Government Employees Pension Fund ("GEPF") Rules:

"14.3.3 Members with 10 years and more pensionable service-

(a) ...

(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. [Rule 14.4.3 amended by GN 1073 of 8 August 2003.]"*

(My emphasis)

29. Further affidavits were obtained by the Prosecutors, Advocates Maema and Mlotswa and DPCI team consisting of *inter alia* a Brigadier. For instance the Hawks team obtained a statement from Kenny Govender, the Director General of the Department of Public Service and Administration, who provided details about employment initiated severance packages. Similarly the statement of Gerda Van den Heever from SARS was obtained. Her situation was comparable to Ivan Pillay's situation. She went on pension when she reached the age of 58 but, unlike Pillay, was made to pay the penalty.

30. In the above regard we were also very alived to the basic principle in our law that there should be equality before the law. The fact that Mr Gordhan was a Minister in the central Cabinet could not excuse him from prosecution if there was a *prima facie* case of unlawful conduct against him.

31. To summarise this position I refer to the following:

31.1. Mr Pillay applied for early retirement in terms of the GEPF Rules and Regulations. He was entitled to do so in view of the fact that he reached the minimum age of 55 at the stage of his application.

31.2. The Minister indeed had the power and authority to adhere to his request.

31.3. The GEPF Rules, however, provide for the specific procedure and more importantly to a specific penalty that ANY PERSON will have to bear in circumstances of an early retirement.

31.4. There is no suggestion of any discretion that the Minister or for that matter any person and/or entity has to exclude the penalty prescribed in the Rules.

31.5. Minister Gordhan adhered to the request of Mr Pillay for early retirement.

31.6. The Minister further instructed that Mr Pillay should not be penalised as prescribed in the GEPF Rules for early retirement but that SARS should accept liability for the penalty referred to above. The Minister had no discretion or power to do so.

31.7. A matter that even concerned us more was the fact that Mr Pillay was directly after his early retirement reappointed in the very same post that he previously held in SARS with the same benefits. It could therefore never be argued that this was a *bona fide* early retirement.

31.8. The reasons provided by Mr Pillay for the above early retirement and to be funded by SARS to provide for the penalty prescribed by

the Rules of the GEPF in excess of an amount of R1,1 million were personal reasons. The objective facts are that Mr Pillay was allowed to take early retirement with full benefits including a huge initial payment and thereafter monthly payments and he was then immediately appointed in the same post with the same remuneration. All this was funded by the South African taxpayers for no legitimate reason and contrary to the express Rules of the GEPF.

31.9. Even if it was true that this unlawful procedure had been implemented in the past, we held the view that such unlawful conduct could not have the effect to render the conduct lawful. In any event we could not obtain any objective evidence of any previous procedure of this nature based on similar facts. This was despite the fact that we endeavoured to obtain information in this regard.

32. Once satisfied that a *prima facie* case existed I requested Dr Susan Bukau, a senior advocate in my office, to do research on "public interest". I made such a note on the memorandum. I myself considered the authorities and she provided me with her research. I considered this factor and took it into account. Once we were satisfied we consulted and provided the NDPP with our views. As mentioned we also raised this issue with the top management of the NPA and they shared our view that the principle of equality before the law should be adhered to despite possible negative results that may follow. At that stage, I was not aware of any financial or legal advice that was obtained by Magashula, Pillay or Gordhan which could indicate the lack of knowledge of unlawfulness.

33. I will briefly deal with specific allegations in the letter of the complainants dated the 1st of November 2016.

33.1. **Ad paragraph 10:**

I deny that I proceeded with the charges with either ulterior purposes or in a breathtakingly reckless fashion, without proper investigation and regard to the evidence. I had no influence on the investigation team, when they completed this leg of the investigation and I did not know when the presentation would be made. I had no ulterior purposes and adjudge the matter on the facts presented to me. I did not proceed in reckless fashion but questioned the prosecutors and asked for further statements.

33.2. **Ad paragraph 11:**

I did not fail my fundamental constitutional and statutory duty to ensure the charges were properly grounded and I took an impartial, independent and objective view of the facts. I had no reason to interrogate or question the investigative work performed by the DPCI at that stage.

33.3. **Ad paragraph 12:**

I fail to understand on what basis in law and fact that what is stated in regard to Mr Abrahams apply with equal force to me. As

illustrated above there was a basis in law and if fact for the charges to be preferred against all three accused.

33.4. **Ad paragraph 13:**

I did not fail to take into account the legal requirement of fraudulent intention and I specifically quizzed the prosecutor, Advocate Sello Maema in regard to the *mens rea* and knowledge of unlawfulness of the accused. I ensured that I obtained memoranda that was sent to the Minister before he approved the final memorandum and in the light of the evidence of the rogue unit under his watch as commissioner for 10 years I was inter alia satisfied that he had a case to answer. I deny that I had any ulterior motive in deciding this matter.

33.5. **Ad paragraph 14:**

I did take the public interest into consideration and did not theatrically broadcast the matter to the world. Specific research was done and authority was obtained by Adv Bukau. This was taken into consideration and there is record of this matter.

33.6. **Ad paragraph 15:**

I did not bungle this matter and I attend to a number of serious matters every day. I deny that I misconducted myself and that I lack conscientiousness. I deny that I lack competence and integrity. I continue to serve this office to the best of my ability.

Personal information:

34. As previously mentioned I am the Acting Special Director of Public Prosecution and Head: Priority Crimes Litigation Unit.

35. I joined the Department of Justice in November 1976 and have been in the employ of the NPA since then. I went through all the ranks from a lower court prosecutor (traffic court- prosecutor), regional court prosecutor to a state advocate in High Court. I was involved in cases like Eugene de Kock, Wouter Basson and a number of other high profile cases like S v Trollip, High Treason case of attack on ANC elective conference at Mangaung. I was an evidence leader at the Goldstone Commission where I was involved in number of investigation like the Phola Park - and Third Force investigation. I also worked at the Law Commission on the Simplification of Criminal Procedure. I was a member of the DSO (Scorpions) and founder member of the Priority Crimes Litigation Unit (hereinafter PCLU) in 2003. As was appointed to act as Special Director of the PCLU in October 2015.

36. I obtained my BA Law Degree at the end of 1979 from University of Pretoria. I obtained my LLB at the end of 1981 from the same Institution and was admitted as advocate of this court on 4 May 1982. I obtained a Master of Laws at the University of London (University College London) on the 16 November 1983. In December 1992 I obtained my Doctor Legum LLD degree in Procedure and Evidence at the University of Pretoria and recently in April 2014 I obtained another Magister Legum LLM degree in International Law with Distinction.

37. I therefore presently have served in the Department of Justice for a period of more than 40 years. Apart from the fact that my promotion to my present senior position will illustrate that I duly adhered to all my obligations through my long career I can confirm that I have never been the subject to any disciplinary investigation and/or hearing against me. I always adhered to the principles that my office stands for in the highest regard and never failed to take any step in order to advance these principles and obligations.

38. Any suggestion that I acted with an ulterior motive and/or failed to comply with my fundamental constitutional and statutory duties is clearly without any merit and/or without any factual basis.

Consequences of suspension:

39. Although I do not suggest that any person is absolutely indispensable I wish to inform the Honourable President that I am presently managing a number of extremely sensitive matters in my capacity as the Acting Special Director of Public Prosecutions: PCLU.

40. I do not wish to disclose full detail of all these cases at this stage but I am more than willing to provide such detail in the event that the Honourable President wishes to consider same. I may mention that these cases include the investigations into alleged acts of terrorism by both perpetrators on the right wing of our political system as well as by Muslim fundamentalists. This includes alleged involvement of the so-called ISIS terrorist organisation. It further includes the criminal investigation into

alleged criminal conduct by members of SAPS in the so-called Marikana tragedy as well as the Grabber matter and of Pooe.

41. I respectfully submit that most of the matters that I am dealing with at this stage are matters of National and also International importance and that my suspension will have a serious detrimental effect on the office of the National Prosecuting Authority as well as in the effective prosecution of criminal matters.

Conclusions

42. I respectfully submit that there is no need to hold an enquiry in to my fitness to hold offices and similarly no need to suspend me in the meantime.

43. I can inform the Honourable President that I intend to pursue my official duties as always with integrity and without fear, favour or prejudice.

J P Pretorius

Acting Special Director and Head: PCLU

National Prosecutions Service
Director of Public Prosecutions
Gauteng Division, Pretoria

NATIONAL PROSECUTING AUTHORITY
South Africa

ENQURIES: S MZINYATHI
EMAIL: smzinyathi@npa.gov.za
TEL: 012 351 6704

28 November 2016

PRETORIA

el: +27 12 351 6700
ax: +27 12 843 1728
ppta@npa.gov.za

Prudential Building
28 Church Square
PRETORIA
0002

P/Bag X300
PRETORIA
0001
South Africa

www.npa.gov.za

His Excellency
President JG Zuma
Union Buildings
Government Avenue
Pretoria
0001

E-mail: ntoeng@presidency.gov.za

Dear President

RE: REPRESENTATIONS IN RESPONSE TO PRESIDENT'S NOTICE OF 14 NOVEMBER 2016 IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT

1. I refer to the letter dated 28 November 2016 addressed to you by Adv Abrahams (the NDPP) in connection with the above-mentioned matter in which he is making representations on behalf of himself, Dr Pretorius SC (Pretorius) and myself. I have read the letter and I associate myself with the contents thereof. The letter is attached hereto for ease of reference.

2. You may have been informed that in the litigation in the matter between Helen Suzman Foundation and Another versus the President of the Republic of South Africa and Others, case no 87643/16, (Gauteng Division, Pretoria), I was represented by a separate team of legal Counsel.

3. Part of the reason for that is that there are facts that are relevant to the NDPP, and which do not necessarily also refer to either me or to Pretorius. Some facts do not affect me at all, and I think, also on advice, that, in considering our representations, it is important for you to know those facts. Other than that, I remain in strong agreement with the NDPP that Complainants have no case whatsoever against any of the THREE of us, on both the facts and the law, for the relief they have asked from the Courts, and from the President.

4. Firstly, I agree with the NDPP that the decision to prefer charges against the Messrs Gordhan, Pillay and Magashula was taken by Pretorius, in consultation with me, and after we had fully briefed the NDPP, who agreed with us.

5. Secondly, at the time we took the decision, we were not aware of the existence of the so-called Symington Memorandum. I only saw the Symington Memorandum as part of the bundle of court papers in the litigation mentioned in paragraph 2 above.

6. Thirdly, I was not consulted by the NDPP subsequent to his receipt of the Symington Memorandum as part of his review of the decision to prefer charges against Messrs Gordhan, Pillay and Magashula.

7. Fourthly, I never saw the representations made to the NDPP, either by Pillay or by Magashula.

8. Fifthly, I only got to know later about the decision that the charges against Messrs Gordhan, Pillay and Magashula were to be withdrawn in light of representations made to the NDPP by Pillay and Magashula, which decision was announced in the Press Conference of 31 October 2016.

9. Sixthly, I am not currently, nor have I been, involved in any investigations of the so-called SARS Rogue Unit.

10. I trust that this will put you Mr President in a position to have sight of all nuances in the decision making process, by whom, and what path was followed by whom of the three of us whom the Complainants want to compel you to suspend us and call an inquiry into our fitness to hold office.

11. I have stated the same things, more or less in my Answering Affidavit, as you will see when you read it, as it forms part of the bundle of papers which will accompany our representations.

12. I have stated in my Answering Affidavit why the Complainants have not made out a case for you to institute either an inquiry or to suspend any of us. I remain unshakably convinced that they have made out NO CASE against any of us, singly or collectively, but since I also have to speak for myself, I thought you need to know all the facts, in all their nuances.

13. In conclusion, I accordingly also humbly align myself with the views of the NDPP and Pretorius that the Complainants' request that you take steps against us in terms of Section 12(6) of the NPA Act should be refused.

Yours faithfully

ADV SIBONGILE MZINYATHI
DIRECTOR OF PUBLIC PROSECUTIONS
NORTH GAUTENG DIVISION
DATE: 28 NOVEMBER 2016

OFFICE OF THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park, Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact numbers: 012 845 6758
Email: ndpp@npa.gov.za
www.npa.gov.za

28 November 2016

His Excellency
President J G Zuma
Union Buildings
Government Ave
Pretoria
0001

E-mail: ntoeng@presidency.gov.za

Dear Mr President

RE: REPRESENTATIONS IN RESPONSE TO PRESIDENT'S NOTICE OF 14 NOVEMBER 2016 IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT

1. I write for myself, and on behalf of Dr Pretorius SC ("**Pretorius**") and Adv Mzinyathi ("**Mzinyathi**"), in response to your letters of 14 November 2016 (File 1:pg 333-338) addressed in the same terms to each of us. (References to *us*, *we* and *our* in this document should be read as encompassing Pretorius, Mzinyathi and myself).

2. You advised in your letter that two civil society organisations, *Freedom Under Law* and the *Helen Suzman Foundation* ("**the Complainants**"), have requested, by way of a letter dated 1 November 2016 ("**the Complaint**"), that you provisionally suspend us, pending an enquiry into our fitness to hold office, in terms of section 12(6)(a) read with, *inter alia*, section 14(3) of the National Prosecuting Authority Act, 32 of 1998 ("**the NPA Act**").

3. Pretorius and Mzinyathi, as indicated in their separate letters associate themselves with the sentiments expressed in this letter, insofar as they specifically concern them. They desire that this letter also be deemed to constitute the representations requested of them in your letter of 14 November 2016.

4. We thank you for affording us an opportunity to make representations.

INTRODUCTION

5. The complaint and our responses thereto fall to be considered in light of two recently filed applications in the High Court, (Gauteng Division, Pretoria) to which extensive reference is made herein. They are:

5.1 Freedom Under Law and Another v NPA and Others (case no. 83058/16) in which the Complainants applied to review and set aside the decision to prefer charges against Minister Pravin Gordhan ("**the Minister**"), Ivan Pillay ("**Pillay**") and Oupa Magashula ("**Magashula**"), in connection with alleged wrongdoing arising out of the purported retirement of Pillay from the South African Revenue Service ("**SARS**"). That application was withdrawn following my decision of 31 October to review and withdraw the aforementioned prosecution. It was withdrawn before opposing affidavits were filed by us. A copy of the Notice of Motion and Founding Affidavit in that case was attached to the Complaint as per paragraph 4 of the Complaint. Since this application has already been furnished to you we do not attach it again.

5.2 Helen Suzman Foundation and Another v the President of the Republic of South Africa and Others, case no. *87643/16*, (Gauteng Division, Pretoria) served on 9 November 2016 in which the Complainants sought to review and set aside your purported decision to decline to invoke section 12(6) of the NPA Act, or, in the alternative, to refuse to take such a decision. A full set of the pleadings in this matter, together with the heads of argument accompany these representations in files marked "**Files 1 and 2**". It was in connection with this application that you elicited the representations set forth herein. The application was heard on 24 November 2016, and was struck from the roll with costs, on the basis that it was not urgent. (I return to consider aspects of this decision below.)

6. We endeavour to demonstrate herein that the Complaint is based upon speculation, a wrong understanding of the law, and a failure to appreciate both prosecutorial policy and duties. In doing so, we prefer not to react to the abusive personal attacks that mar the Complaint (as well as the founding affidavit in the two applications), and confine ourselves strictly to the substance.

7. It appears that the Complainants' motive in seeking our suspension and an enquiry is to forestall charges from being laid in connection with what has become known as "the Rogue Unit". That investigation is still pending. Whilst I have asked the Head of the Directorate for Priorities Crimes Investigations ("**the Hawks**") to expedite the investigation, no decision has been made as to whether charges will be brought, or if so, the nature of the charges, and against whom they will be preferred. The Complainants do not say why the Minister (or anyone else in particular), must not be charged - if there is a

case to answer. The Complainants seek to pre-empt the matter, by insisting in advance that any charges arising from the SARS rogue unit investigations will *necessarily* be unfounded. As noted in paragraph 268 of the answering affidavit (File 1: p 204), I have at no time issued a *threat* that prosecutions arising out of the Rogue Unit will be forthcoming.

8. The founding papers in the first application sent to you together with the Complaint, run to some 198 pages, which you were asked to consider together with the Complaint of 1 November, within a period of 6 days. We would hope that the Complainants, whom we understand have instructed an army of lawyers, would have appreciated that before a decision could be made, it would have been necessary for you to obtain representations from us, as you have done.

9. With respect, our view is vindicated in the above-referred decision of 24 November. A Full Bench of the High Court held:

> *"...It was ill advised and certainly unreasonable for the applicants [Helen Suzman Foundation and Freedom Under Law] to rush and launch this application, brushing aside the request for more time from the president."*
>
> *The relief sought has the potential for this court to stray into the executive terrain which could, if not properly considered, violate the separation of powers doctrine. This could have the judiciary straying into the terrain of the executive.*
>
> *We should also guard, as a court, against creating precedents where, based on insufficient grounds and inadequate foundation, to encourage ordinary citizens ... to use the courts as a platform to dictate to the executive how it should do its work."*

We respectfully associate ourselves with these sentiments.

I. THE ALLEGATIONS IN THE COMPLAINT

10. The allegations made in the Complainants' letter include the following (File 1: pg 125-131):

10.1 In respect of myself, the principal allegations, *inter alia*, are:

10.1.1 that I admitted that the NPA never had sufficient evidence to prefer charges against the Minister, Pillay and Magashula. (It is noted that the letter of complaint refers to GP&M as "the accused persons". I point out that they were summoned to appear in Court. Only upon such appearance would charges have been put to them. It is then that they would have been "accused persons". We do not wish in these submissions to perpetuate the

use of the collective description of them as "the accused persons" but use the acronym *GP SM*;

10.1.2 in light of the circumstances surrounding the preferring and withdrawal of the charges, that I misconducted myself and am not a fit and proper person to hold the office of the NDPP;

10.1.3 that I lack "the required conscientiousness and integrity to be entrusted with the responsibilities of the office of the NDPP";

10.1.4 that I "brought the administration of justice and my High Office into disrepute";

10.1.5 that I committed serious misconduct;

10.1.6 that I "consciously or recklessly ignored (all of these) features and proceeded to take a course of action, in the most public fashion, which I must have known would throw the South African economy into a tail spin";

10.1.7 that I did not apply my mind to the facts or the law and that my failure to do so "at best, shows a stupefying, disabling and disqualifying lack of competence; at worst, [my] failure betrays (sic) ulterior purpose and a lack of integrity;"

10.1.8 that the Priority Crimes Litigation Unit "was not even legislatively mandated to deal with cases of fraud and theft", and that the fact that this unit handled the case "is irregular and confounding";

10.1.9 that I "did not withdraw the charges as a conscientious NDPP of requisite integrity and objectively would…";

10.1.10 that "the charges were ill-conceived and stillborn from the outset";

10.1.11 that "this shows Mr Abrahams fundamentally misunderstood the laws applicable to his powers as NDPP, which in itself demonstrates a wanton lack of conscientiousness, at worst, this shows Mr Abrahams intentionally and unlawfully sought to prop up insupportable charges after the fact as to rescue them from review";

10.1.12 that I have brought the NPA into disrepute and that I continue on a daily basis to erode public confidence in law enforcement institutions.

11. In regard to Pretorius and Mzinyathi the principal allegations are that:

11.1 prosecution of the charges was pursued "either for ulterior purposes or in a breathtakingly reckless fashion, without proper investigation or any regard to the evidence and proper legal analysis";

11.2 they failed in their fundamental constitutional and statutory duty to ensure that charges were properly grounded, and to take an impartial, independent and objective view of all the facts;

11.3 had they applied their minds to the facts and the law, they would have realized that there was no basis in law or in fact for the charges;

11.4 they failed to take account of the "most basic" legal requirement for a successful prosecution of fraud or theft: fraudulent or furtive intention;

11.5 their "bungling of this matter" has severely undermined public confidence in the integrity of the NPA;

11.6 that as prosecutors they "misconducted (themselves) and lack the conscientiousness (including competence) and integrity to continue to serve their official functions".

12. The aforementioned is an encapsulation of the accusations made in the letter of complaint and not an attempt to repeat every statement and allegation made.

II. CHRONOLOGY

13. It is useful to present the most signal events and items of correspondence in tabular form.

TABLE		
1	Tuesday, 11 October 2016	Summons served on the Minister, Pillay and Magashula to appear in the Regional Division, Tshwane District on 2 November 2016. (File 1: pg 75-84).
2	Friday, 14 October 2016	Webber Wentzel writes to me and Pretorius calling upon me to withdraw charges (File 1: pg 89-118)
3	Monday, 17 October 2016	Magashula and Pillay make oral representations to me in terms of section 179(5)(d) of the Constitution and section 22(22)(c) of the NPA Act.
4	Monday, 17 October 2016	I respond to the letter from Webber Wentzel

		advising that Pillay and Magashula have made representations which I was considering; Gordhan to make representations by 17h00 on 18 October 2016. (File 1: pg 341)
5	Tuesday, 18 October 2016	Pillay and Magashula submit written representations (File 1: pg 419 - 423)
6	Tuesday, 18 October 2016	Gordhan declines to make representations. Webber Wentzel invite me to withdraw the charges by 21 October. (File 1: pg 140-142)
7	Friday, 21 October 2016	I respond to the letter from Webber Wentzel of 18.10.16, stating I had been requested by Pillay and Magashula to review the decision in terms of section 179(5)(d); I had directed further investigations to be conducted; I regarded the matter as urgent; and would be in communication with legal representations of Pillay and Magashula to advise them of the outcome of their representations once in receipt of additional information, and has considered same. I reaffirmed that I was attending to the matter urgently. A copy of that letter is at page 143-144 to the application attached to the complaint.
8	Sunday, 23 October 2016	Urgent application served by Helen Suzman Foundation and Freedom Under Law seeking order declaring unlawful the decision to charge the Minister. Application set down for 8 November 2016. This is the application attached to the Complaint).
9	Monday, 31 October 2016	Charges withdrawn by me.
10	Tuesday, 1 November 2016	Webber Wentzel writes to President demanding he suspends Pretorius, Mzinyathi and I, pending enquiries. President was given until Monday, 7 November 2016 to make decision. This is the complaint of 1 November 2016 also at File 1: pg 125-131
11	Monday, 7 November 2016	President responds to Webber Wentzel requesting extension until 21 November 2016 (File 1: pg 132-135)
12	Monday, 7 November 2016	Webber Wentzel advises they will be launching urgent proceedings to secure suspension and have enquiries instituted. (File 1: pg 134-144)
13	Wednesday, 9 November 2016	HSF and FUL launches urgent application, set down for 22 November 2016 for order directing the President to institute an enquiry and suspend prosecutors. (This is the application in files 2 and 3).
14	Monday, 14 November 2016	President writes to Pretorius, Mzinyathi and I affording us an opportunity to make

		representations. (File 1: pg 333-338)
15	Thursday, 24 November 2016	Pretoria High Court strikes application lodged by Freedom Under Law and Helen Suzman Foundation, with costs.

III. STRUCTURE OF THE NPA

14. The structure of the NPA is set out in paragraphs 75 - 81 of the Answering Affidavit (File 2: pg 227 – 230). Details of my power to review prosecutions are set out in paragraphs 82 – 85 of the Answering Affidavit (File 2: pg 230 – 231).

IV. UNLAWFUL CONDUCT OF THE MINISTER, PILLAY AND MAGASHULA

15. The Complainants allege that –

15.1 the charges were "ill-conceived and stillborn from the outset";
15.2 the charges were "insupportable"
15.3 "The prosecutors clearly failed in their fundamental Constitution on statutory duty to ensure that the charges were properly grounded...";
15.4 "... Had the prosecutors applied their minds to the facts and law relevant to the charges ... they would have realised that there was no basis, in law or in fact for the charges".

16. Contrary to these contentions, there was indeed a proper basis for the charges. It was proper to infer from the facts intent to act unlawfully. It was only on production of the oral representations and documents, furnished for the first time upon review, and the documents submitted by the Complainants in their letter to me dated 14 October 2016, that I was able to conclude that it would be difficult to prove intent beyond a reasonable doubt.

17. During September 2016, Sello Maema ("**Maema**"), a Deputy Director of Public Prosecutions in the National Prosecutions Authority ("**NPA**"), who is responsible for providing guidance for the investigation of the so-called Rogue Unit, briefed the NPA management on the alleged involvement of the Minister in the allegedly unlawful manner in which Pillay's retirement had been handled. I should mention that the latter irregularity came to light during the course of the separate investigation into the Rogue Unit. Relevant particulars of the briefing are set forth in the answering affidavits in paragraphs 120 – 123.

18. It was ultimately based upon Maema's briefing, *inter alia*, that Pretorius, in consultation with Mzinyathi, preferred the impugned charges.

SYMINGTON MEMO

19. That Pillay was fully aware of the implications of his decision to take early retirement is apparent from the contents of the so-called *Symington*

memorandum, dated 7 March 2009. (File 1: pg 98-99; paras 128-131, pg 250-251)

20. Discussion of the relevant document is to be found at paragraphs 122-145. (File 1: pg 242-262).

21. At the time when the prosecutors decided to charge GP&M, they did not have the Symington memorandum in their possession (as noted in paragraph 131 of the answering affidavit). It was received by me only when the applicants wrote to me on 14 October 2016, and attached it as an annexure (File 1: pg 98-99). Perusal of the memorandum led me to believe that it was unlikely that a conviction could be obtained - not because the other elements of the offences alleged could not be proven - but specifically because the element of intent would be very difficult to prove beyond a reasonable doubt (File 1: pg 89-116).

LEGAL CONSIDERATIONS

22. Fundamentally, the basis for the charges was that, upon consideration of the available evidence, it became clear that the manner in which Pillay was able to obtain an unlawful benefit at the expense of SARS was through a series of transactions that were *in fraudem legis*, this is discussed in the answering affidavit at paragraphs 182 – 184. (File 1: pg 275)

23. At various times, attempts have been made to defend the transactions by reference to miscellaneous provisions that it is alleged provide warrant for the manner in which Pillay's purported retirement, and the benefits that flowed to him in the course thereof, was handled. Examination of these provisions revealed that in fact none, either alone or read in conjunction, can justify either the R1,2 million effectively paid to Pillay by SARS, or his reappointment to precisely the same position that he had occupied with immediate effect.

The Employee Initiated Severance Package does not apply

24. The response from the Acting Director-General of the Department of Public Service and Administration is (File 1: pg 390-392). Because Magashula did not ask whether it was lawful for SARS to pay Pillay's penalty to the GEPF, the ADG did not address it. What he was asked about was the so-called Employee Initiated Severance Package, which is irrelevant. Pillay did not request such a package.

25. This Employee Initiated Severance Package, and why it does not in any event apply, is discussed in paragraphs 152 – 153 of the answering affidavit. (File 1: pg 266)

The Public Service Act

26. In his memorandum dated 27 November 2009, Pillay requested that his approval be granted in terms of section 16(6)(b) of the Public Service Act, 1994.

27. That provision and why it does not apply is discussed in the answering affidavit at paragraphs 155 – 159 (File 1: pg 267-268)

The GEPF Rules

28. In his letter to the Minister, Magashula relied on **Rule 14.3.3(k)** of the Rules of the GEPF.

29. These Rules, and why they do not apply, are discussed in the answering affidavit at paragraphs 159 – 168 (File 1: pg 268-271)

Section 17(4) of the GEPF Law, 1996

30. This deals with a situation where the employer, or any legislation adopted by parliament, places an additional financial obligation on the GEPF.

31. Why it does not apply *in casu* is discussed in the answering affidavit at paragraphs 170 – 174 (File 1: pg 271-272).

Rule 20 of the GEPF

32. Why this has no application is discussed in the Answering Affidavit at paragraphs 175 – 177 (File 1: pg 273).

The Guide

33. Likewise, the reliance on the Government Employees Pension Members Guide is completely unfounded, for the reasons discussed in the Answering Affidavit at paragraphs 178 – 181 (File 1: pg 273-274).

THE PROSECUTION

34. As noted in paragraph 186 of the Answering Affidavit (File 1: pg 276-277), it is common practice that the charge of theft is always preferred as an alternative to a charge of fraud. The fact that the charges were not a model of clarity does not mean that they were politically motivated or that there was no basis for them. The Accused themselves can always raise lack of clarity as an

issue at the trial. Lack of clarity does not form a basis for the impeachment of the prosecutor, let alone the NDPP.

Intention

35. It is trite that intention as an element of a criminal offence falls to be inferred from an overall conspectus of the alleged facts. Reasonable minds can differ, especially before evidence is heard, as to whether the facts, if true would support an inference of intent. The relevant legal authority is discussed in the heads of argument.

36. It has already been stated that the actual decision to prosecute was taken by Pretorius in consultation with Mzinyathi. (I refer to paragraph 229 of the Answering Affidavit). Any suggestion that I in some sense unfairly shifted responsibility for the initiation of the charges to Pretorius and Mzinyathi is meritless. I reiterate that Pretorius took the decision to institute the charges in consultation with Mzinyathi. I was briefed on this by Pretorius and Mzinyathi and agreed with the decision. (I refer to paragraph 373 of the Answering Affidavit –File 1: pg 322).

37. It is undeniable that Pretorius' decision to prosecute was unpopular, but he was duty bound by the considerations set out above. My decision to review same was also controversial. Fortunately Pretorius and I do not exercise our duties in the hope or expectation of garnering popularity. We simply do our jobs without fear, favour or prejudice, in accordance with our duties to the best of our ability. In this regard I refer to paragraphs 237 – 239 of the Answering Affidavit. (File 1:pg 278).

38. I arrived at the conclusion that intention could not be proved beyond a reasonable doubt having been sent the memorandum of Symington on 14 October 2016 by the Complainants, which memorandum was expressly addressed by the representatives of Pillay and Magashula, when they made representations to me on Monday, 17 October 2016. Pretorius and Mzinyathi were not possessed of the Symington memorandum when the decision was taken to prosecute.

Correspondence with attorneys and Representations

39. This subject matter is discussed in the Answering Affidavit at paragraph 194 (File 1: pg 278-279).

40. The allegation that anyone *reneged* on an undertaking to the Minister is not correct. I refer in this regard to paragraphs 193 and 308 of the Answering Affidavit (File 1: pg 278 and 302-303 respectively).

41. As noted in the paragraph 194 of the Answering Affidavit (File 1: pg 278), in contending that the Minister was entitled to make representations prior to the institution of charges, the Applicants are effectively contending that high

government officials deserve special treatment from the NPA. The Minister was afforded an opportunity to make a warning statement, which he declined. There was no reason to treat the Minister any differently.

42. In a 14 October 2016 letter (File 1: pg 95), the Applicants wrote:

> *"Should you not unconditionally withdraw the charges against the Minister or furnish the information sought [by 16:00 on 21 October 2016], our clients will assume that no reasons for the decisions, and no documents other than the documents annexed to this letter, exist in support of the charges"*. (I refer to paragraph 195 of the Answering Affidavit) (File 1: pg 279).

43. Once again, the inarticulate premise is that a high office holder is entitled to impose special conditions that would not be available to any ordinary citizen subject to prosecution. This is antithetical to the principle of equality before the law as enshrined in section 9 of the Constitution. This subject matter is dealt with in paragraphs 55 – 63 of the Answering Affidavit (File 1: pg 220-223).

44. The applicants added:

> *"In respect of both charges, even if it is assumed (contrary to the dispositive analysis above) that the conduct of the minister of finance was not strictly in accordance with the law. There is no basis for imputing a fraudulent or furtive intention to him and none has been suggested."*

Further:

> *"The main reason for his decision [not to make representations] is that he does not have any confidence in the NDPP's ability or willingness to afford him a fair hearing.*
>
> *First, we repeatedly asked the NPA to afford the Minister an opportunity to make representations to them before they decided whether to prosecute the Minister but they spurned our request.*
>
> *Second, the NDPP's conduct at his press conference announcing the decision to charge the Minister made clear his commitment to the prosecution.*
>
> *Third, having now had an opportunity to study the charges against the Minister, it is also clear to us that they manifest a resolute and not well founded determination to prosecute the Minister at all costs. Any representations to the NDPP would accordingly be pointless."*

45. The conclusion that it would be futile for the Minister to offer representations is ill-founded. I refer to paragraph 202 of the Answering Affidavit (File 1: pg 281). No reasons are offered for the Minister's lack of confidence in me.

46. I could of course be swayed by representations. The charges were preferred by Pretorius, in whom I have every confidence. But I am always open to persuasion. (Regarding my confidence in my colleagues, I refer to paragraphs 336 and 337 of the Answering Affidavit (File 1: pg 308-309).

47. I responded to the applicants' letter on 17 October 2016, (File 1: pg 414-415) confirming that the decision to prosecute was taken by Pretorius, not by myself; that I considered myself empowered to review the decision; that I had received representations from Pillay and Magashula; and that the Minister could make representations by 18 October 2016, if he so elected. I refer to paragraphs 204 and 205 of the Answering Affidavit (File 1: pg 281-282).

48. On 17 October 2016 Magashula and Pillay, through their legal representatives, made representations to me in which they requested me to review the decision to prefer charges. On 18 October 2016 those verbal representations were reduced to writing.

49. Counsel on behalf of Pillay, Advocate Nazeer Cassim SC raised the opinion by Symington dated 17 March 2009 in the following context:

> *"The purpose of this note is to crisply record the grounds whereupon where respectfully submit, Pillay did not have any intention to commit the offences in respect of which he now stands arraigned. In essence, Pillay was guided by the opinion of Vlok Symington ("Symington") a respected legally trained official of SARS at the material time which advised that Pillay's contemplated early retirement from the GEPF, in his application to the Minister of Finance to waive early retirement penalty and is requested to be appointed on contract after his early retirement from the GEPF were technically possible under the rules of the GEPF read together with the employment policies of SARS."* I refer to paragraph 208 of the Answering Affidavit.

50. A copy of these written representations is in File 1: at pp 419-420. (The Symington memorandum is discussed in paragraphs 127 - 131 of the Answering Affidavit - (File 1: pg 249 -252).

51. On 18 October 2016 Magashula's legal representatives, Advocate PJJ De Jager SC also reduced Magashula's representations to writing (File 1: pg 421-424. He states the following concerning the Symington memorandum in particular:

> *"It is true that Mr Magashula promoted and supported Mr Pillay's request for early retirement. He was afforded a memorandum from the Legal and Policy Division (Mr Vlok Symington) and he followed all procedures to the letter. He sent a memorandum on 12 August 2010 to accused No. 3 who approved. With all due respect, any reasonable employer would under the*

circumstances have approved. However, even if you doubt the correctness of the Minister's exercise of his discretion, that is still a far cry from any criminal charge, let alone fraud, theft or otherwise." I refer to paragraph 210 of the Answering Affidavit (File 1: pg 283).

52. As a result of these representations, I authorized further investigation of the matter, in particular because the import of the Symington memorandum was that Pillay, Magashula and similarly the Minister, lacked the necessary intention to commit an unlawful act. To that end, further statements were taken. I refer to paragraph 211 of the Answering Affidavit (File 1: pg 283).

53. The Complainants' suggestion that I should not have conducted further investigation in the course of review is perverse. No doubt, had I failed to pursue relevant matters upon review, I would equally have been accused of dereliction in my duties.

54. The Minister did not make representations, as had Pillay and Magashula. The Minister, however, subsequently indicated that he aligned himself with representations that had been included in the letter of the applicants of 14 October.) I refer to paragraph 212 of the Answering Affidavit (File 1: pg 283-284).

Withdrawal of the charges

55. After affording all interested parties including the Complainants in this matter, the DPCI, SARS, Pillay, Magashula and the Minister, an opportunity to make representations, and considering the representations that were made by those who elected to do so, I then took the decision to review and set aside the charges on 30 October 2016. I refer to paragraph 213 of the Answering Affidavit (File 1: pg 284).

56. As noted above, my decision was taken on the premise that it would be difficult to prove the requisite intention to act unlawfully beyond a reasonable doubt. This was on the strength of the new information that was provided and which was not before the prosecutions team when the third respondent took the decision to prosecute.

57. I announced my decision at a press conference on 31 October; a copy of the statement is attached to the Answering Affidavit. (File 1: pg 427-464).

58. In my statement I said, *inter alia*:

58.1 That the Compiainants had requested me to withdraw the charges, and that Magashula and Pillay had requested a review;

58.2 Magashula had supported Pillay's application and relied on Symington's advice;

58.3 I was distressed that Gordhan believed that he would not receive a fair hearing;

58.4 The Symington memorandum came to the attention of the prosecutors by way of the FUL and HSF submissions;

58.5 I had directed further investigations following the representations and submissions;

58.6 Gordhan and Magashula had been uncertain as to whether Pillay's request should be approved. Gordhan should in hindsight have consulted the Deputy Minister of Finance;

58.7 In light of the above it would be difficult to prove the requisite *animus*;

58.8 In the circumstances I decided to withdraw the charges.

59. The Complainant's allegation (at paragraph 7.3 of the complaint), that I admitted that I had not applied my mind to the charges prior to 11 October, is nonsensical.

60. The essence of the complaint is not so much that I decided to withdraw the charges, but the manner in which I made that decision known. My assessment was that, in light of the wide publicity the charges had attracted, coupled with the fact that they had been initially announced at a public event, it was appropriate that the discontinuation of the prosecution be similarly made known to the public and the media.

61. The applicants disingenuously suggest that the withdrawal of the charges somehow vindicated their position and constituted an admission that the institution of the charges was a mistake. But the withdrawal of the charges pursuant to the review is an instance of the system working precisely as envisaged by the NPA Act. The initiation of the charges elicited representations, which in turn facilitated further consideration and uncovered material suggesting that the three individuals may not have acted with a criminal intention required for the offences of fraud and theft.

THE ALLEGATIONS AGAINST US

Misconduct

62. The Complainants' attempt to persuade you that we have committed misconduct, while denying us our opportunity to state our case, is illustrative of the fact that the Applicants wish to deprive Pretorius, Mzinyathi and me of an opportunity to ventilate our version. They have simply decided on this without having it tested.

63. The Complainants argue specifically that Pretorius and Mzinyathi, like myself, failed to ensure that the charges were properly grounded and that, had applied their minds to the facts and law, they would not have preferred the charges. It is alleged further that Pretorius and Mzinyathi failed to take account of the *animus* element of fraud or theft. (Paras 11-13 of complaint).

64. I have already stated that, given the relevant facts and circumstances, as well as the applicable law, these allegations are fundamentally misconceived. They reflect a deep misunderstanding of the prosecutorial process.

Ulterior Motive

65. For the reasons set out above, based on the circumstances which led to the charges being brought, the decision to prosecute is eminently justified when tested against the prospects of success. The Complainants say that the prosecution was animated by improper purpose. They speculate that it would appear that the alleged purpose was to serve the interests of the political function within the ruling party who are aligned against the Minister, and wish to see him removed from the Cabinet. All of this is expressed in oblique and indeterminate language by the Complainants; it is respectfully submitted that you can attach no weight whatsoever thereto.

66. And even if the prosecution was animated by an improper purpose, that would not suffice to render the prosecution bad in law. What is required is that the prosecution has used its powers for ulterior purposes.

67. I take umbrage at the allegation that I was implacably committed to pursuing the prosecution, and relented only in the face of external pressure. In point of fact, as I told Parliament in my 4 November briefing, at the time I considered whether or not to withdraw the charges, I encountered resistance from Lieutenant-General Ntlemeza ("**Ntlemeza**"), Head of the Directorate for Priorities Crimes Investigations ("**the Hawks**") who strongly contended that the charges should not have been withdrawn. As reflected in the documentation (File 1: pg 343-351), I advised Ntlemeza that the determination as to whether or not to review and withdraw the charges fell within my sole remit.

Bringing the NPA into disrepute

68. The Complainants say that even if my conduct was a *bona fide* blunder, I brought the NPA into disrepute (para 8 of complaint). But, as shown above, the conduct was not a blunder at all. There were good grounds upon which to charge the Minister, Pillay and Magashula, especially if one considers the relatively low standard for prosecution. The fact that a prosecution is reviewed in terms of section 179(5)(d) of the Constitution and section 22(1)(c) of the NPA Act does not imply that the prosecution was flawed *ab initio*. The reviewed provisions provide a process for a prosecution to be re-evaluated

after representations have been made to the NDPP. Representations may include matter which was never placed before the prosecutors and which could only have been known by the accused.

Allegation based on my withdrawal of Charges against Ms Jiba

69. In the founding affidavit in support of an application to compel the President to take steps against us (case no. 87643/2016) (which as noted was struck from the roll on 24 November 2016), the Complainants argued that my withdrawal of the charges against Adv Jiba, arising out of the decision of Corven in the Bocysen matter, was further evidence on my unfitness for office. (I refer to paragraph 356 of the Answering Affidavit). As noted in the aforementioned paragraph, the deponent in the supporting affidavit in case no. 87643/2016 did not disclose that the High Court in the aforementioned General Council of the Bar matter had exonerated Jiba. (I refer to paragraphs 357 – 365 of the Answering Affidavit.)

70. In the judgment of the Full Court in the General Council of the Bar of South Africa v Nomcgobo Jiba & Others (Case No. 23576/2015, GDP), Legodi J said at para [68]:

> *"You do not want members of the prosecution authority to unduly watch their backs for fear of being dismissed or removed from the roll of advocates every time when they make mistakes at prosecuting and presenting cases in court, or every time where an application for authorisation is made in terms of section 2(4) of POCA. An overriding factor for them for consideration should be to adhere to the rule of law and the Constitution..."*

Allegations re Role of Priority Crimes Unit (PCLU)

71. The Complainants are mistaken in alleging that the PCLU is not mandated to deal with fraud and theft cases (para 7.8 of the complaint).

72. In terms of section 24(3) of the NPA Act, a Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director: provided any of the powers, duties and functions referred to in section 20(1) shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned. I refer to paragraph 375 of the Answering Affidavit in this regard.

73. As for the Complainants' suggestion that the PCLU lacks the necessary mandate with respect to the impugned charges, that is incorrect. It is true that the PCLU is mandated to manage investigations and prosecutions of crime that impact on the security of the country. However, the NDPP may determine matters as priority crimes and refer them to the PCLU. The latter is mandated also to render advice or assistance as required by the NDPP in the carrying out of his duties, exercise of his power and performance of his functions as

conferred or imposed or assigned by the Constitution or other laws. The NDPP retains the discretion to refer matters to the PCLU.

Allegation that independence and integrity of the NPA was compromised

74. It is trite that the NPA and high level officers therein must be, and must be perceived to be, independent of executive and political interference.

75. But the Complainants' contention that whenever the fitness and propriety of a senior office bearer is placed in doubt, the integrity of the entire institution is cast in doubt, is unsustainable. One need only consider the case of Mzinyathi. (I refer in that regard to paragraph 274 of the Answering Affidavit). He was accused of serious impropriety, only to have an application to strike him from the roll dismissed.

76. The public may be presumed to be aware that serious allegations against senior office holders are not uncommon; they cannot be presumed to lose all faith in an institution of state whenever allegations against its officers, which may or may not be justified, are raised.

Allegation of incompetence

77. We have taken note of the allegation of the Complainants that the manner in which the impugned charges were handled reflected our collective incompetence. That is denied, for the reasons reflected above.

78. In particular, the institution of the charges by Pretorius and Mzinyathi in no way manifested incompetence. When Pretorius decided to bring charges, he took into account ample documentary evidence that there was no authorisation in law for SARS to pay the penalty, effectively financing Pillay's retirement and education of his children and the persons within SARS expressed grave misgivings. He was influenced by the fact that the "departure" was in fact not an "early retirement" at all. Pillay did not intend to retire, as noted in paragraph 166 of the Answering Affidavit. Both the Minister and Magashula were aware of that.

79. In the light of the above, the prosecutors were quite correct in bringing the charges against the three individuals.

80. Given the offensive charges of incompetence, I would mention that, since my appointment as NDPP, the NPA has notched up significant achievements. I mention only a few of them hereunder.

81. As reflected in the 2015/16 Annual Report of the NPA, it achieved a total number of 289 245 guilty verdicts, with a remarkable overall conviction rate of 93%. I refer in this regard, and with respect to the figures below, to the NPA Annual Report 2015/2016.

82. In the high courts, prosecutors maintained a conviction rate of 89.9% with 910 guilty verdicts, exceeding the target by 2.9%. Prosecutors in the regional courts attained a conviction rate of 78.4%, representing the highest conviction rate in this forum in the past decade, with 24 958 guilty verdicts. In the district courts, prosecutors achieved a conviction rate of 94.7%, exceeding the target by 6.7% with 263 377 guilty verdicts.

83. The Specialist Commercial Crime Unit (SCCU) and the Sexual Offences and Community Affairs Unit (SOCA) achieved remarkable results. The SCCU maintained a high conviction rate of 94.1% by obtaining guilty verdicts in 951 cases against a target of 93% and 928 cases. The SCCU increased the number of convictions of government officials on charges of corruption to 104 as compared to 47 during the previous year, with an increase of 121.3%.

84. In respect of matters investigated by the Anti-Corruption Task Team (ACTT), a Presidential initiative in which the NPA participates, the SCCU exceeded its target of convicting 20 persons of corruption where the amount involved is more than R5 million, by obtaining 25 convictions.

85. On 12 October 2016, when I presented the NPA's Annual Report for 2015/2016 to the Parliamentary Portfolio Committee for Justice and Correctional Services the Chairperson commented favourably on the NPA's achievement under my leadership, along with the stability and unity my leadership brought to the institution.

Alleged Responsibility for Destruction of Economy

86. The exaggerated accounts of the effect of the initial prosecution are dealt with in paragraphs 23, 58 – 59, 245 and 253 of the Answering Affidavit, where it is noted that dire predictions of the Complainants as to future developments, and economic impact, are entirely speculative. It is noted further that it would be improper for a prosecutor to take such speculative allegations into account when determining whether or not to prosecute.

87. It is pertinent to mention that the Full Bench of the Pretoria High Court, in its dismissal of the application under case no. 87643/2016 on 24 November 2016, did so, in the face of wholly speculative attributions in the media of responsibility for economic trauma from the preferment of the charges.

88. I might add that I stand by what I stated in my answering affidavit in that matter: that the covert motivation underlying the request to you to take steps against us under s. 12(6) of the NPA Act is to forestall what the Complainants perceive as the possibility of the preferment of charges against the Minister arising out of the so-called Rogue Unit. Whilst I have not said that such charges are in the offing, no civil society organisation may be heard to demand immunity for anyone, no matter what their status or standing. All are equal in the eyes of the law.

CONCLUSION

89. We humbly submit that for all of these reasons, the Complainants' request that you take steps against us in terms of section 12(6) of the NPA Act should be refused.

Yours sincerely,

ADV SK ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 27 – 11 – 2016

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

CASE NO 87643/2016

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 JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

INDEX TO PLEADINGS

ITEM	DESCRIPTION	PAGES
2.2	Annex "FA2": Media articles regarding Minister Pravin Gordhan's ("**Min. Gordhan**") reappointment in December 2015, between 9 December 2015 and 10 March 2016	64 - 70
2.3	Annex "FA3": Media articles regarding Min. Gordhan and the National Treasury at odds with other elements of State , between 16 May 2016 and 16 September 2016	71 - 74
2.4	Annex "FA4": Summons no. 574/16 served on, *inter alios*, Min. Gordhan, dated 10 October 2016	75 - 84
2.5	Annex "FA5": Statement by Gildenhuys Malatji Attorneys ("**GMA**") on behalf of Min. Gordhan, dated 11 October 2016	85
2.6	Annex "FA6": Media articles regarding NDPP's public statement, between 12 October 2016 and 13 October 2016	86 - 88
2.7	Annex "FA7": Letter from Webber Wentzel ("**WW**") to the National Director of Public Prosecutions ("**NDPP**") and the Acting Special Director of Public Prosecutions, dated 14 October 2016	89 - 116

ITEM	DESCRIPTION	PAGES
2.8	Annex "FA8": Media article published by TimesLIVE entitled, "*'Shaun Abrahams won't give me a fair hearing' - Pravin Gordhan*", dated 14 October 2016	117 - 118
2.9	Annex "FA9": Subpoena in terms of section 205 of the Criminal Procedure Act, 1977 to CEO Krishen Sukdev of the Government Pensions Administration Agency, dated 20 October 2016	119 - 120
2.10	Annex "FA10": Mandate of the Priority Crimes Litigation Unit, dated 25 March 2003	121
2.11	Annex "FA11": Letter from WW to the office of the President of the Republic of South Africa ("**the Presidency**"), with the covering emails, dated 1 November 2016	122 - 131
2.12	Annex "FA12": Letter from the Presidency to WW, dated 7 November 2016	132 - 133
2.13	Annex "FA13": Letter from WW to the Presidency, dated 7 November 2016	134 - 144
2.14	Annex "FA14": Letter from the Presidency to WW,	145

ITEM	DESCRIPTION	PAGES
	dated 8 November 2016	
2.15	Annex "FA15": Letter from WW to the State Attorney, dated 19 September 2016	146 - 147
2.16	Annex "FA16": Media article published by DESTINY Magazine entitled "*Nxasana willing to give up R17m to get back his job*", dated 4 November 2016	148 - 149
2.17	Annex "FA17": Media article published by News24 entitled "*Exclusive: Pravin to be charged again*", dated 6 November 2016	150 - 151
3.	Confirmatory Affidavit: Wesley Timm	152 - 153
4.	Applicants' Supplementary Founding Affidavit	154 - 156
5.	First Respondent's Answering Affidavit	157 - 196
5.1	Annex "AA1": Letter from the Presidency to Dr Pretorius, dated 14 November 2016	197 - 198
5.2	Annex "AA2": Letter from the Presidency to Adv Abrahams, dated 14 November 2016	199 - 200
5.3	Annex "AA1": Letter from the Presidency to	201 - 202

ITEM	DESCRIPTION	PAGES
	Adv Mzinyathi, dated 14 November 2016	
6.	Second, Third and Fifth Respondents' Answering Affidavit	203 - 329
6.1	Annex "SA1": Confirmatory Affidavit of the Third Respondent	330 - 332
6.2	Annex "SA2": Letters from the Presidency to Adv Abrahams, Dr Pretorius and Adv Mzinyathi, each dated 14 November 2016	333 - 338
6.3	Annex "SA3": JSE Market Cap Chart accessed at https://ycharts.com/companies/JSEJF/market_cap, dated 11 November 2016	339 - 340
6.4	Annex "SA4": Letter from the NDPP to WW, dated 17 October 2016	341 - 342
6.5	Annex "SA5": Letter from the National Head: Directorate for Priority Crime Investigation ("**the DPCI**") to the NDPP, dated 18 October 2016	343
6.6	Annex "SA6": Letter from the DPCI to the NDPP, dated 31 October 2016	344 - 347

ITEM	DESCRIPTION	PAGES
6.7	Annex "SA 7": Letter from the NDPP to the DPCI, dated 31 October 2016	348 - 349
6.8	Annex "SA 8": Letter from the NDPP to the DPCI, dated 8 November 2016	350 - 351
6.9	Annex "SA 9": Internal Memorandum from Ivan Pillay ("**Mr Pillay**") to George "Oupa" Magashula ("**Mr Magashula**"), dated 27 November 2009	352 - 353
6.10	Annex "SA10": Internal Memorandum from Mr Magashula to Min. Gordhan, undated	354 - 355
6.11	Annex "SA11": Affidavit of Nico Johan Coetzee under BROOKLYN CAS 427/05/2015, dated 14 September 2016	356 - 366
6.12	Annex "SA12": Employment contract entered into between South African Revenue Service and Mr Pillay, on 7 February 2011	367 - 379
6.13	Annex "SA13": Affidavit of Chrisna Susanna Visser under BROOKLYN CAS 427/05/2015, dated 10 August 2016	380 - 384

ITEM	DESCRIPTION	PAGES
6.14	Annex "SA14": Draft Statement of Min. Gordhan, dated 23 August 2016	385 - 389
6.15	Annex "SA15": Email from Mr Magashula to Kenny Govender ("**Mr Govender**"), dated 23 July 2010	390
6.16	Annex "SA16": Email from Mr Govender to Mr Magashula, dated 3 August 200	391 - 392
6.17	Annex "SA17": Document entitled, "*Determination on the Introduction of an Employee-Initiated Severance Package for the Public Service (Revised)*" authored by the Minister for the Public Service and Determination, dated 1 January 2006	393 - 405
6.18	Annex "SA18": Letter from GMA to the NDPP, dated 29 August 2016	406
6.19	Annex "SA19": Letter from WW to the NDPP, dated 14 October 2016	407 - 413
6.20	Annex "SA20": Letter from the NDPP to WW, dated 17 October 2016	414 - 415
6.21	Annex "SA21": Letter from WW to the NDPP, dated 18 October 2016	416 - 418

ITEM	DESCRIPTION	PAGES
6.22	Annex "SA22": Memorandum from Adv Nazeer Cassim SC to the NDPP, dated 18 October 2016	419 - 420
6.23	Annex "SA23": Letter from Adv PJJ de Jager SC to the NDPP, dated 18 October 2016	421 - 426
6.24	Annex "SA24": Copy of Media Announcement by the NDPP, dated 31 October 2016	427 - 452
6.25	Annex "SA25": Extract from *The General Council of the Bar of South Africa v Jiba and Others* [2016] ZAGPPHC 833 (15 September 2016)	453 - 464
7.	Fourth Respondent's Answering Affidavit	465 - 498
8.	Applicants' Replying Affidavit	499 - 540
9.	Annex "RA1": Media Articles regarding the so-called Symington "hostage drama", between 27 October 2016 and 28 October 2016	541 - 547

Dated at Pretoria on 18 November 2016

WEBBER WENTZEL
Applicants' Attorneys
90 Rivonia Road
Sandton
2196
Tel: (011) 530 5000
Fax: (011) 530 5111
Email: dylan.cron@webberwentzel.com
Ref: V Movshovich / P Dela /
D Cron / D Rafferty /
W Timm / T Dye
3012607

C/O HILLS INCORPORATED ATTORNEYS
835 Jan Shoba Street
Brooklyn
Pretoria
0075
Tel: 087 230 7314
Ref: L Pienaar

TO:
The Registrar
High Court of South Africa
Gauteng Division, Pretoria

AND TO:
THE STATE ATTORNEY
PRETORIA
Respondents' Attorneys
SALU Building
316 Thabo Sehume Street
Cnr Thabo Sehume and Frances Baard Streets
Pretoria
Private Bag X91
Pretoria 0001
Ref: 8081/2016/Z64

Tel: 012 309 1623
Fax: 012 309 1649/50
Fax 2 Email:
086 507 1910
Email: rsebelemetsa@justice.gov.za
Enq: Mr R J Sebelemetsa

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

CASE NO: 87643/16.

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

and

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2016 -11- 09
J. NAGEL
REGISTRAR'S CLERK
REGISTRATEUR VAN DIE HOË HOF VAN SUID-AFRIKA GAUTENG AFDELING, PRETORIA

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SHAUN ABRAHAMS	Second Respondent
DR JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the applicants intend to make application to the above Honorable Court on Tuesday, 22 November 2016 at 10h00 or as soon thereafter as counsel for the parties may be heard, for an order in the following terms:

1. To the extent necessary, condoning the applicant's non-compliance with the rules of this Honourable Court relating to the service and

time periods, and hearing this application on an urgent basis in terms of rule 6(12).

1. the failures, *alternatively,* refusal by the first respondent:

1.1 to institute an enquiry, under section 12(6)(a) of the National Prosecuting Authority Act, 1998 ("**NPA Act**"), into the second respondent's fitness to hold the office of the National Director of Public Prosecutions ("**the Abrahams enquiry**");

1.2 provisionally to suspend the second respondent from his office, under section 12(6)(a) of the NPA Act pending the finalisation of the Abrahams enquiry,

1.3 to institute an enquiry, under section 12(6)(a) of the NPA Act, into the third respondent's fitness to hold the office of Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit ("**the Pretorius enquiry**");

1.4 provisionally to suspend the third respondent from his office, under section 12(6)(a) of the NPA Act pending the finalisation of the Pretorius enquiry,

1.5 to institute an enquiry, under section 12(6)(a) of the NPA Act, into the fourth respondent's fitness to hold the office of Director of Public Prosecutions ("**the Mzinyathi enquiry**");

1.6 provisionally to suspend the sixth respondent from his office, under section 12(6)(a) of the NPA Act pending the finalisation of the Mzinyathi enquiry,

are reviewed and set aside;

2. the first respondent is directed to institute the Abrahams enquiry and provisionally to suspend the second respondent from his office pending the finalisation of such enquiry;

3. the first respondent is directed to institute the Pretorius enquiry and provisionally to suspend the third respondent from his office pending the finalisation of such enquiry;

4. the first respondent is directed to institute the Mzinyathi enquiry and provisionally to suspend the fourth respondent from his office pending the finalisation of such enquiry;

5. ordering the first respondent to pay the applicant's costs, including the costs of two counsel, jointly and severally, the one paying the others to be absolved, together with any other respondent who opposes the relief sought in this application;

6. granting the applicant further and / or alternative relief.

TAKE NOTICE FURTHER THAT the founding affidavit of **FRANCIS ANTONIE**, together with the annexes thereto will be used in support hereof.

TAKE NOTICE FURTHER that the applicants have appointed Webber Wentzel as their attorneys of record and the address at which they will accept service of notices and other process in these proceedings is care of Hills Incorporated Attorneys at 835 Jan Shoba Street (Duncan), Brooklyn, Pretoria; *alternatively*: dylan.cron@webberwentzel.com.

TAKE NOTICE FURTHER that if any of the respondents intends to oppose the relief sought in this application, such respondent is required:

(a) to notify the applicants' attorneys in writing on or before 12:00 on **Thursday, 10 November 2016** and in such notice to appoint an address within 15 kilometres of the office of the Registrar of this Honourable Court at which such respondent will accept notice and service of all process in these proceedings; and

(b) to file its answering affidavit, if any, on or before 10:00 on **Tuesday, 15 November 2016**, so as to allow the applicants to deliver replying papers, if any, by 12:00 on **Thursday, 17 November 2016.**

PLEASE ENROL THE MATTER FOR HEARING ACCORDINGLY.

DATED AT JOHANNESBURG ON 9TH NOVEMBER 2016

WEBBER WENTZEL
Applicants' Attorneys

90 Rivonia Road
Sandton
2196
Tel: (011) 530 5000
Fax: (011) 530 5111
Ref: V Movshovich / P Dela /
D Cron / D Rafferty /
W Timm / T Dye
3012607

C/O HILLS INCORPORATED
ATTORNEYS
835 Jan Shoba Street
Brooklyn
Pretoria
0075
Tel: 087 230 7314
Ref: L Pienaar

THE REGISTRAR
High Court
PRETORIA

AND TO: **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**
First Respondent
c/o STATE ATTORNEY
SALU Building
316 Thabo Sehume Street
Cnr Thabo Sehume and Frances Baard Streets
Pretoria

BY HAND
BY EMAIL:
presidentrsa@presidency.gov.za;
president@po.gov.za;
ntoeneng@presidency.gov.za;
nmajake@presidency.gov.za;
angeline@presidency.gov.za;
geofrey@presidency.gov.za;
sello@presidency.gov.za;
janm@po.gov.za

STATE ATTORNEY
PRIVATE BAG/PRIVAATSAK X91
2016 -11- 09
PRETORIA 0001
STAATSPROKUREUR

janm@presidency.gov.za;
mike@presidency.gov.za;
makhonsini@presidency.gov.za;

AND TO: **SHAUN ABRAHAMS**
Second Respondent
Victoria and Griffiths Mxenge
Building
123 Westlake Avenue
Weavind Park
Silverton
Pretoria
c/o STATE ATTORNEY
SALU Building
316 Thabo Sehume Street
Cnr Thabo Sehume and Frances
Baard Streets
Pretoria

BY HAND
BY EMAIL:
skabrahams@npa.gov.za;
hzwart@npa.gov.za

AND TO: **DR JP PRETORIUS SC**
Third Respondent
Victoria and Griffiths Mxenge
Building
123 Westlake Avenue
Weavind Park
Silverton
Pretoria
c/o STATE ATTORNEY
SALU Building
316 Thabo Sehume Street
Cnr Thabo Sehume and Frances
Baard Streets
Pretoria

BY HAND
BY EMAIL:
kbenjamin@npa.gov.za;
jppretorius@npa.gov.za

AND TO: **SIBONGILE MZINYATHI**
Fourth Respondent

Victoria and Griffiths Mxenge
Building
123 Westlake Avenue
Weavind Park
Silverton
Pretoria
c/o STATE ATTORNEY
SALU Building
316 Thabo Sehume Street
Cnr Thabo Sehume and Frances
Baard Streets
Pretoria

BY HAND
BY EMAIL:
skabrahams@npa.gov.za;
hzwart@npa.gov.za;
kbenjamin@npa.gov.za;
jppretorius@npa.gov.za

AND TO: **THE NATIONAL PROSECUTING AUTHORITY**
Fifth Respondent
Victoria and Griffiths Mxenge Building
123 Westlake Avenue
Weavind Park
Silverton
c/o STATE ATTORNEY
SALU Building
316 Thabo Sehume Street
Cnr Thabo Sehume and Frances Baard Streets
Pretoria

BY HAND
BY EMAIL:
skabrahams@npa.gov.za;
hzwart@npa.gov.za;
kbenjamin@npa.gov.za;
jppretorius@npa.gov.za

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

CASE NO: 67643/16

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 JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned

FRANCIS ANTONIE

do hereby make oath and say that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("**HSF**"), situated at 2 Sherborne Road, Parktown, Johannesburg.

2. I am duly authorised to depose to this affidavit on behalf of the applicants.

3. The facts contained in this affidavit are within my personal knowledge, unless it appears otherwise from the context, and are both true and correct. Where facts are not within my personal knowledge, I refer to the confirmatory affidavit of Mr WJ Timm which will be filed herewith.

4. All legal submissions are made on the advice of the applicants' legal representatives.

INTRODUCTION

5. On 11 October 2016, the second respondent, the National Director of Public Prosecutions ("**the NDPP**"), in a press conference lasting over an hour ("**the 11 October press conference**"), announced to the world, in the most vivid detail and with unequivocal force, that the National Prosecuting Authority ("**NPA**"), after the conclusion of a full investigation, had decided to prefer serious and credible fraud and theft charges against the sitting Minister of Finance, the former Commissioner of the South African Revenue Service ("**SARS**") and the former Acting Commissioner of SARS.

6. This news, as the NPA was warned in prior correspondence, and, in the circumstances, inevitably, resulted in the South African market going into a tailspin, serious questions being posed as to the independence of the NPA and the NDPP, the workings of the Executive being affected and the country being rocked by political uncertainty.

7. By 31 October 2016, however, the charges (which were clearly never sustainable in law) had, *sans* apology, been withdrawn, with the NDPP performing a remarkable *volte face* and seeking now, incredibly, to blame the accused for the bringing of the spurious charges (as well as lying all

responsibility for the actual initial bringing of the charges at the feet of the third and fourth respondents).

8. This represented a remarkable about-turn from the NDPP's own theatrics at the 11 October media spectacle, where, seizing the limelight and as the responsible head of the NPA under section 179 of the Constitution, the NDPP lent his *imprimatur* to the legitimacy of the initial charges. At this press conference the NDPP announced to the world, after smearing the names of the accused for well over 30 minutes (through innuendo on completely unrelated matter, which has not even been investigated, being the co-called SARS rogue unit), that the NPA was prosecuting the accused.

9. The NDPP, desperately attempting to distance himself from the charges and his initial pronouncements, now brazenly claims that he should bear no responsibility for this debacle, instead placing the blame at the feet of, of all people, the charged individuals, the direct victims. His fastidious insistence that he is blameless and his unwillingness to shoulder responsibility sadly confirms that he is not fit and proper for the high office of the NDPP, which office is endowed with immense power and is the head of a critical component of our constitutional project. The NPA cannot learn from its most dramatic calamity, correct its egregious violation of rights, or repair the destruction of its integrity and reputation, while it is headed by somebody of the second respondent's character and competence.

10. At the core of the matter is a display of incompetence of a magnitude so stupefying that it beggars belief and/or the use of public power for such blatantly obvious ulterior motives that it has caused a national uproar, riots in the streets (see news report annexed "**FA1**") and the urgent summoning of the second respondent to Parliament to explain himself. This immense public power was exercised in a manner so recklessly that it did not only

severely impact on the rights of charged individuals and on the public's trust in the integrity of the NPA, but sent the economy into a nose-dive, wiping R50 billion off the Johannesburg Securities Exchange almost immediately. Yet, only 20 days later, and after all the damage was already done, the second respondent admitted that an elementary mistake had been made in bringing the charges and that the charges were (and had always been) utterly baseless.

11. In the circumstances of the matter, as developed below, the ineluctable conclusions are that the second to fourth respondents:

11.1 are incompetent and not fit to hold positions within the NPA; and / or

11.2 are not acting independently, are beholden to others, and are acting contrary to the constitutional mandate of the NPA, in order to promote and further their or others' ulterior purposes.

12. This requires urgent judicial redress, particularly given the first respondent's failure to act to protect the Republic, and the NPA, from the continued fumblings (be they innocent or cynical) of the second to fourth respondents.

IMPORTANCE OF THE RELIEF SOUGHT

13. This is an urgent application under Rule 6 of the Uniform Rules of Court, *inter alia*, seeking to review, set aside and declare unlawful the first respondent's failure, alternatively, refusal:

13.1 to institute an enquiry, under section 12(6)(a) of the National Prosecuting Authority Act, 1998 ("**NPA Act**"), into the second to fourth respondents' fitness to hold the offices of National Director of Public Prosecutions, of Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit, and of Director of Public

Prosecutions respectively ("**the enquiries**") based on the conduct of each of the second to fourth respondents in respect of charges ("**the Charges**") which were brought and then withdrawn against the Minister of Finance, Mr Pravin Gordhan, MP ("**Min. Gordhan**"), Mr Visvanathan "Ivan" Pillay ("**Mr Pillay**") and Mr George "Oupa" Magashula ("**Mr Magashula**") (together, "**the accused**") by the NPA; and

13.2 provisionally to suspend the second to fourth respondents from office, under section 12(6)(a) of the NPA Act, pending the enquiries.

14. The applicants furthermore seek to direct the first respondent to institute the enquiries and provisionally to suspend the second to fourth respondents from office pending the enquiries.

15. As I shall demonstrate, there is simply no lawful basis for the first respondent's failure to exercise the power vested exclusively in him under section 12 of the NPA Act to institute the enquiries and provisionally to suspend the second to fourth respondents pending the outcome of those enquiries.

A matter of paramount public importance

16. This matter raises the core constitutional question: do we live in a society where government officials may use their powers recklessly and with a clear ulterior motive, with wanton disregard for the law or the effect of their conduct on the Republic, and yet continue to lead, participate in and operate one of South Africa's most important crime-fighting units? If the answer is no - and it must be no - then the protection of the rule of law requires prompt and clear action from the Court.

17. The second to fourth respondents wield enormous public power and occupy high level positions within the NPA. Such offices cannot be entrusted to individuals who have very publically used their power with utter recklessness, incompetence, clear ulterior purposes and with shattering effects on the economy. There can be no clearer case for the unfitness and impropriety of individuals for their offices.

18. The NPA is a constitutionally mandated organ which is indispensable to the protection of our constitutional democracy. The need to insulate the NPA from political and other interference, and to ensure its officers (particularly its most senior officer) are at least adequately competent, is attributable in part to the fact that at the core of its mandate is the requirement to investigate and prosecute all crimes, including high-level and high-profile corruption and other crimes, which often implicate important political figures. The converse of this duty is, likewise, to ensure that this immense power, from which significant consequences may flow for both the public and the individuals involved, is exercised properly, lawfully, and with respect to the rights of individuals involved.

19. In view of their conduct, and the fact that the test for being fit and proper is an objective one, the second to fourth respondents ought to have recognised the enormity of their failures and ought to have resigned of their own accord. They were given that opportunity, but have chosen – apparently on the basis of their own subjective assessment of their competence and fitness – to remain in office. Given their refusal to do their duty, there is a clear call for enquiries to be instituted into the conduct of the second to fourth respondents. Moreover, they should be suspended pending such enquiries. The incontrovertible evidence illustrates that they have misconducted themselves and lack the fitness and propriety required of their offices.

20. Each day that the second to fourth respondents are allowed to occupy their respective offices under this cloud of uncertainty and impropriety potentially irreparably prejudices the work of the NPA and does damage to the public perception of and confidence in this constitutionally mandated institution. There is no need to speculate about the risk that these officials pose. That risk has already been painfully confirmed beyond doubt by their conduct in relation to the charges recklessly preferred and then withdrawn against Min. Gordhan and Messrs Pillay and Mageshula (which resulted in inestimable damage to our economy, our country's reputation and the rights of those accused), and their steadfast refusal – through the NDPP – to acknowledge any wrong or accept any responsibility.

21. It also poses an unacceptable risk to the work of the NPA. This is particularly so when the second respondent, unrepentant with respect to his conduct to date, is already threatening that new charges may yet be around the corner for Min. Gordhan. His commitment to ruinous conduct is on public display, matched only by his wanton inability or refusal to see or accept responsibility for the role he is playing in destroying the credibility of the institution he is meant to head.

22. The only recourse available to preserve the sanctity of the office occupied by the second to fourth respondents (and the institution as a whole), and to protect the Republic from the devastating impact of the misuse of their power, is to approach this Honourable Court on an urgent basis for the relief set forth in the notice of motion which this affidavit supports.

23. This is a matter of profound national importance and, as I shall demonstrate below, there is no basis in law for the President's failure or refusal to institute the enquiries in respect of, or suspend pending those enquiries, each of the second to fourth respondents respectively. The first respondent has failed in

his constitutional duty to protect the integrity and independence of and public confidence in one of South Africa's most important corruption and crime fighting institutions and to uphold the rule of law.

24. It is clear the second to fourth respondents occupy positions at the very heart of the NPA's ability to function effectively to fulfil its constitutional mandate. Indeed, the second respondent has wide and sweeping powers under the NPA Act which can affect almost every aspect of the functioning of that organisation. The second to fourth respondents make 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 NPA, which would be difficult or impossible to reverse. They are also a proven severe threat to the economy of the Republic and, unrepentantly, the second respondent has threatened that his NPA may repeat his misconduct by bringing further ill-conceived charges in the near future, which can only be explicable on the basis of ulterior motive.

25. It is thus imperative that the offices occupied by the second to fourth respondents are not again abused, nor unlawfully compromised or impeded. The NPA, the office of the NDPP as well as other high level offices within the NPA must be, and must be perceived to be, independent of executive and political interference and competent to perform their duties. If the fitness and propriety of any office bearers are placed in doubt (in this case there is no doubt whatsoever about their unfitness for office), then the integrity of the institution as a whole is compromised and a perception among the public and members of the NPA is created that the NPA is not independent, is not competent and is vulnerable to executive interference or political influence.

The intransigent and supine attitude by the first respondent jeopardises the functioning of the entire criminal justice system and the rule of law which is the basis of our Constitution.

26. The importance of an impeccable prosecutorial service which has the capacity, willingness and fortitude to pursue the interests of the Republic above narrow political interests, and the effective prosecution of all crimes, including high level corruption and organised crime, cannot be gainsaid. As our courts have held previously, it is imperative that any threat to the efficacy and operation of a constitutionally mandated institution and any opportunity for political interference in the functioning of such institution must be addressed as a matter of urgency.

The duty to exercise public power

27. Where, as in this case, the first respondent has the power to suspend the second to fourth respondents and institute a disciplinary enquiry under a statute and the Constitution, there is a duty on that functionary to exercise such power when the jurisdictional facts for such exercise are present. Such duty is not discretionary, cannot be ignored, and is an objective exercise.

28. The first respondent has failed in his constitutional duty to exercise the power vested in him, lawfully or at all, in what clearly constitutes appropriate circumstances.

PARTIES

29. The first applicant in this application is the HSF. The HSF was established in 1993, and is a non-governmental organisation whose objectives are "*to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*".

30. The second applicant is Freedom Under Law NPC ("**FUL**"). FUL is an organisation that is primarily concerned with upholding the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"), constitutionalism and the rule of law, particularly in the context of law enforcement agencies.

31. The applicants approach this Honourable Court, firstly, in their own interest. They are both organisations that are primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law. The applicants contend that the NPA has acted unlawfully, irrationally and contrary to its mandate as the law enforcement body tasked with the prosecution of crimes in South Africa. The applicants thus have an interest in ensuring that the unlawful decisions of the NPA are set aside and that the NPA be prevented from taking further unlawful decisions which will prejudice the Republic as a whole and do irreparable violence to our democracy.

32. The applicants also approach this Honourable Court in the public interest. All South Africans have an interest in the rule of law, the requirements for a properly functioning constitutional democracy, and, in particular, that bodies charged with law enforcement and the prosecution of crimes act lawfully, in good faith, in accordance with their mandates, independently and in the best interests of the Republic. The far-reaching powers and functions of the NPA mean that it is essential that they act responsibly and in good faith in their interactions with members of the public and all other public officials.

33. The first respondent is the President of the Republic of South Africa ("**the President**"). It is the President's failures to suspend and institute enquiries into the fitness for office of the second to fourth respondents which are the subject matter of this application. This application will be served electronically on the email addresses identified in previous correspondence with the office of the Presidency, as well as being served care of the State Attorney.

34. The second respondent is the NDPP, Mr Shaun Abrahams ("**Mr Abrahams**"). Mr Abrahams'/the NDPP's office is located at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. Papers will be served at the above address and by way of email to the email addresses of Mr Abrahams and his executive assistant: skabrahams@npa.gov.za; and hzwart@npa.gov.za. The President's failures relate directly to Mr Abrahams and his misconduct.

35. The third respondent is Dr JP Pretorius SC ("**Dr Pretorius**"), the acting special director of the Priority Crimes Litigation Unit, cited in his personal and official capacities, whose place of business is at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. Dr Pretorius is ostensibly the prosecutor who, in consultation with Mr Sibongile Mzinyathi ("**Mr Mzinyathi**"), elected to proceed with the Charges. Papers will be served at the above address and by way of email to the email addresses of Dr Pretorius: jppretorius@npa.gov.za and kbenjamin@npa.gov.za. The President's failures relate directly to Dr Pretorius and his misconduct.

36. The fourth respondent is Mr Mzinyathi, the Director of Public Prosecutions, North Gauteng, whose place of business is at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. Papers will be served at the above address and electronically at

jppretorius@npa.gov.za; kbenjamin@npa.gov.za; skabrahams@npa.gov.za; and hzwart@npa.gov.za. The President's failures relate directly to Mr Mzinyathi and his misconduct.

37. The fifth respondent is the NPA. The NPA's office is located at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. Papers will be served at the above addresses and electronically at jppretorius@npa.gov.za; kbenjamin@npa.gov.za; skabrahams@npa.gov.za; and hzwart@npa.gov.za

STANDING AND A CLEAR RIGHT

38. The applicants approach this court on an urgent basis to guard against a constitutional crisis, where it appears that independent institutions, such as the NPA, are being abused; have been captured or unduly influenced by third parties; are acting irrationally, arbitrarily or for ulterior purpose and the political or financial gain of others; are being led or manned by individuals who lack the requisite competence and/or are acting in a manner glaringly at odds with their mandates.

39. These principle of legality concerns, coupled with the national importance of the matter, the implications for the functioning of the Executive, perceptions of NPA independence and the devastating economic and other effects of the abuse of these powers, make it uniquely in the public interest for the second to fourth respondents immediately to be suspended from office and subjected to the enquiries.

40. The applicants clearly have standing to pursue this matter, and rely on clear rights (of their own and of the public's) to ground the relief sought.

41. In addition to what has been stated above pertaining to the applicants acting in their own and the public interest, it is clear that the President's failures do violence to our constitutional democracy and must, in the public interest, be rectified without delay. This is thus pre-eminently a case where the applicants should, and do, act in the public interest.

42. As the Constitutional Court has recently held:

> "*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]

43. It is further trite that the NPA is enjoined to act lawfully, and to fight, *inter alia*, corruption and organised crime relentlessly, independently and effectively.

44. The applicants, and, indeed, all people in the Republic, have a clear constitutional right to an independent and functioning criminal justice system, where public power will be mobilised rationally and lawfully. They further enjoy the rights that the institutions tasked with implementing such system, such as the NPA, act responsibly, independently and in the best interests of the administration of justice. Furthermore, the applicants, and the public at large, are entitled to expect the President to act on his constitutional and

[1] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC), para [1].

statutory duty to exercise his powers where the necessary jurisdictional facts exist. In the present case, these jurisdictional facts are undeniable, yet the President is unmoved, and thus he fails in his constitutional duty.

45. The applicants, as well as the public, have a right to expect public office bearers and State institutions to act lawfully and rationally, and that the NPA's powers are exercised in the best interests of the Republic.

46. Where there is a clear case, as there is in the present case, that the offices of the NPA are in fact being abused, then those with the public power to remove office bearers must do so without delay. Where the empowered official fails to exercise this power, his failure falls to be set aside without any delay.

47. Ultimately, this matter implicates a number of clear rights enjoyed by the applicants and the public (on whose behalf the applicants also litigate). The applicants have a clear right (grounded in at least the principle of legality and the rule of law) to review the decisions, have them set aside and have the necessary processes under section 12(6) of the NPA Act set in motion without delay.

A HISTORY OF INVESTIGATION AND PERSECUTION

48. It is notorious that, for some time now, Min. Gordhan and his co-accused have been the subject matter of various investigations by the Directorate for Priority Crime Investigation ("**DPCI**"). The manner in which these investigations have been conducted, coupled with the various and contradictory statements by the DPCI, are only reasonably explicable on the basis that Min. Gordhan is being targeted for sinister ulterior purposes or to further the political agenda of others.

Appointment

49. Min. Gordhan's reappointment (in December 2015) as the Minister of Finance came at a time when there was a perceived attempt to "capture" the National Treasury. When Mr Nhlanhla Nene was summarily removed as Minister of Finance and replaced by the relatively unknown Mr Des van Rooyen, speculation was rife that this was a cynical ploy, by high-placed individuals within government, to gain access to the Treasury to ensure that certain investments were made and projects invested in. Media articles to this end are annexed marked "**FA2**".

50. In any event, amidst an economic meltdown in reaction to the Cabinet reshuffle, Min. Gordhan was, days thereafter, appointed as Minister of Finance in December 2015. Since then, it has been widely reported (which clippings are annexed marked "**FA3**") that Min. Gordhan and the National Treasury are at odds with other elements of the State regarding:

50.1 The composition of the board of directors of South African Airways SOC Limited;

50.2 The State funding and adoption of various nuclear energy programmes and proposals;

50.3 Agreements entered into by state-arms company Denel SOC Limited;

50.4 Eskom Holdings SOC Limited's review of its contractors;

50.5 The structuring of the South African Revenue Service; and

50.6 Generally, the corporate governance and funding of the government and state-owned entities.

Investigation of the so-called SARS rogue unit

51. Against the background of the above disputes, it emerged that the DPCI was investigating an alleged rogue unit within the South African Revenue Service (the so-called SARS rogue unit). This is despite the existence of such unit being known for years, and having been reported on by third parties and the media from as far back as 2014. Reports varied as to whether Min. Gordhan was a suspect in this investigation.

52. Min. Gordhan was ultimately called upon to answer the notorious "27 questions"; was then assured that he was not a suspect in the investigation, and then, summarily, was called upon to present himself to give a warning statement, seemingly in anticipation of imminent charging.

53. The basis of the prefaced charges were groundless, and no charges were, in fact, proceeded with.

The charges

54. On 11 October 2016, summons no. 574/16 was served on, *inter alios*, Min. Gordhan (a copy of which is annexed marked "**FA4**"). The charges included allegations of theft and fraud in relation to the alleged payment by SARS to the Government Employees' Pension Fund of Mr Pillay's early retirement pension deduction, and allegations of fraud in relation to the rehiring of Mr Pillay by SARS in or around April 2014.

55. At no time were allegations of fraud or theft ever put to the accused; indeed, these charges were distinct from those which had been investigated and publicised up until this point.

56. The applicants understand that Mr Abrahams was, at all relevant times and in particular prior to 11 October 2016, a member of "the reference group", or a

group by another name, which included government officials and/or intelligence officials and/or police officials and/or other law enforcement personnel who would regularly and secretly discuss *inter alia* various law enforcement issues including criminal investigations and the bringing of criminal charges against the accused and/or issues related to these charges. The applicants understand that these meetings were held *inter alia* at the offices of the NPA. The applicants invite Mr Abrahams to explain these interaction and/or his involvement with the aforesaid group and any discussions he may have with any of the aforesaid individuals in relation to the Charges.

The 11 October press conference

57. The 11 October press conference at which Mr Abrahams, in his capacity as NDPP and head of the NPA, announced these new charges, was farcical. It was also an unlawful abuse of power in its own right.

58. Before addressing the Charges, Mr Abrahams spent the first 30 minutes of his press conference preaching on the unlawfulness of the so-called SARS rogue unit. Mr Abrahams asserted that the SARS rogue unit was "*unlawful*" in that it was covert in nature and that the creation of the unit was a violation of legislation and the Constitution. He further asserted that those who operated the unit, those who authorised its establishment and those who maintained its existence violated the SARS Act, the National Strategic Intelligence Act, 1994 and the Constitution. Mr Abrahams and the NPA thus asserted, as a proposition of fact and law, that each of Mr Pillay, Mr Magashula and Min. Gordhan acted unlawfully and unconstitutionally.

59. These statements, of course, had nothing to do with the charges actually preferred against the accused, and were in relation to an investigation which

the NDPP himself conceded was "*incomplete and ongoing*", and which had resulted in no charges. These statements were thus of no relevance at all to the Charges, and served only, publicly and indeed globally, to smear the names and reputations of those involved with the so-called SARS rogue unit. This can, regretfully, only speak to ulterior purpose, and a desire to harass and intimidate the accused on a global platform.

60. In addition, it evidences the NDPP's impermissible pre-judging of a matter where he may be called upon to exercise his constitutionally afforded review powers - clearly he has now rendered himself incapable of doing so in an objective manner, and at least the perception of the independence of the NPA has suffered yet another death-knell.

61. This public prejudging of a live matter before an investigation has even been concluded falls far short of the actions required of an NDPP, particularly where charges have not even been made (and, as can be seen in respect of the Charges, Mr Abrahams' standards for sufficient evidence to lay charges are impermissibly low in any case, to the point of being risible). This in itself shows that Mr Abrahams holds a patent and shameless prejudice towards the SARS rogue unit case and with respect to the accused. Worse still, it appears that Mr Abrahams did not even realise that his lengthy commentary and prejudgment in the SARS rogue unit matter were manifestly improper, or if he did, he acted with a clear intention to malign those accused by means of show trial. These considerations simply emphasise his unsuitability to hold the high office of NDPP.

62. In any event, if Mr Abrahams, as stated, believed that there was a difference between unlawfulness and criminality of conduct, and the latter was still under investigation, on what basis does the NPA, which is tasked with prosecuting *criminal*, and not simply unlawful conduct, make lengthy

comments about the lawfulness of conduct especially where no decision on a prosecution has been made? There can be no proper purpose for such statements. This reveals an astonishing lack of propriety and requisite judgment on the part of Mr Abrahams, as well as a lack of integrity and a devious intention to malign the accused.

63. In revealing his motive and prejudice, Mr Abrahams, disturbingly yet tellingly, violated the rights of the accused and abused his position. He misused his office to smear the SARS unit and, by association, the accused, since none of these statements bore any relation to the new Charges he then announced. I am advised that the NPA is not permitted to use the media in an attempt to influence public opinion against an accused or suspect, not least of all on charges that are not even being preferred against him. Yet that is precisely what the Mr Abrahams sought to do, having admitted at the 11 October press conference that the SARS rogue unit had nothing to do with the Charges.

64. Confoundingly, Mr Abrahams then spent less time explaining the new charges than he did defaming the accused by association with his inappropriate musings on the SARS rogue unit. When he did eventually turn to the Charges, Mr Abrahams did not explain how the Charges in question were supported in evidence. On the contrary, he mentioned that the early retirement of Mr Pillay (which was the object of the Charges relating to fraud and alleged theft) was preceded by at least 3 000 other cases of early retirement in the 5 years prior to Mr Pillay's retirement. Mr Abrahams referred to an affidavit from the Director General of the Department of Public Administration which described the circumstances under which early retirement is usually given, and explained that it was ordinarily granted for the purposes of transformation within state entities.

65. Despite the very obvious lack of substance to the Charges, Mr Abrahams stridently defended and justified them in the press conference, including stressing that any suggestion (as was made by Min. Gordhan) that the Charges are groundless and constitute "*no more than a bitter political mischief*" is, "*as you will come to learn, ... nothing further from the truth*".

66. Either the NDPP was thus fully apprised of the facts, and was incompetent in believing the Charges to be sustainable, or the NDPP was not fully apprised with the relevant facts, and thus acted grossly negligently and recklessly, if not deliberately cynically, in announcing the credibility of the Charges to the world.

67. There are also a number of revealing statements made by Mr Abrahams in response to questions from the media at the conference. When asked whether, in light of the 3 000 other instances of early retirement, there had been any prosecutions for fraud on the basis of early retirement before, Mr Abrahams said that he could not say off the cuff. The admission is revealing in the extreme. It shows that, despite the fact that the Charges against Min. Gordhan had been preceded by 3 000 other instances of similar conduct, Mr Abrahams and the prosecutors did not bother to check if any of these 3 000 had been criminally prosecuted, nor did he direct investigations into the ubiquitous and accepted practice in relation to early retirement in state institutions. This indicates both: (a) breath-taking incompetence, in that Mr Abrahams did not, despite knowing of the 3 000 precedents, consider this evidence which clearly indicated that crucial elements of the charge, namely lawfulness, or at the very least, intention was absent; and (b) ulterior motive, in that, despite being aware of 3 000 other instances of the conduct in question, only the conduct concerning the accused was to be prosecuted.

68. Min. Gordhan's attorneys, on 11 October 2016, published a statement on behalf of Min. Gordhan (annexed marked "**FA5**"). Its content speaks for itself; I pray that it is incorporated by reference. It is notable that it was stressed that the NPA had reneged on its undertaking first to interact with Min. Gordhan before any decision to prosecute was taken, and that Min. Gordhan had not even been informed he was an accused in this matter on the new charges.

69. Finally, during the press conference, Mr Abrahams made a jocular, but not inaccurate, remark that he is accountable for everything that happens within the NPA. Later, and with great hubris, Mr Abrahams then declared that the days of disrespecting the decisions of the NPA were over and, further, that the days of not holding government officials to account were over (a sentiment which, apparently, does not apply to himself or others within the NPA). Mr Abrahams, who had declared his responsibility for all that occurred within the NPA, and declared grandly that government officials would be held to account, would pusillanimously later attempt to distance himself completely from the Charges, placing the blame on Min. Gordhan, the other accused persons, Dr Pretorius and Mr Mzinyathi.

70. This back pedalling began (in the face of scathing public criticism) on or about 13 October 2016, when Mr Abrahams issued a public statement, seemingly distancing himself from any decision to prosecute Min. Gordhan and indicating that he believed himself endowed with the power to review the decision to prosecute and to withdraw the Charges, and was indeed open to reconsidering the Charges. A copy of media reports recording this statement are annexed marked "**FA6**".

The applicants challenge the decision

71. Between 13 and 18 October 2016, there was a flurry of correspondence between the applicants and the NPA / NDPP (the relevant correspondence is annexed as bundle **"FA7"**, with annexes). The contents of this correspondence speak for itself, and I pray it be incorporated by reference.

72. Ultimately, the applications placed the NDPP on terms to withdraw the charges, alternatively to provide information and reasons related to the decisions to prefer the Charges. These demands were not complied with, causing the applicants to launch urgent Court proceedings to set aside the Charges as being unlawful.

73. During this exchange of correspondence, and as new facts came to light after the launch of the proceedings, it emerged that the NDPP and NPA were still desperately trying to procure information in relation to the charges, which information was necessary to allow for a proper consideration thereof.

74. The Charges are, of course, either supportable or insupportable on the basis of the docket, and the sustainability of the decision to prosecute must be decided on that basis. The very fact that the NDPP sought to institute further investigations after the announcement of the Charges illustrates that there was obviously insufficient evidence to sustain the Charges.

75. Where there was plainly no evidence which warrants the continuation of any prosecution based on the Charges and overwhelming reasons for withdrawal, the NDPP's failure timeously to withdraw the Charges serves on its own to confirm that he is not capable of acting in a manner that is independent, impartial and conscientious. It is telling to note that, at the time, in response to an invitation to make representations to the NDPP in relation to the review of the Charges, it was reported that Min. Gordhan "*does not have any*

confidence in the National Director of Public Prosecutions' ability or willingness to afford him a fair hearing", as appears from the article annexed marked **"FA8"**.

76. After launching urgent proceedings, the applicants became aware of a subpoena issued to the CEO of the Government Pensions Administration Agency (photographs of which I annex marked **"FA9"**). The subpoena on its face was issued on 20 October 2016 under section 205 of the Criminal Procedure Act, 1977. It called on the CEO to submit:

76.1 appendices A and B to the 18 October 2010 memorandum, on which charge 1 of the Charges, and the alternative to charge 1, are based (**"the Memorandum"**). Those appendices are: (a) the statistics showing that, over the five years prior to August 2010, the GEPF has approved over 3000 requests from various government departments for staff members to retire before the age of 60 with full benefits; and (b) evidence that the former and current Ministers of Finance have approved five such requests over the two years prior to August 2010;

76.2 an affidavit:

76.2.1 explaining the approval of the 3000 requests from various government departments for early retirement on full benefits between 12 August 2005 and 12 August 2010; and

76.2.2 giving an explanation as to whether the GEPF approves requests from government departments for early retirement.

77. The *subpoena* is an indictment of the prosecutorial process leading to the Charges. It is also clear that the NPA never had sufficient evidence to take the formidable decision to prefer charges against the accused. Clearly, any

evidence which spoke to the practices and lawfulness of early retirement of public servants with full pension had to be fully investigated and considered *before* charging the accused. This is particularly so where this evidence is referenced in the very document on which the prosecution is based - ie, the Memorandum. The Memorandum is specifically referenced in charge 1 of the Charges. The prosecuting authorities were thus expressly directed to, and must have been aware of, the existence of such potentially exculpatory evidence.

78. This evidence was not even sought, much less considered. The decision to prosecute thus clearly failed to consider the actual evidence pertinent to the charge - indeed, it appears as if the second to fourth respondents elected to ignore any facts which had the potential to corroborate the lawfulness of the conduct in question. This not only speaks to the substantive irrationality of the decision to prosecute, but also reinforces the submission that the Charges were pursued for an ulterior purpose, in breach of the constitutional mandate of the NPA. That the prosecuting authorities were only then, days after the announcement of the Charges, calling for the evidence and considering the applicable laws, simply reinforces the unlawfulness of the Charges and the abusive and precipitous manner in which they were pressed.

The decision to withdraw and press conference

79. On the morning of 31 October 2016 at approximately 10:25 am, Mr Abrahams informed the applicants' attorneys that he was withdrawing the Charges. It is understood by the applicants that the accused also received such notification.

80. Minutes later, at approximately 10.30am, Mr Abrahams held a press conference where he would announce to the public that the Charges had been withdrawn ("**the 31 October press conference**"). Before announcing the actual withdrawal of the Charges, however, Mr Abrahams spent a great deal of time attempting to distance himself from the decision to prosecute. He alleged that there had been general public misconception of the NDPP's role, that he did not institute the decision to prosecute in this matter, that he had acted only as a spokesperson at the 11 October press conference, that he had not reviewed the evidence himself before announcing the decision to prosecute on 11 October 2016 and that he only become involved in the decision after the conference when called on to review the Charges. He also attempted to paint the process as one which happens on a regular basis.

81. Mr Abrahams engaged in another long legal expose with respect to the interpretation of various provisions and continued to suggest that Mr Pillay's early retirement had been suspicious and that the early retirement "*did not advance SARS' business interests*". These assertions, however, had nothing to do with the criminality of the conduct of the charged individuals with respect to the Charges. The assertions made by Mr Abrahams at this stage were thus irrelevant and seemingly made simply in an attempt to preserve (or manufacture) a cloud of suspicion over the accused, despite the dropping of the Charges. As he had done at the 11 October press conference, Mr Abrahams continued to abuse his position as NDPP to malign and cast aspersions on the accused, despite the fact that the press conference had in fact been called to withdraw the Charges.

82. Mr Abrahams then turned to the relevant information. Mr Abrahams alleged that the NPA had not seen a memorandum to the then Commissioner of SARS, Mr Magashula, from SARS Legal & Policy Division's Mr Vlok

Symington dated 17 March 2009 (a document which was attached to the applicant's 14 October 2016 letter, which is in bundle **"FA7"**) (**"the Symington memorandum"**). This document was alleged by Mr Abrahams to be the key document which Mr Abrahams relied on to withdraw the Charges. If the Symington memorandum was utterly dispositive of the question of intent (or lack thereof) as he alleges, it is astonishing that Mr Abrahams had not simply dropped the Charges upon receipt of this document on 14 October 2016. Instead, Mr Abrahams admitted that he called for numerous items of further evidence.

83. But the Symington memorandum was not the reason why the Charges were unsustainable. They were unsupportable from the outset. Mr Abrahams and the NPA at no stage had any evidence of fraudulent or furtive intention by any of the accused. Moreover, there was nothing unlawful about any of the accused's' conduct in this matter, as set forth in the 14 October 2016 letter. The Symington memorandum simply stated what would already have been evident to any rational, conscientious prosecutor, and one with integrity. Indeed, if the Symington memorandum was so pivotal, there would clearly have been no need to issue the subpoena. What Mr Abrahams' conduct after 14 October 2016 reveals is that he was actively seeking to bolster the feeble case against the accused through his further enquiries. Moreover, it is not clear why the Symington memorandum would have been of any consequence in relation to the Charges pertaining to the renewal of Mr Pillay's employment agreement in 2014.

84. Mr Abrahams announced the withdrawal of the Charges at the 31 October press conference. He accordingly withdrew the Charges. One may have expected that, for a blunder as monumental as this, that a conscientious and constitutionally minded NDPP would resign or, at the very least, apologise.

Instead, Mr Abrahams engaged in victim blaming, stating that these issues could have been properly clarified if there had been proper engagement and co-operation by the accused.

85. For the most part, it is not remarkable what was said, but what was not said. There is no explanation as to:

85.1 why Mr Abrahams did not himself consider the credibility of the Charges before the much-publicised decision to charge the accused, especially given the political and economic significance of the Charges, and the devastating effect their publication had;

85.2 on what basis Mr Abrahams aligned himself with the Charges, and their credibility, when announcing the fact of these charges to the world on 11 October 2016, particularly given that he stressed he had not reviewed the evidence (or, more accurately, lack thereof) at such time;

85.3 how the NPA made as fundamental an error as issuing charges where critical elements, such as *animus*, clearly could never be established. This is particularly so where charges are preferred against the Minister of Finance, against a backdrop where allegations of a battle to "capture" National Treasury and remove the Minister as a perceived impediment are rife. These factors, combined with the political and economic sensitivities of the matter, necessitated that great care was taken to ensure the Charges were sustainable and credible;

85.4 why charges were preferred when clearly a significant amount of evidence and consultation with various officials was still required, including internal SARS documents such as the Symington memorandum and the documents which were annexed to the Memorandum;

85.5 on what basis Mr Abrahams can allege that the matter could easily have been clarified, without the need for charges, had there been "*proper engagement and co-operation*" between the DPCI and the accused (particularly where the NPA, and not the DPCI, makes the decision to prosecute); and

85.6 what steps will be taken to hold those who made this disastrous "error" accountable.

86. After the official statement, a question and answer session was held with the media. During this session, and when asked why he had not reviewed the Charges before he decided to announce them, Mr Abrahams alleged that he could not, *mero motu*, intervene in a decision to prosecute taken by Dr Pretorius and Mr Mzinyathi unless he was called on to review. He alleged that he had called the 11 October press conference, not because he had taken the decision on the Charges but because he was mindful that the decision was of great public interest, and, as the head of NPA, it was incumbent upon the NDPP to take the public into his confidence and address "*why*" such a decision to prosecute had been made.

87. Mr Abrahams' tortured excuse for apparently not applying his mind to the Charges before the press conference is, however, self-contradictory. If his intention was to address "why", this implies that Mr Abrahams intended to convey a substantive understanding of the basis of the Charges to the public. To do so, he first had to understand these charges himself. If, as head of the NPA, he wishes to present these charges as being good in law to the public, and taking account of the intense public interest, he must have satisfied himself as to their credibility and evidential basis. If he in fact did this, then it is clear that he is incompetent. On the other hand, had he failed to do this, it is clear that he was grossly reckless.

88. Mr Abrahams emphasised that he had been briefed on the facts of matter and believed there was a case to prosecute and that he was "*satisfied that there was a case to answer by all three of the accused... when I applied my mind to the matter*". This begs the question of Mr Abrahams' competence, bearing in mind the glaring deficiency of any proof of unlawfulness or intention.

89. Despite admitting that he had in fact applied his mind to the matter, Mr Abrahams still attempted to distance himself from the Charges, implying that he had simply gone on the say-so of his inferiors. He stated that he had primarily relied on the briefing by the relevant prosecutors, in whom he had full confidence. It was for this reason, Mr Abrahams alleged, that he did not ask for further information at the time the Charges were announced. This is despite the fact that he admitted that he did ask for further information in some cases. He could not explain why he did not do so in a case of such public significance and with such glaring deficiencies. Of course, Mr Abrahams is, in any event, wrong (in law) in both the assertion that he could not review the Charges before they were brought and that he could not review the Charges *mero motu*.

90. Finally, it appeared that Mr Abrahams had absolutely no appreciation of the magnitude of the questions posed as to the NPA's independence, ability and conscientiousness arising out of this matter, and refused to offer any apology. Mr Abrahams stated, ironically, but which irony was apparently lost on him, that he believed the press conference goes to show the independence and integrity of the NPA.

91. At the 11 October press conference, Mr Abrahams, as NDPP, stated that the decision to prefer the Charges was "made within the confines of the rule of law and the Constitution". He thus clearly adopted the decision to prosecute,

represented it as being lawful, and conveyed to the world that it was a credible prosecution, supported by evidence. Of course, days later, he reversed this position, attempting to distance himself from the Charges, which he then ultimately announced were not credible, were not supported by evidence and never had been. It does not credit the NDPP first to align himself, publicly and unequivocally, with the legitimacy of the Charges, only then to try remain aloof from the decision to prosecute, representing that, in fact, he had nothing to do with this decision and his role was limited to an ex post facto review role.

Aftermath and further comments and explanations by Mr Abrahams

92. Mr Abrahams' naivety in assuming the 31 October press conference would speak to the independence and integrity of his office shows how divorced from the reality and demands of his high office Mr Abrahams is. Indeed, the 31 October press conference ignited a nationwide uproar over the Charges.

93. It also came to light that, on 10 October 2016, the day before the Charges were announced, Mr Abrahams attended a meeting at the headquarters of the African National Congress at Luthuli House in Johannesburg. This meeting was apparently attended by, among others, the President, the Minister of Justice, Michael Masutha, MP, the Minister of Social Development, Bathabile Dlamini MP and the Minister of State Security David Mahlobo, MP (**"the Luthuli House meeting"**).

94. The mere fact that the NDPP would see no issue in attending at the headquarters of a political party, the day before preferring charges against a perceived thorn in said party's leader's side, is remarkable. Of course, the NDPP must be seen to be wholly independent - it is thus never open to him or her to attend at the headquarters of any political party, behind closed

doors, for clandestine meetings (quite apart from the unique facts of this matter, where there was a heightened duty to avoid such a meeting).

95. On 1 November 2016, Mr Abrahams gave an interview of more than forty minutes with Eye Witness News's Mandy Weiner.

96. Some of Mr Abrahams' statements in the interview are revealing. Mr Abrahams:

96.1 reemphasised that he believed there was a "*strong*" and "*winnable*" case on the papers;

96.2 emphasised that the NPA does not have investigative power but relies on the DPCI;

96.3 explained that the Charges had been a leg of the SARS rogue unit investigation (despite the fact that he had admitted in the 11 October press conference that the Charges had nothing to do with the SARS rogue unit. Indeed the facts bear out that the only commonalities between the two investigations are the individuals they target);

96.4 explained that, in his view, the Priority Crimes Litigation Unit ("**PCLU**") was the correct unit to refer the Charges to as the PCLU dealt with "*Foreign bribery matters, corruption, fraud, financial irregularities*" (it is disturbing, and speaks to incompetence, that Mr Abrahams is not aware that the PCLU does not deal with any of these matters, but is in fact mandated to deal with the crimes of genocide, crimes against humanity, war crimes, high treason, sedition, terrorism, sabotage and crimes relating to foreign military assistance; see the mandate of the PCLU annexed hereto marked "**FA10**"). He referred to the SARS rogue unit in particular as it "*impacts on the security of the country*" (despite the fact

that the SARS rogue unit no longer exists and thus could not possibly pose a threat to the Republic);

96.5 admits that he informed the Minister of Justice prior to the laying of charges against Min. Gordhan that the Charges would be laid, and that this information was communicated to the President. Mr Abrahams denies, however, that the Charges were discussed at the Luthuli House meeting. Instead, Mr Abrahams weaved a bizarre story that the meeting was of the Justice, Crime Prevention and Security Cluster: that the Minister of State Security was serving as the Acting Minister of Police, and that the Minister of Social Development was serving as the Acting Minister of Defence. The meeting, according to Mr Abrahams, only concerned the recent violence on the campuses of South African universities. Despite their centrality to the issue in question, it is noteworthy that the Minister of Higher Education and indeed Min. Gordhan, who is the Minister of Finance, were not invited to the meeting;

96.6 laughed, when asked to acknowledge that he had done something illegal when he named a suspect before the suspect had appeared in Court, and stated only that he did not think it was illegal;

96.7 confirmed that he "had a handle" on the Charges before the press conference, or else he would never have called it. He also claimed, however, that he largely relied on the people who made the initial decision;

96.8 also displays his hallmark arrogance when, in response to a question whether he is incompetent, states simply that "*my career speaks for itself. There is nobody out there that can call me incompetent. I would*

not have the long list of successes had I been incompetent. Certainly, nobody that is incompetent can achieve what I have achieved in my career." What Mr Abrahams fails to understand is that mere elevation to a position does not render a person fit and proper for that position. This is why provisions such as section 16(2) of the NPA Act exist, so that unsuitable individuals like Mr Abrahams may be removed from their offices. Unfortunately, Mr Abrahams cannot rely on his historic appointments to justify his continued tenure as NDPP. He must explain why, in response to this affidavit in the face of overwhelming evidence to the contrary alluded to herein, he is in fact fit and proper for the position. In any event, if Mr Abrahams is not incompetent, then he must be consciously reckless or dishonest: both disqualify him from his office;

96.9 claims that the public outcry regarding the Charges did not impact his decision to withdraw; and

96.10 admits that he was mindful of the effects of his decisions with respect to the Charges on South Africa's economy.

97. If there is any doubt as to the public importance of this matter, it must be put to rest by the fact that Mr Abrahams was summoned to attend at Parliament on 4 November 2016 to explain the Charges.

98. During these proceedings, the chairperson of the Committee on Justice and Correctional Services stated, correctly, that the NDPP was a crucially important office which "*lies at the heart of our criminal justice system*". The Chairperson noted explicitly the national uproar and concerns that the NDPP's office had been "*captured*" and was being used "*to fight political battles within the ruling party*". The chairperson is a member of the African National Congress (the so-called "*ruling party*").

99. It is also worth noting that the Chairperson noted that, at the last meeting of the committee, Mr Abrahams had objected to the presence of opposition Member of Parliament Ms Glynnis Breytenbach, MP as Ms Breytenbach had pending charges against her (though no convictions). The Chairperson stated that legal advice had since been taken by the committee and it had been (rightly) determined that Ms Breytenbach had every right to participate. It is quite astounding that Mr Abrahams, as the head of the NPA, does not understand simple constitutional principles, such as the right to be presumed innocent until proven guilty, and that he thought it was somehow within his competence to raise an objection against a sitting member of Parliament's presence in a committee meeting to which he had been invited. This simply demonstrates further the disturbing lack of competence on the part of Mr Abrahams, as well as a seeming vendetta Mr Abrahams has with the perceived political rivals of President Zuma and his allies. It is noteworthy that Mr Abrahams had no compunctions about attending the clandestine Luthuli House meeting with President Zuma, in respect of whom the High Court had ordered the reinstatement of 783 serious charges in *Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] 3 All SA 78 (GP).

100. Mr Abrahams largely repeats the explanations for his conduct which were given in the 31 October press conference, as well as during the interview with Ms Mandy Weiner:

100.1 he alleged that he had been satisfied, on the merits, that the Charges could be sustain, after a briefing by Mr Mzinyathi and Dr Pretorius. He later reiterated that he was "*satisfied that there was a case*";

100.2 he indicated that he thought (he seemed unclear on this aspect) that Mr Mzinyathi had given his concurrence in writing, and he offered to make

that document available in a court of law – and he is accordingly called on to produce it as part of his answering affidavit in this application;

100.3 he also claimed that he had considered the political ramifications of the Charges, just as he had done in other cases, but that he did not allow them to influence his decision;

100.4 he repeated his bizarre account of the Luthuli House meeting and asserted that the NDPP should be able to meet with anyone regarding any issues relating to prosecutions or state security;

100.5 asserted that he had to do further investigations following the submission of the representations and the Symington memorandum; stating that he could not simply accept the documents at face value, but needed to investigate further (contrary to his assertion in the Mandy Weiner interview that the NPA could not investigate and relied on the DPCI);

100.6 asserts that there was "*not an iota of proof*" of a political motive and that the media had "*self-created*" this narrative;

100.7 confirms that, he had previously told the media that he would personally take charge of any prosecutions in relation to the SARS rogue unit and Min. Gordhan. Mr Abrahams then went on to say that when the docket in respect of the Charges was handed to him, that he spoke instead to Dr Pretorius, handing him the docket. Mr Abrahams alleged that he considered it inappropriate for him (Mr Abrahams) to handle the matter himself. It is not clear why; and

100.8 confirmed that he had received calls to resign, including from the applicants, but that he would not do so.

Latest correspondence by the applicants

101. In light of the conduct of the second to fourth respondents in respect of the Charges, and the overwhelming evidence such conduct provides of their unfitness and impropriety, the applicants wrote to the President on 1 November 2016 (this letter is attached, without enclosures, but with the covering emails, marked annex "**FA11**"). In this letter, the applicants call on the President to exercise his powers under section 12(6)(a) to suspend the second to fourth respondents from their offices and to hold enquiries into their fitness and propriety for those offices. To avoid prolixity, I do not attach the enclosures to the letter. These will, however, be made available should this be required.

102. The letter set out in detail the grounds on which the President should exercise his discretion in this respect. To avoid prolixity, I do not traverse each of the grounds set forth in the letter, but pray that these be incorporated by reference.

103. The letter also called on the second to fourth respondents to resign so as not to further harm the Republic's law enforcement institutions any further.

104. Finally, the letter called on the President to suspend the second to fourth respondents and institute enquiries into their fitness and propriety by 16:00 on Monday, 7 November 2016, failing which the applicants would exercise their rights in law on an urgent basis without further notice.

105. In response, at 16:08 on 7 November 2016, a most peculiar letter was received from the office of the Presidency (annexed marked "**FA12**"), which requested an extension, seemingly on the basis that the applicants' 1 November 2016 letter had only come to the attention of the President on 7 November 2016. The President's office does not allege that it (ie, the

Presidency) did not receive the letter. Indeed, the letter was in fact sent on 1 November 2016 to each of the email addresses stated in that letter, and all of these email addresses are addresses stated on the websites of the Presidency and the Government Communication and Information Services (the relevant extract is annex "A" and "B" respectively to the letter referred to as annex "FA13" below). No error messages were received after the email was sent.

106. Rather, the Presidency's response is seemingly premised on the basis that the half dozen people within the Presidency who did receive the applicants' 1 November 2016 letter (and were for all intents the interface of the Presidency with the public) were all not "authorised" to deal with this specific issue (or presumably bring the matter to the President's attention). This (astoundingly) includes the President's private secretary. One of the addressees was, however, "correct" even on the President's version and the letter was thus (on any basis) timeously received.

107. The applicants replied to the President on 7 November 2016 (which letter is annexed marked "FA13"), pointing out various of the incongruences in the President's response and precognising the respondents of this application, including that it may be launched electronically after hours. No additional emails were received for service purposes. I pray that the contents of the applicants' letter, including all the evidence which establishes that the 1 November letter was correctly sent, be incorporated by reference.

108. In the President's letter of 7 November 2016, the President sought an extension until 21 November 2016 to make the decision whether to suspend the second to fourth respondents and institute the enquiries. Having regard to the public importance of the matter, the urgency and all the circumstances, it is plain that any further delay was inappropriate. The President is,

however, invited to decide to suspend and institute enquiries against the second to fourth respondents prior to the hearing of this matter on 22 November 2016, which may obviate a hearing on the urgent roll. If, however, the President, following further consideration, refuses by the date of the hearing hereof, to suspend and institute enquiries as aforesaid, this application and these founding papers are also directed against that decision.

109. On 8 November 2016, the applicants received a response from Mr Michael Louw at the President's office, annexed marked "**FA14**", which states that the 7 November letter will be brought to the attention of the President. Interestingly, Mr Louw is Director: Support Services, and the Presidency website printout attached to the applicants' letter of 7 November 2016 shows that one of the email addresses for Mr Louw is presidentrsa@presidency.gov.za, which is one of the addresses to which the 1 November letter was dispatched.

Other relevant conduct

110. Mr Abrahams' self-proclaimed commitment to the rule of law and to equality is belied, not only by the facts set out above in relation to the Charges, but by his recent handling of another high profile matter.

111. The matter in question concerns the now suspended Deputy National Director of Public Prosecution Nomgcobo Jiba ("**Ms Jiba**"). Ms Jiba was accused, in a summons delivered to her on 24 March 2015, of two counts of fraud and one of perjury. These charges arose from her involvement in a case against former KwaZulu-Natal provincial head of the DPCI, Maj-Gen Johan Booysen. In a Durban High Court ruling penned by the Honourable Mr Justice Gorven (*Booysen v Acting National Director of Public Prosecutions and Others* [2014] 2 All SA 391 (KZD), "**the *Booysen* case**"), the charges

brought against Booysen were set aside. Importantly, the court in the *Booysen* case strongly implied that Ms Jiba had misled the Court (see para [34]). These findings were made in judgment of a High Court and are an undeniable basis for, at the very least, a *prima facie* case against Ms Jiba in respect of fraud and perjury.

112. After the unceremonious exit of the then NDPP, Mr Mxolisi Nxasana, Mr Abrahams was appointed as the NDPP on 18 June 2015. On 18 August 2015, the day before she was meant to appear in court on the charges, Mr Abrahams announced that the charges against Ms Jiba would be dropped, claiming that Ms Jiba had acted in good faith and that she was thus absolved from criminal responsibility.

113. Subsequently, this Court, in the matter of *the General Council of the Bar South Africa v Jiba and Others* [2016] ZAGPPHC 833 (15 September 2016), struck Ms Jiba off the roll of advocates on the basis of, *inter alia*, her dishonesty in the *Booysen* case. Following that judgment, on 19 September 2016, the applicants wrote to Mr Abrahams to request the immediate reinstatement of the charges against Mr Jiba (the letter is annexed marked **"FA15"**). Mr Abrahams has, to date, failed to act in this respect.

114. The contrast between the Charges against the accused and the charges against Ms Jiba is remarkable: the Charges were preferred against the accused despite a dearth of evidence in respect of criminality; while the charges preferred against Ms Jiba were withdrawn despite a court judgment and an array of demonstrably false representations.

115. The Jiba matter furthers the perception that Mr Abrahams is incompetent or prone to partiality. Any perception of independence is diluted when he chooses to prefer charges which lack any substance, and cannot meet even

basic jurisdictional criteria, over charges against his now suspended deputy, which were supported by judicial findings. At best for him, he appears entirely incapable of assessing whether a charge is good in law and must be proceeded with.

116. It is submitted that Mr Abrahams' conduct in the case of Ms Jiba is further evidence that Mr Abrahams cannot be entrusted with the office of NDPP, particularly when viewed in contrast to his markedly different treatment of the Charges.

THE UNFITNESS AND IMPROPRIETY FOR OFFICE OF THE SECOND TO FOURTH RESPONDENTS

Mr Abrahams

117. In light of the circumstances surrounding the preferring and withdrawal of the Charges, Mr Abrahams has misconducted himself and is not a fit and proper person to hold the office of the NDPP, in that he lacks the required conscientiousness and integrity to be entrusted with the responsibilities of the office of the NDPP. He has also brought the administration of justice and his high office into disrepute.

Mr Abrahams has plainly displayed his lack of conscientiousness and integrity, and has committed serious misconduct, as set out above. He has, *inter alia*, improperly violated the rights of individuals not even accused of crimes, by pronouncing to the world of their unlawful conduct; acted grossly recklessly or with ulterior purpose in permitting the Charges to have been preferred; delivered contradictory narratives and versions to Parliament, the Republic and the public; acted in a manner which casts serious aspersions on his independence; displayed a lack of understanding of the law and

appears more interested in self-preservation than serving the interests of the Republic.

118. It is important to recall that Mr Abrahams, as the NDPP, is no mere civil servant. He is entrusted with the independent exercise of immense public power; the type of public power which can be used to curtail the liberty of every person and entity in the Republic. This is a power that the NDPP is enjoined, constitutionally, to exercise without fear or favour. When the NDPP abuses this power, or even when he is perceived to be abusing this power, it fundamentally undermines the public confidence in the integrity of the institution. Accordingly, Mr Abrahams' conduct in the above matter, even if his conduct was a *bona fide* blunder (which the applicants deny), has brought the NPA into disrepute, continues on a daily basis to erode public confidence in law enforcement institutions, and casts a long shadow of doubt over Mr Abrahams' present ability and his future conduct. Mr Abrahams is tasked with making dozens of critical, and potentially irreversible, decisions on a daily basis, which reinforce the potential for irreparable harm. Indeed, Mr Abrahams has alluded to potential future important investigations in the 31 October press conference.

119. Furthermore, in a botched prosecution, which was clearly unsustainable from inception, but resulted in the loss of billions of Rand, the besmirching of the reputations of loyal servants of State and greatly affected the standing of the Republic in the eyes of the world, it is astounding that there is not a trace of humility or accountability from the NDPP. He has failed even to offer an apology to the accused, much less take any steps to protect the integrity of the NPA, which steps must, it is submitted, include his resignation (or, at the very least, suspension during a full enquiry).

120. Moreover, there can be no suggestion of any harm to the State or the NPA were Mr Abrahams to be suspended pending a disciplinary enquiry. It cannot be suggested that no other individual in the Republic has the skillset and appetite to discharge the functions of the NDPP in the interim - simply by way of example, the previous NDPP, Mr Nxasana, has publicly indicated a willingness to resume his role (see the newspaper report attached hereto marked "**FA16**").

121. It is furthermore important to note that Mr Abrahams repeatedly contradicted himself when giving his explanation of the events surrounding the Charges during the various press conferences, the Mandy Weiner interview and the portfolio committee meeting. The ineluctable conclusion flowing from the contradictory versions presented by the NDPP is this: quite simply, he cannot be trusted to take the public, the Republic or Parliament into his confidence. Either he is, sadly, completely incapable of remembering what he has and has not done in the last month in relation to one of the most controversial prosecutions in recent time (which version beggars belief and falls summarily to be rejected), or, fully aware of his deeds, he is presenting another, false narrative to the world at large. This conduct does not behove the high office of the NDPP, and further erodes any perception of the independence or conscientiousness of the NPA or the NDPP, and destroys any faith in the ability or integrity of Mr Abrahams to lead the NPA and hold the high office of the NDPP.

122. The sheer fact of the contradictions in his multiple versions should be sufficient to warrant an immediate suspension and inquiry into his propriety for office; of course, however, the failings, regretfully, far exceed mere contradictions in public statements.

123. Mr Abrahams is not a fit and proper person to continue to occupy his high office and should be suspended and disciplined urgently.

JP Pretorius SC and S Mzinyathi

124. It is plain that the prosecution of the Charges was pursued either for ulterior purposes or in a breathtakingly reckless and incompetent fashion, without proper investigation or any regard to the evidence and proper legal analysis. After the Charges came to be publically criticised, and despite seeking the limelight for himself in announcing the Charges at the press conference on 11 October, Mr Abrahams has shifted all responsibility to Dr JP Pretorius, SC and Sibongile Mzinyathi (collectively, **"the Prosecutors"**) (with Dr Pretorius allegedly taking the decision in consultation with Mr Mzinyathi).

125. The Prosecutors clearly failed in their fundamental constitutional and statutory duty to ensure that charges were properly grounded and to take an impartial, independent and objective view of all the facts, including considering all the evidence which was required to be considered in the matter.

126. In addition to what is stated above in relation to Mr Abrahams (which applies with equal force here), had the Prosecutors applied their minds to the facts and law relevant to the Charges, as a rational and conscientious prosecutor of integrity would have done before the decision to prefer the Charges was taken, they would have realised that there was no basis, in law or in fact, for the Charges and would never have taken the decision to prefer charges.

127. According to the 31 October press conference, the Prosecutors failed to take account, *inter alia*, of the most basic legal requirement for a successful prosecution of fraud or theft: the fraudulent or furtive intention. This is inexcusable, particularly in a matter with such drastic national consequences.

The Prosecutors' failures, at best, show a startling lack of competence; and at worst, betray ulterior motive and a lack of integrity. The seniority of the Prosecutors augments the case for ulterior purposes.

128. The Prosecutors were obliged to discharge their constitutional mandate lawfully and properly. In the circumstances of this case, that included a duty, not only to the accused but to the Republic and the NPA, only to prefer charges which were supported by evidence and met the requirements of the alleged crimes.

129. Similarly to Mr Abrahams, as explained above, the Prosecutors' unacceptable handling of this matter has severely undermined public confidence in the integrity of the NPA. It is thus imperative to restoring public confidence in institution that they be suspended and an enquiry into their continued fitness to hold office as prosecutors commenced as a matter of utmost urgency.

130. It is thus plain that the third and fourth respondents misconducted themselves and lack the conscientiousness (and/or competence) and integrity to continue to serve their official functions.

THE PRESIDENT'S FAILURES

The legal framework

131. Section 179 of the Constitution provides for a single prosecuting authority that has the power to institute criminal proceedings and to carry out all incidental functions necessary thereto on behalf of the State. Section 179 further provides that Directors of Public Prosecutions will be appointed in terms of an Act of Parliament. The NPA Act was enacted in order to give effect to the provisions of the Constitution.

132. At all relevant times, Mr Abrahams held the position of NDPP and is currently the NDPP. Both the Acting NDPP and Deputy NDPP are governed by section 11 (read with section 12) of the NPA Act.

133. At all relevant times, Dr Pretorius has occupied the position of Acting Special Director of Public Prosecutions ("**Acting Special Director**") and Head of the PCLU, as contemplated under section 14 of the NPA Act.

134. At all relevant times, Mr Mzinyathi has occupied the position of DPP Director of Public Prosecutions ("**DPP**"), as contemplated under section 14 of the NPA Act.

135. Section 12 of the NPA Act, read with section 14, governs the term of office of the NDPP, DPP and Acting Special Director. Section 12(6)(a) provides that the NDPP, Director and Special Directors may provisionally be suspended by the President, pending an enquiry into the fitness of such NDPP or Deputy NDPP to hold that office and may be removed by the President from such 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.

136. Section 14(3) of the NPA Act (which applies to persons in the position of the Mr Mzinyathi and Dr Pretorius) makes the provisions of section 12(6)

applicable to a Director, including a Special or Acting Special Director of Public Prosecutions.

Grounds of review

The failures to institute disciplinary proceedings and to suspend are irrational and unlawful

137. Persons occupying the office of a NDPP, a DDPP and an Acting Special Director of Public Prosecutions wield tremendous public power. Such persons are required to be fit and proper to hold such office; this requirement must be closely scrutinised and applied, to ensure confidence in the institution.

138. The requirement that the NDPP, Deputy NDPP and Special Directors of Public Prosecutions must be fit and proper with due regard to his / her misconduct, conscientiousness and integrity is not a matter to be determined subjectively. Rather, it must be determined objectively.

139. Furthermore, the test for rationality in decision making obliges a court to engage in an evaluation of the relationship between the means employed to reach a decision on the one hand, and the purpose for which the power to make the decision was conferred and the information available to the decision maker, on the other. Each and every step in the process must be rationally related to the outcome. A failure to take into account relevant material or properly to apply one's mind to the facts and law renders the decision reviewable.

140. The purpose of the conferral of the power on the President to discipline persons in the position of the second to fourth respondents was to ensure that the office of the NDPP, DPPs and Special Directors of Public

Prosecutions remain inviolable and the persons appointed to such office are sufficiently conscientious and possess the integrity required to be entrusted with the responsibilities of the office.

141. In light of the evidence of incompetence, impropriety, ulterior motive and a patent lack integrity on the part of the second to fourth respondents the fifth respondent's conduct and failure to take any decision in relation to the second to fourth respondents, let alone discipline and suspend them, is plainly unconstitutional.

142. In light of the power granted to the President as set forth above, and in the face of the conduct of the second to fourth respondents in respect of the Charges, there is a duty on the President to exercise such power to suspend the second to fourth respondents and forthwith to institute disciplinary proceedings against them. This, the President has singularly failed to do.

143. The applicants submit that it would be appropriate for this Honourable Court to substitute the President's failure to institute disciplinary proceedings against the second to fourth respondents with an order that disciplinary proceedings as contemplated under section 12(6) of the NPA Act are instituted against the second to fourth respondents and further, that the second to third respondents are suspended pending the outcome of such disciplinary proceedings.

144. Courts are generally unwilling to usurp the powers of decision makers by granting an order for substituted relief except under exceptional circumstances and if certain factors are met. Those factors are clearly satisfied in the present case.

145. The first factor to be considered is whether a court is in as good a position as the original decision maker to make the decision. The second is whether the

decision is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court may still consider other relevant factors. These include delay, bias or the incompetence of the decision maker. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."

146. The applicant submits that this Honourable Court is in as good a position as the President to make a decision to institute disciplinary proceedings against the second to fourth respondents and to suspend them pending the outcome of such disciplinary proceedings. These decisions are largely of a legal nature, which are well suited to the Court's institutional competence. Moreover, the applicant placed before this Honourable Court all material information which information was largely publically available and broadly known in any case. The respondents may provide the balance of any relevant information in their answering affidavits.

147. The Court will thus be in as good a position as the fifth respondent to make the relevant decisions. As the decisions are of a legal nature, the President has very little discretion in the exercise of his powers and, based on the available evidence was required, objectively as a matter of constitutional law, to suspend the second to fourth respondents and to institute disciplinary proceedings without delay.

148. When these findings of impropriety are viewed through the lens of the power conferred on the President and the fact that the offices occupied by the second to fourth respondents are of paramount constitutional and public

importance, there is no other conclusion that a rational decision maker could reach.

149. Furthermore, the fact that the President has refused alternatively failed to take a decision to institute disciplinary proceedings against the second to fourth respondents, despite being called upon by various different public interest organisations may be symptomatic of a closed mind on the part of the decision maker. Moreover, the unreasonable delay in the exercise of the President's powers has been highly prejudicial to the integrity of the NPA and the offices occupied by the second to fourth respondents. Further delay would visit considerable further violence on the NPA, public confidence and the rule of law.

150. This is particularly so where it is reported that charges against, *inter alios*, Min. Gordhan, in relation to the SARS rogue unit, are to be brought in the near future (see, for example, the media report annexed as "**FA17**"). For the NDPP to oversee the bringing of these charges where he has already preferred, or permitted the preferring, of unsustainable charges against Min. Gordhan (but has not acted on credible charges against either the President or Adv. Jiba), smacks of political partisanship, and further undermines any perception of the independence of the NDPP (and the NPA).

151. For these reasons, the applicant submits that there are compelling grounds for this Honourable Court to grant the substituted relief prayed for in the notice of motion to which this affidavit is attached.

URGENCY

152. The applicant approaches this Honourable Court on an urgent basis.

153. There is a strong case that the second to fourth respondents are not fit to hold the high offices which they currently occupy and their continued performance of their official duties jeopardises dozens of critical prosecutions and investigations daily – and brings the law into disrepute and makes a mockery of those offices.

154. The NPA has the mandate and duty to institute and conduct criminal proceedings on behalf of the State; carry out any necessary functions incidental to instituting and conducting such criminal proceedings (this includes investigation); and to discontinue criminal proceedings. Dozens of critical decisions which affect the criminal justice system as a whole are taken on a daily basis by the NDPP, the DPPs and Special Directors of Public Prosecutions.

155. Mr Abrahams, as the NDPP in particular may exercise far reaching powers including the power to review a decision to prosecute or not to prosecute and the power to conduct any investigation he deems necessary in respect of a prosecution. This is particularly concerning in light of the threat, at the 31 October press conference, that investigations regarding the SARS rogue unit were ongoing. It appears that Mr Abrahams expects to undermine the integrity of the NPA even further and perhaps wipe another R50 billion of the stock exchange soon.

156. Under section 20(4) of the NPA Act a DPP may exercise or perform any of the powers, duties and functions of the NDPP which he or she has been authorised by the NDPP to exercise or perform in the area of jurisdiction for which he has been appointed. Effectively, a DPP is able to play a central role in prosecutorial decisions in the area of his jurisdiction, subject to the "supervision" of the NDPP whose integrity and fitness and propriety is also seriously in question.

157. Such an insidious position cannot be allowed to endure as it has the real potential to cause irreparable harm to the functioning of the NPA, actual and perceived.

158. Acting Special Directors of Public Prosecutions are also vested with far reaching powers which powers are conferred or assigned to them by the President, subject to the direction and control of the NDPP. The NPA's website refers to the Proclamation published in 2003, which sets out the powers of the PCLU and its head: then Mr A Ackerman (see the proclamation, attached above marked "**FA10**"), now Dr Pretorius. These are plainly positions of enormous responsibility and public trust, which cannot be entrusted to a person of potentially redoubtable character and competence.

159. The failures by the President to institute an enquiry into the fitness and propriety of, and to suspend, the second to fourth respondents (despite being called on to do so must be addressed without delay).

160. It is evident that substantial redress cannot be obtained in due course and as such the matter is patently urgent. This conclusion is fortified by the fact that the issues raised in this matter strike at the heart of our constitutional democracy; and the ramifications for our constitutional democracy of allowing the second to fourth respondents to maintain power, unchecked, unaccountable and under a cloud of justified suspicion.

161. If a hearing were only to take place in the ordinary course, there is a real risk that this will result in continuing irreparable harm to the reputation of the NPA and the rule of law.

162. Furthermore, if the second to fourth respondents were to remain in their current offices, they will inevitably take hundreds of decisions that will have an impact on members of the public, the NPA as well as parties that are

subject to prosecution and the victims and the families of victims of criminal acts. Undeterred and apparently impervious to self-reflection, it also seems that Mr Abrahams is already contemplating his next move against Min. Gordhan and, indeed, the economy and the already-shattered reputation of the NPA.

163. These decisions may be irreversible or will only be reversible with a great amount of difficulty following review proceedings. In any event, the decisions will have numerous irreversible consequences.

164. This application has been launched a day after 7 November 2016, the date set forth in the 1 November letter for the President to act. The timetable set out in the notice of motion is commensurate with the exigency of the matter and has been designed to allow the respondents almost a week to respond to this application, by Tuesday, 15 November 2016, which will permit the applicants a short period to formulate a reply, to the extent necessary, as required under the Rules.

CONCLUSIONS

165. In light of the above, it is clear that the President has acted irrationally and unlawfully by failing to institute disciplinary proceedings against the second to fourth respondents and to suspend them pending the outcome of such disciplinary proceedings.

WHEREFORE, the applicants pray for the relief set forth in the notice of motion to which this affidavit is attached.

FRANCIS ANTONIE

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Rosebank on 08 November 2016, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS
Full names: Mabotela Malose
Address: 15 Sturdee Ave Rosebank
Capacity: Cst

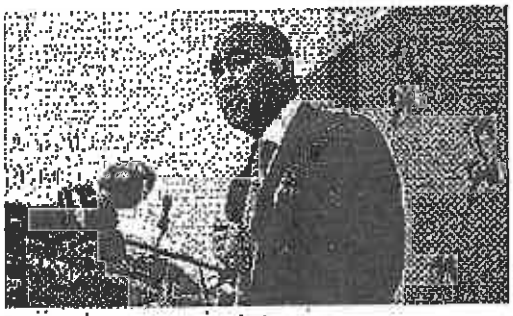
SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2016 -11- 08
CSC
ROSEBANK
SUID-AFRIKAANSE POLISIEDIENS

Print this page (#)

Pretoria mass protests to go ahead, despite dropping of Gordhan charges

Nov 1, 2016 | TMG Digital

If National Director of Public Prosecutions Shaun Abrahams was hoping his decision to withdraw charges against Finance Minister Pravin Gordhan would stave off mass protests planned for Wednesday, he's in for a bitter disappointment.



In the case of the EFF, Abrahams' u-turn may even have helped bump him up to centre stage in proceedings, with a demand for his resignation now one of three points listed as "burning issues" for its #DayofAction march. File photo
Photograph by: Gallo Images / Seeld / Lisa Hnatowicz

While the South African Communist Party announced on Monday that it had cancelled a picket planned for Pretoria on the day Gordhan was due to appear in the city's magistrate court, the Economic Freedom Fighters and business groups have vowed to go ahead with their protest actions.

In the case of the EFF, Abrahams' u-turn may even have helped bump him up to centre stage in proceedings, with a demand for his resignation now one of three points listed as "burning issues" for its #DayofAction march.

The other two are that free tertiary education be given the urgent attention it deserves and that President Jacob Zuma resigns for failing to uphold his oath of office.

"These demands are in no way affected by Shaun Abrahams spurious decision to withdraw the charges against Gordhan. In fact, this decision has further emphasized the need for this incompetent head of the NPA to step down," a statement from the party said.

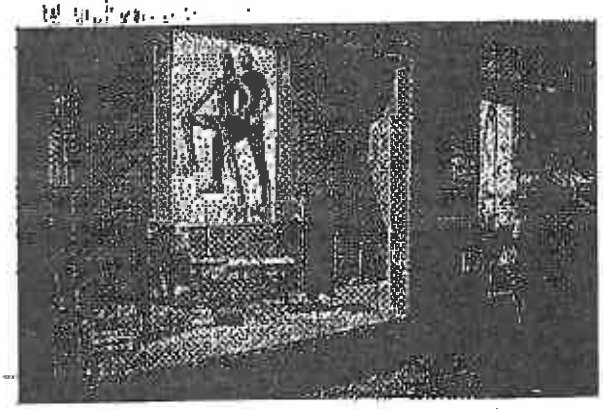
Business Unity South Africa, Business Leadership South Africa and the CEO Initiative are also going ahead with their combined activities planned for Wednesday, saying it was their "collective duty and paramount responsibility as citizens" to protect state institutions and "fight to maintain our investment grade rating".

"The decision to drop charges will therefore not alter the decision of business leaders and organised business to be in Pretoria on Wednesday... for a historic event: the first time in the 22-year history of our democracy that civil society, faith-based organisations, labour, business and thousands of citizens will join together to express what we stand for and what binds us together; namely the belief in our Constitution and a future for our society that it envisages."

EYEWITNESS NEWS

TSHWANE BUSINESS OWNERS LEFT REELING AFTER LOOTERS STRIKE DURING EFF MARCH

A business owner says the demonstrators broke into his bar, threatened staff and assaulted customers during an EFF march in Pretoria yesterday.



A Spitz shop in Pretoria's CBD after being looted during an EFF march. Picture: Thomas Holder/EWN

Jacob Zuma (http://ewn.co.za/Topic/Jacob-Zuma), Economic Freedom Fighters (http://ewn.co.za/Topic/Economic-Freedom-Fighters), Victor Mangwegape (http://ewn.co.za/Contributors/Victor-Mangwegape) & Christeen Hendricks (http://ewn.co.za/Contributors/Christeen-Hendricks) | *6 days ago (6 days ago)*

JOHANNESBURG - After a day of clashes between police and Economic Freedom Fighters (http://ewn.co.za/Topic/Economic-Freedom-Fighters) (EFF) supporters in the Pretoria CBD, business owners say nothing can justify the looting by some members of the red berets yesterday.

EFF leader Julius Malema (http://ewn.co.za/Topic/Julius-Malema) led a march through the capital.

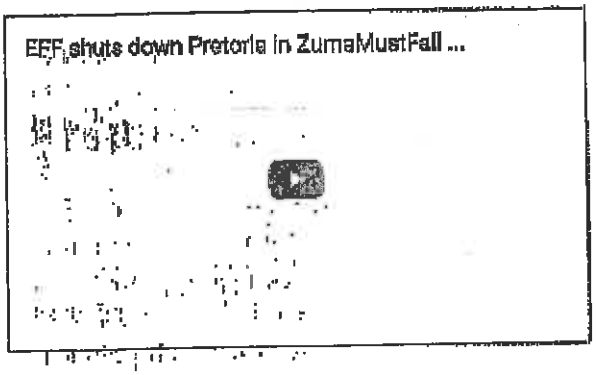
Shop owners claim his supporters damaged property and stole stock.

One business owner says the demonstrators broke into his bar, threatened staff and assaulted customers.

"They also set the place alight in two places, which we luckily managed to extinguish. We were thrown with bottles; I have a cut on my arm. My father was hurt and some of the other staff were hurt. Whenever you try to see whether the masses have passed, they throw stones again."

EFF supporters also clashed with police, who used stun grenades, rubber bullets and water cannons - to disperse the supporters after they apparently tried to force their way onto the lawns of the Union Buildings.

WATCH: EFF Shuts down Pretoria in #ZumaMustFall march



There were chaotic scenes outside the seat of government as EFF supporters wanted to access what they called "their property".

After being denied access, Malema then addressed supporters on the State of Capture report. (http://ewn.co.za/2016/11/03/must-read-the-full-state-capture-report)

"She (Thuli Madonsela) makes points about (Des) van Rooyen, she makes points about (Mosebenzi) Zwane and she makes points about Eskom. The evidence that she came across is very worrying evidence.

Malema says the report is also clear that Zuma is deep into the pockets of the Gupta family.

The EFF has vowed to return to the Union Buildings in another protest for Zuma to leave office.

(Edited by Masechaba Sefularo)

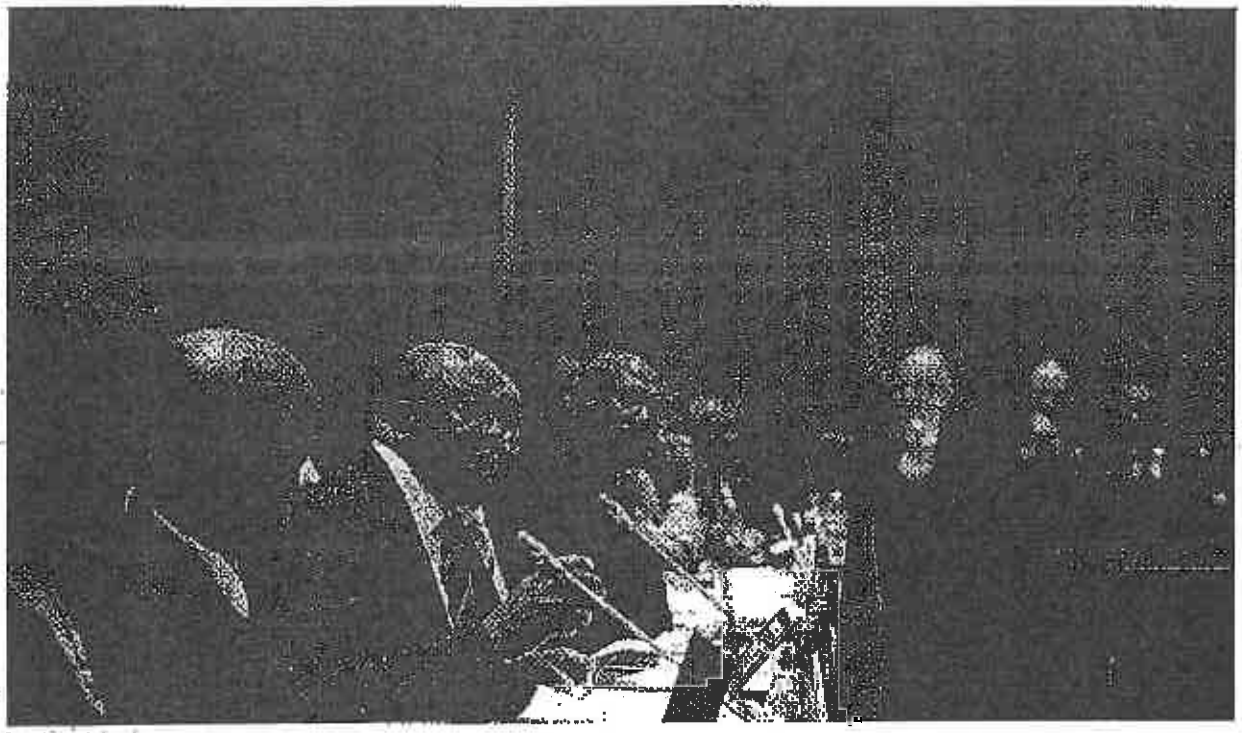
COPYRIGHT 2015 ALL RIGHTS RESERVED | TERMS & CONDITIONS (/TERMSANDCONDITIONS)

Final call for Investing in the Future Awards 2016
Entries close 28 October 2015
To find out more click here

NATIONAL (HTTP://MG.CO.ZA/SECTION/NEWS-NATIONAL)

Nhlanhla Nene removed as finance minister

Matuma Letsoalo (http://mg.co.za/author/matuma-letsoalo-author) 09 Dec 2015 22:45



Nhlanhla Nene. (David Harrison, M&G)

(http://mg.co.za/article/2015-12-09-nhlanhla-nene-removed-as-finance-minister)

President Jacob Zuma took an unprecedented step on Wednesday night by dismissing Finance Minister Nhlanhla Nene – barely two years after he took office.

In a shocking move that saw the rand plummeting to below R15 to the US dollar, Zuma appointed a relatively unknown backbencher David 'Des' van Rooyen – who served as a member of the finance committee in Parliament – to replace Nene. Nene has been at loggerheads with SAA chair Dudu Myeni – who serves as thechairperson of the president Jacob Zuma's education trust.

Tensions between Nene and Myeni worsened last week after Nene turned down a proposal from the SAA board to restructure a re-fleeting transaction with Airbus. Nene reportedly gave a stern warning that should the board proceed without his permission, it would constitute financial misconduct with consequences for the directors. The treasury said in a statement last week that the board's proposal to restructure the deal would leave the SAA in a materially "worse off financial position where it is unable to meet commitments as they become due".

Nene is not the first minister to bite the dust after clashing with Myeni. Malusi Gigaba was moved from the public enterprises portfolio to home affairs after he fought with Myeni, and SAA was taken away from the current minister Lynne Brown to the treasury after Brown clashed with Nyeni.

DA leader Mmusi Maimane said Zuma's decision would have a negative impact on the economy.

"Nene fought for the fiscal discipline. The implication of this on the economy is that South Africa is now seen [by investors] as unstable. Former minister Trevor Manuel served for two terms. For Zuma to fire Nene after a just over a year is a clear indication of instability within his administration. This will have huge implications for job creation. It is very irresponsible," said Maimane.

Maimane said Nene's sin was to refuse to toe Zuma's line by providing funds to the nuclear deal and the president's private jet – a price tag estimated to be R4-billion.

"He [Zuma] needs someone who can toe the line at the expense of South Africans. He believes he comes first, before the people of South Africa. Even the ANC, in this case, is becoming second," said Maimane.

The Economic Freedom Fighters (EFF) said Nene was fired because he refused to take "illegal instructions" made by Zuma and his friends in both business and state-owned enterprises.

EFF spokesperson Mbuyiseni Ndlozi said: "Nene refused to give SAA guarantees and bailout when Zuma's girlfriend and chairperson of the board requested it. Nene also refused to buy Zuma a new luxurious private jet and declined to grant Zuma's staff exemptions from using expensive hotels and flying first class. Above all, Nhlanhla Nene was reluctant to approve the country's new nuclear deal which Zuma wanted expedited so he can benefit before his term as president ends. There can be no more shocking news coming out of South Africa to signify that we are a country in crisis, with no knowledge of what tomorrow holds.

"We have always warned that with Zuma you must either be corrupt or you fall out of favour with him. No one in the world will trust a political leadership that changes Cabinet and finance ministers like underwear. A decision to change a person that presides over the treasury of the country must come with substance, be predictable and not come as a shock. If so, we all doubt what is being intended with the taxes of the people," Ndlozi said.

Cope spokesperson Dennis Bloem described the decision to fire Nene as the "worst card" ever played by the president.

"Ideally, it is President Zuma who should have been axed by the ruling party. His exit would end the national drift and the policy paralysis that is crippling the economy. He stands between South Africa and economic growth. He has certainly overstayed his welcome and it is he who should go," said Bloem. He said the axing of Nene would make the jittery market even more dubious about South Africa's prospects of shifting economic gears and holding spending.

"Whatever the reason, Zuma has played his worst card ever. If South Africans were blasé up to now, they should wake up to the fact that our government and our economy are in the very worst of hands. Nene must have been under immense pressure not to apply the fiscal brakes," said Bloem.

The ANC said in a statement on Wednesday night that it noted and respected Zuma's decision to appoint a new finance minister – Van Rooyen – to replace Nene.

"The president has exercised his constitutional prerogative to appoint a new minister who we believe has what it takes to lead the ministry," said ANC spokesperson Zizi Kodwa.

"We believe his experience and tenure as the ANC National Assembly whip for both the finance portfolio committee and theANC Caucus' Economic Transformation Cluster will enable him to provide the necessary leadership in the department. We wish the new minister well in his responsibilities. The former minister remains a valuable resource in the organisation and we accordingly commend him for the excellent service he rendered to the department and the people of South Africa."

ANC head of economic transformation Enoch Godongwana said the decision to remove ministers were the prerogative of the president. He said he knew Van Rooyen when he served as a mayor of the Merafong Municipality. "He [Van Rooyen] left for Parliament where he served as a whip of in the economic transformation cluster and the standing committee on finance. Because of that, he attended ETC [economic transformation committee] meetings of the ANC," said Godongwana.

The South African Transport and Allied Workers Union (Satawu), which has defended Myeni throughout, last week called on Zuma to take action against those who were against her.

"SAA has moved from one crisis to another under Public Enterprises Minister Lynne Brown and Finance Minister Nhlanhla Nene. It's time President Jacob Zuma brought this state-owned entity under his fold."

Last week, SAA chair Dudu Myeni confirmed that the Hawks were investigating the airline's financial affairs. It now appears the investigation will go beyond SAA's finances and probe a plot to sabotage the national carrier.

News of the plot came to light on Friday, when SAA Pilots Association head Captain John Harty was summoned to Douglasdale police station for questioning by several members of the Hawks.

Harty was questioned about his alleged involvement in recruiting technicians to interfere with the functioning of an aircraft rudder of a craft flown by a black pilot. Harty was quizzed about his understanding of treason, because if successfully carried out, such a plot would result in the loss of hundreds of passenger lives. "In light of this, Satawu calls for the immediate suspension of Captain Harty as the allegations put to him are serious and tantamount to treason," the union said in a statement.

Moneyweb

Our partnership with Wilderness Safaris is proof of our commitment to Africa's growth. Find out more.

Standard Bank

Moving forward

South Africa

Zuma 'removes' Nene as finance minister

Replacement Des van Rooyen is an ANC veteran.

Ryk van Niekerk / 9 December 2015 20:42

Nhlanhla Nene

President Jacob Zuma's surprise 'removal' of highly-respected Nhlanhla Nene as the Minister of Finance has shocked economic analysts and sent the rand plummeting to record lows against the major international currencies.

Zuma issued a statement on Wednesday night in which he announced that ANC veteran Des van Rooyen would take the reins from Nene as the new head of Treasury.

The shock of the message was clearly visible in the sharp drop in the exchange rate. On Thursday morning the rand traded at R15.08 against the dollar, R16.58 against the euro and R22.86 against the pound. The JSE opened lower, but quickly recovered to trade 0.34% higher at 9:45am.

In his statement Zuma said: "I have decided to remove Mr Nhlanhla Nene as Minister of Finance, ahead of his deployment to another strategic position. Mr Nene has done well since his appointment as Minister of Finance during a difficult economic climate."

Zuma did not announce which portfolio Nene would be redeployed to. The South African president also did not give any reasons for Nene's removal.

This turn of events follows a highly controversial announcement by the National Treasury to reject proposed changes to the deal it had negotiated between national carrier SAA and aircraft manufacturer Airbus last week.

SAA chairperson Dudu Myeni, a close ally of Zuma, proposed the changes to the deal and Nene said in his explanation of the rejection that it would leave the already beleaguered SAA in a worse financial position.

Nene's removal also follows last week's credit rating downgrade by ratings agency Fitch.

Reaction

Several South African political commentators and economists reacted in shock to the announcement.

Roelof Botha, economist and faculty member of the Gibe Business School, said: "The one portfolio where a company requires stability, consistency and the highest standards of corporate governance is National Treasury."

He said Zuma's decision to remove Nene will impact credit ratings, the exchange rate, investor sentiment and bond yields, which will impact on fiscal stability. "To remove a Minister of Finance without any obvious good reason is a point of grave concern and international investors will certainly frown on this decision."

Goolam Ballim, chief economist at Standard Bank, said government "will have to give a sound explanation why the decision was taken to remove a pragmatic finance minister at a time when South Africa is probably at its lowest in 20 years in terms of credible policy making."

He said that both the National Treasury and the Reserve Bank are credible national pillars of South Africa's broad institutional breath. "The unceremonious removal of Nene therefore challenges the general underpinnings of South Africa's policy-making foundations."

Des van Rooyen

David Douglas Des van Rooyen, who takes the reins from Nene, is an ANC veteran. According to several websites he was an MK operative and held various leadership positions in Congress of South African Students, the United Democratic Front and the National Union of Mineworkers. Between 1994 and 2007 he held various leadership positions within the ANC.

According to the People's Assembly website, Van Rooyen holds a Masters Degree in Public Development and Management and a MSc Finance (Economic Policy) from the University of London.

Zuma said in his statement that Van Rooyen currently serves as a Whip of the Standing Committee on Finance and Whip of the Economic Transformation Cluster.

He is a former Executive Mayor of Merafong Municipality and a former North West provincial chairperson of the South African Local Government Association.

Twitter erupted with the news.

Ray Mahlaka
@RayMahlaka
Follow

After all, there are about three years until Zuma's presidential term ends. I guess another round of looting continues. #Nene
1:21 PM - 10 Dec 2015

Ranjeni Munusamy
@RanjeniM
Follow

We gonna be needing a #16DaysofActivism campaign to save the Rand... Or 16 years to save the country
twitter.com/brucebusiness/...
7:24 AM - 10 Dec 2015

10 10

Jacaranda News
@JacaNews
Follow

#Vavi says #Nene was purged for being honest and not corruptible. STM
12:23 PM - 10 Dec 2015

13 10

Dr. E.B MALAPANE
@falling_fly2
Follow

In the next 5 years from now RSA=Zimbabwe. #ZumaMustFall #Nene
12:28 PM - 10 Dec 2015

Not entirely omniscient
6 November 2016 20:59 (South Africa)

DAILY MAVERICK
(http://www.dailymaverick.co.za/)
South Africa

State capture: Did the Guptas offer Treasury's top job to Deputy Minister Jonas?

- Marianne Thamm

Marianne Thamm

- South Africa (http://www.dailymaverick.co.za/section/south-africa/)
- 10 Mar 2016 12:02 (South Africa)

(http://www.dailymaverick.co.za/article/2016-03-10-state-capture-did-the-guptas-offer-treasurys-top-job-to-deputy-minister-mcebisi-jonas/)

A report on Wednesday in the globally influential the Financial Times makes the startling allegation that two weeks before President Zuma fired Finance Minister Nhlanhla Nene in December, the Gupta family met with Deputy Finance Minister, Mcebisi Jonas, at the family's home in Saxonwold, to ask whether he was interested in the job. If true, it presents another piece in a disturbing puzzle of an attempt at state capture. By MARIANNE THAMM.

Just as Finance Minister Pravin Gordhan touched down in London this week on the first leg of his investment roadshow to foreign investors and credit agencies, the influential publication the *Financial Times* dropped a bombshell of a story (http://www.ft.com/intl/cms/s/0/abd6ea34-e619-11e5-a09b-1f8b03139eca.html#axzz4gCGkYxLo) highlighting the extent of Gupta family's influence and control of President Jacob Zuma's government.

The story, by Andrew England, makes the startling claim that two weeks before President Jacob Zuma fired Finance Minister Nhlanla Nene, replacing him with backbencher David van Rooyen, the family had themselves met with Deputy Minister of Finance, Mcebisi Jonas, and had asked if he was "interested in the Treasury's top post".

It is unlikely that a newspaper of standing, like the FT, would risk publishing the serious allegation if it were not sure of its sources. It would also indicate that the Gupta family has intimate knowledge of the comings and goings of Ministers as well as believing it has the power to chose these Ministers. If true, these serious claims would amount to a scandal which should warrant a demand for the stepping down of President Jacob Zuma who enjoys a perilously close (for South Africa) relationship with the Gupta family.

While the Gupta family denied the claim, it is telling that, when approached by England, the Treasury and the Deputy Minister's office "declined to comment, neither denying nor confirming the existence of the meeting".

A response to a request by the Daily Maverick to the Deputy Minister's office on Wednesday to respond to questions in relation to the *Financial Times* report had not been forthcoming at the time of writing.

If the Gupta family did indeed approach Deputy Minister Jonas – who was also, according to a Daily Maverick source, allegedly offered a financial inducement – he would have been legally obliged, under the Prevention of Organised Crime Act, to report the matter. The FT exposure of the Gupta's alleged request also begs the question whether Nene too had been aware of the approach to his Deputy Minister.

Evidence of an apparent attempt by the Gupta family at capturing the Treasury is mounting, especially considering that Des van Rooyen arrived at Treasury for his four-day stint as Finance Minister with two as then unnamed advisors who turned out to be Gupta associates Mohamed Bobat and Ian Whitley. Director General of Treasury Lungisa Fuzile was reportedly so enraged that he threatened to resign.

The UK-based publication, Africa Confidential, reported that Bobat and Whitley had informed National Treasury officials that they would be able to sign expenditure and other authorisations on behalf of Van Rooyen.

Bobat and Whitley have been shuffled off with Van Rooyen to the Ministry of Cooperative Governance and Traditional Affairs where Whitley is now Van Rooyen's Chief of Staff.

Last month Africa Confidential revealed that the Gupta family, who would be the main beneficiaries of a R1 trillion nuclear deal, had influenced President Zuma to appoint Van Rooyen in an attempt to secure uranium contracts for nuclear plants in a similar fashion the family has gone about capturing a coal mine which supplies a portion of the Arnot power station's power needs.

Van Rooyen's appointment as Minister of Finance caused financial chaos and resulted in the tanking of the Rand (which benefitted some) until President Zuma was forced to re-appoint Pravin Gordhan.

In the *Financial Times* piece England writes that under President Zuma's watch "predatory networks of patronage and cronyism are effectively looting the state" and that the phrase "state capture" had become part of the South African lexicon.

"And as scrutiny on their interests and role mounts, the Guptas are increasingly portrayed as a symbol of the malaise afflicting the nation. They have been accused of overstepping the mark in a range of areas, from wielding influence over state officials and appointments, to using their connections to win government contracts. The allegations - none of which is proven – have proliferated amid battles for power inside the faction-plagued ruling African National Congress and the government," he writes.

In the light of all of the above, Gordhan will have a tough job on his roadshow – he will soon head for the US - where he will be meeting with key investors and institutions to unpack South Africa's budget and the way forward in a precarious economic environment as well as convince these investors that South Africa is not a banana republic and indeed "Africa's most industrialised nation".

England points that it is not only opposition parties inside South Africa who have questioned the Gupta's influence on Jacob Zuma's government but also three former chiefs of intelligence – Gibson Njenje, Mo Shaik and Jeff Maqetuka – who all suggested the Guptas should be investigated. All three resigned after facing resistance from then Minister of State Security Siyabonga Cwele.

Ranjeni Munusamy, writing in the Daily Maverick (http://www.thedailymaverick.co.za/article/2012-05-06-the-top-spooks-gupta-warning-which-cost-them-their-jobs/#.VtAfpNqfNZ) in 2013, revealed how Njenje as former NIA chief, Shaik as former head of foreign intelligence and Jeff Maqetuka as former Director General of of State Security (all of whom were close to Zuma) all resigned a few months apart in 2011.

"Alarm bells started ringing in the intelligence agencies about the conduct and dealings of the Gupta brothers and Njenje ordered an investigation into the family's inappropriate influence on South Africa's top political leaders and government officials. When Cwele learnt of this, he ordered that the investigation be stopped immediately."

Munusamy wrote that Njenje, backed by the other two DGs, tried to warn that the Guptas behaviour constituted a "threat to national security" and if allowed to continue would compromise the stability of the state. Cwele refused to listen or investigate whether there was legitimate cause for the investigation.

"This soured relations between Cwele and the DGs, which over the next few months deteriorated to the extent that the minister asked them to leave," wrote Munusamy.

The warnings about the Guptas, she wrote, later came back to haunt the Zuma administration (and South Africa) and now appears to be the taxle gift that keeps on giving.

In April 2013, the cleverly emboldened Gupta family flew a jet filled with family, friends and wedding guests into the National Keypoint, the Waterkloof Air Force Base. A government inquiry later found that the use of the base by the Gupta wedding party had merely been a "national security incident" and concluded that the "activities of some of the persons involved were driven by the undesirable practice of undue influence and abuse of higher office".

In January that year senior ANC officials met to "deal decisively with the threat of state capture" but three years later it is no longer a threat but a reality, even though ANC Secretary General Gwede Mantashe might be of the view that only certain "individuals" had been captured and not the state.

Since the Guptagate scandal – as the Waterkloof landing has become known – there have been several others, all involving the Gupta family, including appointment of their ally Mosebenzi Zwane as Minister of Mineral Resources, as well his trip accompanying a delegation from the Gupta-owned Tegeta Exploration & Resources to visit Glencore in Switzerland last year in an attempt to negotiate the purchase of Optimum Colliery.

Eskom levied a R2.5 billion penalty to Optimum for delivering sub standard coal resulting in the colliery being placed in business rescue as its operations were no longer financially viable. The mine was bought by Tegeta in December for R2.15 billion. Three weeks before the deal, Duduzane Zuma's Mabengela Investments snapped up 28.5 percent of the deal while the Gupta's Oakbay Investments gobbled up 34.5 percent. Insiders have said that South African mining authorities used the threat of regulatory action to pressure Glencore into the sale. Optimum supplies Eskom's Hendrina plant while Arnot is one of seven "interim suppliers" (http://www.dailymaverick.co.za/file:///Users/frankh/Desktop/downloads%2001/JOHANNESBURG%20-%20Eskom%20says%20it%20will%20not%20reveal%20any%20potential%20bidders%20looking%20to%20fill%20contracts%20as%20required%20suppl to Eskom. The state-owned company will make its final suppliers known at the end of this month and there are bound to be no surprises.

Meanwhile Exxaro Resources, which supplied Eskom with coal for 40 years, has shut down its operations, affecting 1,800 jobs. James Lorimer, DA Shadow Minister of Mineral Resources, has said the contract was ended in favour (http://www.fin24.com/Economy/Eskom/exxaros-coal-fight-with-eskom-heats-up-20160203) of a new deal with the Gupta-Zuma owned Optimum.

"Eskom ended the contract... in favour of coal to be trucked in from Optimum," he said, "That looks like a duck".

The current SARS Wars saga and the bitter battle between Pravin Gordhan and Commissioner Tom Moyane, a Zuma appointee, also suggests an attempt at capturing the country's revenue service. On 1 March, journalist Max Du Preez revealed in a column (http://www.news24.com/Columnists/MaxduPreez/the-sars-dossier-that-could-spell-trouble-for-zuma-and-friends-20160301) that one of the keys to the hostility between the two men is a secret dossier that contains "dynamite allegations of corruption, fraud, front companies and foreign bank accounts against prominent benefactors of President Jacob Zuma".

"Several billions of rands are at stake and Zuma would be extremely embarrassed if the alleged dossier were to be acted upon. It could well open him up to prosecution himself and/or to a massive income tax bill – at least for evading donations tax," wrote Du Preez.

The revelations in the *Financial Times* on Wednesday and the allegation that the Guptas offered the Treasury to Jonas present a new, disturbing piece in a dark puzzle. Taken together, the political domination of the NPA, SAPS, Hawks and State Security, as well as the SARS affair, coupled with the shockingly wrong appointments of Zwane as Minister of Mineral Resources and van Rooyen as Finance Minister, it all now begins to make sinister sense.

The only man who could really act decisively in cleaning up the mess is the man who, through his friendship and family connections, is deeply implicated in it all. President Jacob Zuma is hardly likely to want the truth revealed.

But the President does not exist in a vacuum. He is part of the ANC, the oldest liberation movement in Africa. The party has survived 104 years in the most adverse of conditions but never before has it faced such a critical challenge. Is the ANC up to this grave challenge of fixing a mess that could possibly shake the foundations of the South African state and society?

Breaking his silence with regard to the SARS "rogue unit" saga earlier this month Gordhan hinted at the source of the malaise that England says afflicts the nation: "There is a group of people that are not interested in the economic stability of this country and the welfare of its people. It seems they are interested in disrupting institutions and destroying reputations."

As more information bubbles to the surface in this toxic mess, it appears that Gordhan is a well informed man. DM

Photo: President Jacob Zuma, Atul Gupta (Reuters, Supa)

- Marianne Thamm

Marianne Thamm
South Africa (http://www.dailymaverick.co.za/section/south-africa/)

Get overnight news and latest Daily Maverick articles

Email Address

☑ First Thing *(Mon - Sun 06:10, SAST)*

☑ Afternoon Thing *Mon - Fri (15:00, SAST)*

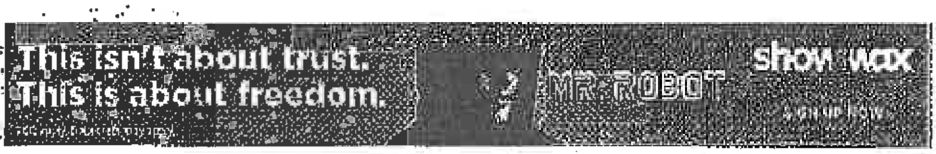
☐ Info Thing *(Special Events/Notices/Offers)*

Subscribe

Do Not Miss

159

"FA3" 71



fin24

Search by company name or news keyword Search

Zuma-Gordhan struggle

Latest bombshells show the president in an increasingly vulnerable light.

SA's three-headed snake

We can still regain the moral high ground despite bad election choices, says Solly Moeng.

Act for justice, SA!

Hunger, joblessness and a corrupt government are a dangerous mix, says Mandi Smallhorne.

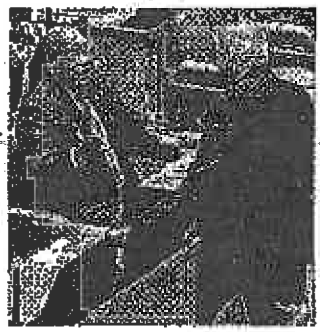
INET BFA	ZAR/AUD	ZAR/EUR	ZAR/GBP	ZAR/JPY	ZAR/USD	All data is delayed
	10,63 (0,55%)	15,22 (-0,33%)	17,04 (-0.37%)	0,13 (0,00%)	13,93 (-0.67%)	

See More

Zuma wants Gordhan's head - economist

May 16 2016 21:30

Cape Town - President Jacob Zuma is hunting for any route to remove Finance Minister Pravin Gordhan, which should be hard but not impossible, said Nomura emerging markets economist Peter Attard Montalto.



He said the ongoing battle between the tenderpreneur and anti-tenderpreneur camps stepped up significantly over the weekend with the news of Gordhan's "imminent arrest" over his apparent involvement in the SA Revenue Service's (Sars's) "rogue unit".0

READ MORE:

Zuma factor stymies Gordhan's bid to rescue SA economy

Impact of Gordhan 'arrest' will be 'swift, awful'

Gordhan 'ready to do battle'

Political turmoil hits rand

"We think the market is still grossly underestimating political risk premia and President Zuma's present position and power – he is not a lame duck and may discount market turbulence," said Montalto.

The Sunday Times reported that Gordhan faces "imminent arrest" after the Hawks allegedly handed a docket over to the National Prosecuting Authority (NPA). Former finance minister Trevor Manuel and former Sars commissioner Ivan Pillay were also implicated.

RELATED ARTICLES

- Rand declines on fears Gordhan may be arrested
- Impact of Gordhan 'arrest' will be 'swift, awful'
- Gordhan 'ready to do battle'
- Gordhan 'arrest' will cause economic earthquake - DA
- Gordhan moves to reassure Fitch, S&P on SA economy
- Treasury making it harder to evade tax – Gordhan

Montalto said charges would likely claim that there were covert operations at Sars for political purposes to aid former president Thabo Mbeki.

The presidency dismissed the report, saying it was clearly the "work of dangerous information peddlers who wish to cause confusion and mayhem in the country", while the NPA denied receipt of the docket.

"As far as the so-called rogue unit matter is concerned, which is [being] investigated by the Hawks, our prosecutors are actually guiding that investigation," NPA spokesperson Luvuyo Mfaku told News24 on Sunday.

The Presidency also denied any imminent Cabinet reshuffle.

"However, it is assumed that any arrests should take place after the 3 August local elections so as not to disrupt ANC chances then," said Montalto.

He said the news is not a total surprise. "The ongoing conflict between the tenderpreneur camp

MOST READ | EDITOR'S CHOICE

- Zuma's 'most qualified' Tamin had help with assignments - report
- Gordhan: SA will be foolish not to avoid possible car crash
- Appeal stalls clawback of R42bn by Eskom from customers
- Nomura concerned Zuma will use 'scorched earth' strategy
- Two options for funding higher education in SA

COMPANY SNAPSHOT

GO

"On the nuclear issue, the whole procurement process is still being blocked by the lack of sign-off from Pravin Gordhan and yet government rhetoric maintains that it will proceed."

Mantalo pointed out that Zuma had to reluctantly reappoint Gordhan in December last year after former finance minister Nhlanhla Nene refused to take the job back and given the lack of other obvious candidates.

Zuma unceremoniously removed Nene of his post and replaced him with unknown ANC MP Des van Rooyen, only to replace the latter four days later amid a financial market rout.

"Given this stalemate, President Zuma is going to have to take a major step forwards to achieve his goals. Pravin Gordhan's strategy so far has been defensive and will have to remain so. For both sides the conflict is existential to different visions of South Africa. Pravin Gordhan has to successfully defend against every attack; President Zuma ultimately has to win only once."

Mantalo said a trial of Gordhan would never be successful and probably could never be attempted. He cited four reasons for this.

- Proving that the so called rogue spy unit was undertaking political activities would be nearly impossible;

- Trying to prove that the unit was undertaking illegal covert activity seems to be a challenge given it appears to have been acting within relevant laws.

- The existence of dossiers at Sars, originating from this unit, on Zuma, his family and associates would come up in any trial and be problematic for him and those around him.

- If Zuma were indeed involved in the setting up of the unit and was a witness for the defence in any trial, it would further make such a trial untenable.

However, he added that it may be that a trial never has to happen.

"We believe there is a scenario that Pravin Gordhan and others merely have to be charged (after the local elections) in order for President Zuma to reshuffle the Cabinet and install a new finance minister (and deputy as well most likely).

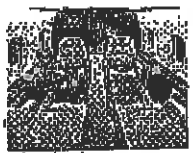
"The charges could then hang in place for some time before being dropped and no trial would ever have to occur. In the interim, whoever takes on the finance minister role would have had time to provide whatever sign-offs and project approvals President Zuma may require," Mantalo said.

Follow Fin24 on Twitter, Facebook, Google+ and Pinterest. 24.com encourages commentary submitted via MyNews24. Contributions of 200 words or more will be considered for publication.

fin24

Read more about: sas | jacob zuma | pravin gordhan | sa economy

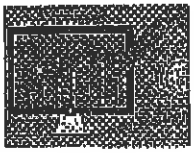
YOU MIGHT ALSO LIKE



South African Binary Options trader given us a private tour of his . 24 Business News.

Cape Town Teacher makes R4,200 per day! He reveals his Money-www.realcashguide-sa.com

Say Goodbye to Boks. - Grandma's R449 Trick Erases Wrinkles Health News Online



Say Goodbye to Your Spreadsheet – It's the Age of the Accounting GetApp.com

MORE FROM FIN24

Pick n Pay charms its way into the hearts of Zimbabweans

Explaining the Note 7 promptS SA consumer body response

WATCH: How Gauteng's seamless minibus taxi fare works

Gupta's 'legal repaid' prepayment loan - Eskom

PROMOTED STORIES

7 reasons why you're crazy to buy Lotto tickets in a shop TheLotter

How Much Did Bacon Cost In Your Birth Year? Consumer Price Index (CPI) - Inflation Calculator and Rates

Dubai Mansions Offer Luxury You Can Only Imagine Mansion Global

How 3 Lottery Winners Blew Their Fortune TheLotter

An expert provides tips for entrepreneurs on how to tackle some of the key business issues that keep them awake at night.

Related links:
From selling boiled eggs at the stove, to Entrepreneur of the Year
New tech era means equal chance for big and small business

Get the latest with Fin24 Tech

Motor taxis lose bid to declare Uber anti-competitive
2016-10-20 10:58

The Competition Commission has struck down metered taxi drivers' bid to declare internet app Uber as engaging in predatory pricing and anti-competitive behaviour.

Exploding Note 7 prompts SA consumer body response

Note 7 'recall' kicks in as SA airports

Apple to end Mac update drought with October event

MORE

Tech Home | Multimedia | News

FOLLOW FIN24

MONEY CLINIC

- How to protect your assets in the event of divorce
- Debt-ridden single mom of three seeks advice
- What to do with R5m to spare?
- Investing in the Top-40 bucket
- The workings of debt mediation

Do you have a question about your finances? We'll get an expert opinion.

Click here...

VOTING BOOTH

Do you use all your downloaded apps on your smartphone?

Yes

Trending News Opinion Investing Lifestyle Video Sponsored Shop Forum

It's gone. Undo
What was wrong with this ad?
Inappropriate Repetitive Irrelevant

Google

Search

follow biznews.com

LEADERSHIP / September 15, 2016

Key battlegrounds: Zuma, Gordhan grapple for control of SA's finances

While President Jacob Zuma says there's no internal war at the ANC, those looking from the outside in are seeing a different picture. The battle is over South Africa's finances and there are some key institutions at play. In the summation from Bloomberg below, the reporters look at six areas in play. – Stuart Lowman

by Mike Cohen and Ferial Haffajee

(Bloomberg) – South Africa's government appears to be at war with itself, as President Jacob Zuma and his Finance Minister Pravin Gordhan grapple for control of the nation's finances.

While Zuma has downplayed the conflict, saying "there is no war within government," he's undermined Gordhan's authority by refusing to back him in stand-offs with the police, national tax agency and loss-making state airline.

Pravin Gordhan, South Africa's finance minister, right, sits beside Jacob Zuma, South Africa's president, left, before delivering his 2016 budget speech to parliament in Cape Town, South Africa, on Wednesday, Feb. 24, 2016. Photographer: Halden Krog/Bloomberg

Several government agencies have been drawn into the fight. Here are the key battlegrounds:

The National Treasury

The Treasury's tight rein over state finances has helped South Africa retain an investment-grade credit rating and its national budget is ranked among the world's most transparent. Zuma's decision to appoint little-known lawmaker David van Rooyen as his finance minister in place of the respected Nhlanhla Nene in December raised fears that the Treasury's independence was under threat and sparked a run on the rand and nation's bonds. After business and

GET THE DAILY B
The Best of Biznews in Your

Email Address

Signup Free

Trending

Billions disappea
ake "hole in hea
staff and pull plu
ombassies?

Can new Public F
save South Afric
speech suggests
less action

Malema: SA neec
Zimbabwe-style l
expropriation wi
compensation

Revealed: Pravin
private meeting
CEO Naseem Ho

ruling party leaders lobbied Zuma to change course, he reinstated Gordhan to the post of finance chief, which he had held from 2009 to 2014. Deputy Finance Minister Mcebisi Jonas said in March that the Gupta family, who are friends with Zuma, had offered him the position of finance minister before Nene was fired.

The Hawks

The elite police investigative unit known as the Hawks is investigating Gordhan, warning that he may face arrest for setting up an allegedly illicit surveillance unit when he led the national tax agency almost a decade ago. Gordhan says he hasn't broken any laws. While Zuma says he can't interfere in the case, opposition parties say he wants to use it to install a more pliant head of the Treasury. The Hawks have referred the case to the National Prosecuting Authority, which is deciding whether to charge Gordhan. Meanwhile, the Helen Suzman Foundation has filed a lawsuit aimed at overturning the police minister's appointment of Berning Ntlemeza as head of the Hawks. The High Court last year ruled that Ntlemeza was untrustworthy and lied under oath, a finding the Johannesburg-based non-profit group said rendered him unfit to hold office. The Pretoria High Court is due to hear that case in December.

The South African Revenue Service

Tom Moyane, who Zuma appointed commissioner of the South African Revenue Service in 2014, asked for an investigation into whether the tax agency had breached the law before he took over, triggering the probe by the Hawks into Gordhan's conduct. While the finance ministry oversees the tax agency, Moyane has defied Gordhan's authority and ignored his order to halt a management overhaul. The finance minister described Moyane's behavior as "totally unacceptable" and asked Zuma to fire him – a request the president refused.

The Banks

The nation's largest lenders were caught in the political crossfire when they said they will close accounts belonging to companies owned by members of the Guptas, who are in business with Zuma's son and employed one of his four wives. While Gordhan and two other cabinet ministers were tasked with investigating the decision, the banks said they weren't able to discuss it because they couldn't breach client confidentiality. Mineral Resources Minister Mosebenzi Zwane then announced that the cabinet had authorized a judicial inquiry to review the banking oversight system, and said the government had to ensure lenders didn't unfairly withhold banking services. Zuma rebuked Zwane and denied authorizing a judicial review. Gordhan said he saw no need for a probe because the courts offered adequate recourse to anyone who felt aggrieved by the banks.

State-Owned Companies

Gordhan and the Treasury have been in open conflict with several state companies over their management and spending plans. The Treasury accused power utility Eskom Holdings SOC Ltd. of stalling efforts to review its contracts, including one struck with a company in which the Guptas have a stake. It threatened legal action against state arms company Denel SOC Ltd. to stop it from entering into a joint venture in Asia with a company controlled by Gupta associates. Both companies and the Gupta family issued statements denying any wrongdoing.

The Financial Intelligence Center

The Financial Intelligence Center, which targets money laundering, has also come under attack, with Zwane calling for it to be overseen by the Ministry of State Security rather than the Finance Ministry. Zuma hasn't signed off on a law that's been passed by Parliament and will enhance the center's ability to investigate people with a high political profile, their families and their business connections after an objection from the Progressive Professionals Forum.

STUART LOWMAN

SEPTEMBER 16, 2016 | BANKS, BERNING NTLEMEZA, BNTS, CREDIT RATINGS, DAVID VAN ROOYEN, DENEL, ESKOM, FINANCES, FINANCIAL INTELLIGENCE CENTER, GOVERNMENT, GUPTA FAMILY, HAWKS, JACOB ZUMA, MCEBISI JONAS, MONEY LAUNDERING, MOSEBENZI ZWANE, NATIONAL TREASURY, NHLANHLA NENE, PRAVIN GORDHAN, SARS ROGUE UNIT, TOM MOYANE

YOU'LL LOVE OUR FREE DAILY NEWSLETTER

Email Address SIGNUP

RMB acted as sole adv
bookrunner for the
award-winning RBM
securing Internationa
for South African min

Read more ▸

BizNews Forums

BizNews Forums - Latest topics

name of the company is Wealth Pro
never heard of them. .
Oct 12, 2016 2:40 PM

Where to get retirement style acc
hol...
@elf_investor01 wrote: Where to ge
style account to buy and hold ETFs
could get tax breaks and have it in
a...
Oct 12, 2016 2:38 PM

1TM - What to do with 1Time Holdi
@Andrew wrote: I own a couple of
and after their suspension in 2012,
dormant in my share trading accou
anyth...
Sep 28, 2016 9:08 AM

Active vs passive debate - ongoin
@Ekkekan w
days pass wi
something or
topic. When i
the passive s
constantly r...

Sep 27, 2016 9:22 PM

Capitec Bank Credit Card

RSS Feed Widget

Open Letter to
Thuli Madonsel

Open Letter to Thuli M
from Jeff Koorbanally,
Investigator.

uncensoredopinion.co.za

CAS: BROOKLYN
429/05/2015

"FA4" 75

J175 (81/810713)

REPUBLIC OF SOUTH AFRICA

Summons No. 574/16

COPY: To be handed to accused

Case No. ...../.....

SUMMONS IN CRIMINAL CASE

Magistrate's Court

District Pretoria		Regional division Tshwane District
Held at Pretoria	Court 16	Date of trial 02-November-2016

TO THE ACCUSED

1. You are hereby summoned to appear in person before the above-mentioned court at 08:30 on the above-mentioned date and place in connection with the charge(s) of which the particulars is/are mentioned above and to remain in attendance.
2. An admission of guilt fine of ..... may be made on or before ..... to the Clerk of the above-mentioned Magistrate's Court or at any police station within the area of jurisdiction of the said Court.

Name Pravin Gordhan													
Address 93 Frans Oerder street Groenkloof													
Gender	Male	Occupation	Member of Parliament										
Age 67		Id No.	4	9	0	4	1	2	5	1	3	0	0	8	7

Particulars of charge(s):

Accused is/are guilty of the offence of fraud

in that upon or about the 18 day of October in the year 2010 and at or near BROOKLYN

the accused did wrongfully SEE ATTACHED ANNEXURES A-E

3. Warning: (i) Should any change in above-mentioned address take place before the proceedings are finally disposed of you are compelled to inform the official who served this summons upon you thereof.

   (ii) Failure to comply with either the above-mentioned warning or this summons renders you liable to a fine or a term of imprisonment not exceeding three months

4. Should you decide to dispute the charge(s) against you, and you wish to make use of legal practitioner, you may, if you cannot afford a legal practitioner, apply for legal aid at the local Legal Aid Officer.

2016 -10- 10

Date stamp of issuing office

Department of Justice and Constitutional Development

J175

ADMISSION OF GUILT UNDER SECTION 57 OF ACT 51 OF 1977

I do hereby acknowledge that I am guilty of the offence(s) set out in this summons.

Signature .....

Identity number | | | | | | | | | | | | | |

The amount of R ..... deposited this ..... day of ..... in the year of .....

Licence/Receipt No. ..... Dated .....

for the amount of R ..... produced.

IMPORTANT

1. Should you intend making use of the post the documents must be posted on a date which will be early enough to ensure that it will reach those formerly mentioned on or before the mentioned payment date.
2. Only cash, a money order, a postal order or a cheque guaranteed by a bank, will be accepted.
3. The summons, signed by you, must accompany the fine.

ANNEXURE "A" Case no: /2016

THE STATE

VERSUS

OUPA MAGASHULA	**ACCUSED 1**
IVAN PILLAY	**ACCUSED 2**
PRAVIN GORDHAN	**ACCUSED 3**

COUNT 1

THAT the accused are guilty of the crime of FRAUD read with sections 1, 103, 250, 256 and 257 of Act 51 of 1977 and further read with section 51(2) of Act 105 of 1997.

IN THAT upon or about 18 October 2010 and at or near PRETORIA in the Regional Division of Gauteng the accused, did unlawfully, falsely and with the intent to defraud give out and pretend to Nic Coetzee and/or Susan Visser and/or Khethang Mokoena and/or the South African Revenue Service (SARS) and/or the National Treasury that SARS was liable to pay a sum of One Million one hundred and forty one thousand one hundred and seventy eight rands and eleven cents R1 141 178.11 to the Government Employees Pension Fund on behalf of Ivan Pillay which amount was a penalty payable by Pillay to the Government Employees Pension Fund for taking early retirement for his own personal reasons, by requesting, recommending and approving that SARS should pay the said amount through a memorandum dated 18 October 2010.

AND did there and then and by means of the said false pretences induce Nic Coetzee and/or Susanna Visser and/or Khethang Mokoena and/or the South African Revenue Services or the National Treasury to their/its actual prejudice to pay the sum of One Million one hundred and forty one thousand one hundred and seventy eight rands and eleven cents R1 141 178.11 to the Government Employees Pension Fund on behalf of Ivan Pillay;

WHEREAS when the accused so gave out and pretended they well knew that in truth the South African Revenue Service (SARS) was not liable to pay the amount of One Million one hundred and forty one thousand one hundred and seventy eight rands and eleven cents R1 141 178.11 to the Government Employees Pension Fund on behalf of Ivan Pillay thereby committing fraud.

ANNEXURE "B" Case no: /2016

THE STATE

VERSUS

OUPA MAGASHULA	**ACCUSED 1**
IVAN PILLAY	**ACCUSED 2**
PRAVIN GORDHAN	**ACCUSED 3**

Alternative to count 1

That the accused are guilty of Theft read with sections 1, 92(2), 250, 256 and 257 of Act 51 of 1977, further read with sections 51(2) of Act 105 of 1997

IN THAT upon or about 18th October 2010 and at or near Pretoria in the Regional Division of Gauteng, the accused did unlawfully and intentionally steal an amount of One Million one hundred and forty one thousand one hundred and seventy eight rands and eleven cents R1 141 178.11, the property or in the lawful possession of Nic Coetzee and/or Susanna Visser and/or Khethang Mokoena and/or the South African Revenue Services (SARS).

ANNEXURE "C"

Case no: /2016

THE STATE

VERSUS

OUPA MAGASHULA **ACCUSED 1**

IVAN PILLAY **ACCUSED 2**

COUNT 2

THAT the accused are guilty of contravention of Section 86 read with section 1, 38, 39 and 45 of the Public Finance Management Act, Act 1 of 1999 and further read with Sections 1, 92(2), 250, 256 and 257 of Act 51 of 1977

IN THAT upon or about the date and place mentioned in count 1, accused 1 whilst being an Accounting officer for The South African Revenue Services (SARS), acting in concurrence with accused 2 and 3 wilfully and in a grossly negligent way, caused SARS to incur or failed to prevent irregular, fruitless and wasteful and unauthorised expenditure and thereby contravening the said sections of the Act.

ANNEXURE "D" Case no: /2016

THE STATE

VERSUS

OUPA MAGASHULA **ACCUSED 1**
IVAN PILLAY **ACCUSED 2**

Count 3

THAT the accused are guilty of the crime of FRAUD read with sections 1, 103, 250, 256 and 257 of Act 51 of 1977 and further read with section 51(2) of Act 105 of 1997.

IN THAT upon or about 7th February 2011 and at or near PRETORIA in the Regional Division of Gauteng the accused, did unlawfully, falsely and with the intent to defraud give out and pretend to Chrisna Susanna Visser and/or Human Resources of SARS and/or SARS that SARS was authorised to enter into an employment contract with Mr Visvanathan Pillay for a period of five (5) years commencing on 1 January 2011 and terminating on 31 December 2015;

AND did there and then by means of the said false pretences induce Chrisna Susanna Visser and of Human Resources of SARS and/or SARS to her /its prejudice to a remuneration package for a period of five (5) years instead of a remuneration package of three (3) years

WHEREAS when the accused so gave out and pretended, they well knew that in truth the South African Revenue Service (SARS) was only authorised to conclude a three (3) year contract with effect from 1 August 2010 with Mr Visvanathan Pillay and thereby committing fraud

ANNEXURE "E" Case no: /2016

THE STATE

VERSUS

IVAN PILLAY **ACCUSED 2**

PRAVIN GORDHAN **ACCUSED 3**

Count 4

THAT the accused are guilty of the crime of FRAUD read with sections 1, 103, 250, 256 and 257 of Act 51 of 1977 and further read with section 51(2) of Act 105 of 1997,

IN THAT upon or about 1st April 2014 and at or near PRETORIA in the Regional Division of Gauteng the accused, did unlawfully, falsely and with the intent to defraud give out and pretend to Chrisna Susanna Visser and/or Human Resources of SARS and/or SARS that SARS was authorised to enter into an employment contract with Mr Visvananthan Pillay as Deputy Commissioner for a period of four (4) years commencing on 1 April 2014 and terminating on 31 December 2018;

AND did there and then by means of the said false pretences induce Chrisna Susanna Visser and of Human Resources of SARS and/or SARS to her /its prejudice to an annual remuneration package of One million nine Hundred and eighty nine thousands five Hundred and eighty

nine rands and fifty two cents for a period of four (4) years when there was no approved internal memo or letter authorising same.

WHEREAS when the accused so gave out and pretended, they well knew that in truth the South African Revenue Service (SARS) was under no obligation to enter into a new employment contract or extend the employment contract entered into on 7 February 2011with Mr Visvanathan Pillay as it still had a period of a year to run to conclusion and thereby committing fraud.

GILDENHUYS MALATJI
ATTORNEYS

News history

Follow Us

Share 2

Firm Profile

DOWNLOAD OUR FIRM PROFILE

BBBEE

VIEW OUR BBBEE CERTIFICATE

We are a level two (AA) BBBEE and Value Adding supplier verified by Empowerdex.

STATEMENT BY GILDENHUYS MALATJI ON BEHALF OF MINISTER PRAVIN GORDHAN.

We have received the attached summons directed to Minister Pravin Gordhan to appear in the Regional Division, Pretoria Court 16 on 2 November 2016. The summons was received by Minister Gordhan's office in circumstances where we had expected that the National Director of Public Prosecutions ("NDPP") will interact with us in light of the correspondence exchanged between our office and the NDPP dating back to 18 May 2016. We had repeatedly requested that the NDPP afford Minister Gordhan the opportunity to make written and/or oral representations before making a decision on whether to prosecute or not. In particular, the NDPP, Adv. S. K. Abrahams, advised us on 25 August 2016 that he will only consider our request to make representations to him on whether to initiate a prosecution or not once the investigation has been concluded and a docket has been submitted to the National Prosecuting Authority. It is surprising that we have only received a letter dated 4 October 2016 but only sent to our office this morning advising that Minister Gordhan is an accused person. The correspondence exchanged between our office and that of the National Prosecuting Authority is attached.

The other difficult matter for Minister Pravin Gordhan to appreciate is the nature of the charges. We were firstly advised that he is not a suspect during May 2016. In August 2016, Minister Pravin Gordhan was advised that he should give a warning statement which by its very nature meant that he is now considered to be a suspect in relation to very clearly defined charges. It was contemplated by the HAWKS that he has contravened the provisions of Sections 1, 34 and 81(2) of the Public Finance Management Act, 1 of 1999, that he was guilty of corruption in terms of Section 3, 4 and/or 10 of the Prevention of Corrupt Activities Act, 12 of 2004 as well as Section 3 of the National Strategic Intelligence Act, 39 of 1994. These related to the establishment of an investigative unit at SARS and the early retirement of Mr Ivan Pillay as SARS Deputy Commissioner.

The charges now preferred against Minister Pravin Gordhan are charges of fraud alternatively theft insofar as it relates to Mr Pillay's early retirement. Fraud is defined as "the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another". In order to succeed with proving the crime of fraud, the State must establish the elements of the crime which are defined as first, a misrepresentation, second, prejudice or potential prejudice to another, third, unlawfulness and lastly an intention to so prejudice.

The Minister is taking counsel on all available legal avenues to bring this matter to an expedited end.

Tebogo Malatji
Gildenhuys Malatji Inc
11 October 2016

All the documents mentioned in this statement are available here

Official audio clip by Tebogo Malatji discussing above statement, please click here to download

Privacy Policy | Terms & Conditions

Copyright © 2012

GROUPON
THOUSANDS OF DEALS AT YOUR FINGERTIPS
Up to 70% off
INTERNATIONAL GETAWAYS
Click Here to Escape

Gordhan's fraud charges may be reviewed: Prosecutor

Wednesday 12 October 2013 21:50
SABC

Finance Minister Pravin Gordhan was asked to be ready tomorrow on Tuesday to appear in court over fraud charges. (SABC)

TAGS:
National Prosecuting Authority | NPA | Pravin Gordhan | Fraud | Hawks | Shaun Abrahams | spy tapes

Just barely a day after serving fraud charges against Finance Minister Pravin Gordhan, National Director of Public Prosecutions Shaun Abrahams says he won't hesitate to review the charges should Gordhan himself make a review application for such determination.

Following the announcement on Tuesday by Abrahams that Gordhan was being served with fraud charges and also summoned to appear in court in November, the rand dropped with high speed by more than 3%.

Again, just immediately after Abrahams's remarks before the Portfolio Committee on Justice that chances of reviewing the decision to charge the minister are very much possible, the rand recovered for the second time.

"I am more than willing to review any matter if somebody applies to me to review that matter. Now, Minister Pravin Gordhan, if he can submit submission to me with regard this matter and I will certainly look into the matter," says Abrahams.

Fending off the barrage of questions from members of the Portfolio Committee on Justice in Parliament, Abrahams was at pain telling MPs that it was not his decision to lay charges against Gordhan and two former South African Revenue Services (SARS) officials Ivan Pillay and Oupa Magashule.

"Firstly the decision to prosecute was made on the recommendation of prosecutors by the Special Director who heads the Priority Crimes Investigation Unit in consultation with the Director of Public Prosecutions of North Gauteng. Now, the NPA Act Section 179 of the Constitution and Section 22 Sub-section 2 of the National Prosecuting Act enjoins me as the National Director to review a matter."

> The NPA will consider its approach and make a decision at a later stage regarding the so-called spy tapes

Abrahams gave parliament his assurance that similar charges like that issued against the finance minister in future will be made to anyone who dares contravene the Public Finance Management Act (PFMA).

"We certainly are. And I give this committee my assurance that this is not the first, nor the last prosecution in respect of contravention of the PFMA Act."

Earlier in the day, just before Abrahams could even begin presenting the annual report, he recorded his objection for the presence of the DA MP and former NPA Senior Prosecutor Glynnis Breytenbach.

The matter was taken up to the Speaker of the National Assembly Baleka Mbete to look at it, or a possible submission of the substantive motion for future engagement between Breytenbach and the NPA while she is still under criminal investigation.

Meanwhile, the NPA will consider its approach and make a decision at a later stage regarding the so-called spy tapes.

The Constitutional Court has issued an order that it is not in the interests of justice to hear the NPA at this stage.

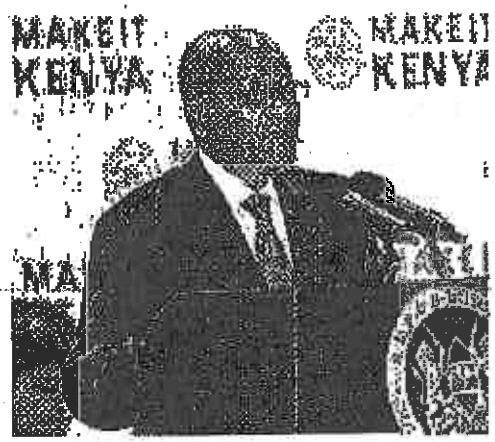
Abrahams says he is consulting with senior council on the matter. He says they have not yet had a chance to make a decision following the Supreme Court of Appeal's ruling that President Jacob Zuma's lawyers must argue why he should be granted leave to appeal against a High Court ruling that he should face corruption charges.

NPA chief backtracks over Gordhan charges

Abrahams says he did not take decision and is willing to review it Finance minister explores his legal options

Business Day · 13 Oct 2016 · 1 · Natasha Marrian, Genevieve Quintal and Khulekani Magubane

National Prosecuting Authority (NPA) boss Shaun Abrahams may have been too hasty in summoning Finance Minister Pravin Gordhan to court to face fraud charges.



On Tuesday, Abrahams said he was part of the collective that decided to charge Gordhan and two former South African Revenue Service (SARS) officials, Oupa Magashula and Ivan Pillay.

Hardly a day later, Abrahams took a step back in Parliament, saying he did not take the decision and that he was willing to review it.

The announcement by Abrahams that Gordhan was summoned to appear in court on November 2 on fraud charges relating to his authorisation of early retirement for Pillay, sent shock waves through the economy and raised fears of a Cabinet reshuffle.

It has also emerged that early retirement, such as Pillay's, is a common occurrence in the public service and was provided for by the Government Employees Pension Fund (GEPF).

Addressing the portfolio committee on justice and correctional services on the matter after briefing it on the NPA's annual report, Abrahams said the decision to charge Gordhan was a result of work by his team of prosecutors.

"Section 22 (2) of the NPA act enjoins me to review a matter and invite representation from the accused and complainant."

But on Tuesday, Gordhan's attorney Tebogo Malatji intimated that Abrahams had acted in bad faith for failing to allow the minister an opportunity to make representations.

He revealed that Abrahams had given a written undertaking to consider a request for the minister to make representations once a docket from the Hawks was received. However, Abrahams failed to do this and Malatji received a letter dated October 4 on Tuesday, shortly before the announcement of the summons, indicating that Gordhan was an accused person.

Gordhan said he was exploring his legal options.

There are three possible options in this regard — one is a stay of prosecution, the second is to simply face the charges and the third is to ask Abrahams to review the decision in terms of Section 179 of the Constitution.

Abrahams said this section provided that the national director of public prosecutions may intervene in the prosecution process when policy directives are not being complied with and review a decision on whether to prosecute.

ANC treasurer-general Zweli Mkhize was the first "top six" leader of the party on Tuesday to criticise the case against Gordhan, describing the charges as "not convincing" and "thin".

"The issues that are being raised are a bit tricky in the sense that people retire and get brought back. If there was any error in that, it becomes an administrative, internal issue that the Department of Public Service and Administration generally handles," Mkhize said, adding

EARLY RETIREMENT SUCH AS PILLAY'S IS COMMON IN THE PUBLIC SERVICE

that it was his personal view.

Gordhan will face two counts of fraud. In the first he is accused of misrepresenting to the GEPF and to SARS that Pillay was entitled to full pensionable benefits in terms of the employee-initiated severance package to the tune of R1.1m.

The minister faces another count for the extension of Pillay's employment contract.

The GEPF on Wednesday said in terms of its rules, members could retire at any time after their 55th birthday and before they turned 60 with written permission from their employer.

"The legislation provides for an executive authority to allow for an employee to go on early retirement and concomitantly the GEPF law requires that actions taken by the employer, which places an additional financial obligation on the fund, must be made good by the employer," the statement said.

The fund said that it played no role in the decision to approve or disapprove the early retirement of an employee. Three unions working in the public sector said it was common for employees to take early retirement if they required the money and many would then be re-employed on a contract basis.

Mkhize said, fortunately, the matter would be ventilated in court and described the Treasury as "sticklers" on the Public Finance Management Act.

It would therefore be interesting to see how the court interpreted the matter, he said.

"Certainly in a number of those instances it's not common that an executive authority is the one who is charged, it tends to be the administration that manages a lot of those issues. So it tends to be a very nebulous process to deal with that matter."

WEBBER WENTZEL

in alliance with > Linklaters

Shaun Abrahams
National Director of Public Prosecutions
National Prosecuting Authority
Victoria and Griffiths Mxenge Building (Corner Westlake & Hartley)
123 Westlake Avenue
Weavind Park, Silverton
Pretoria
0184

90 Rivonia Road, Sandton
Johannesburg, 2196
PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa
Docex 26 Johannesburg
T +27 11 530 5000
F +27 11 530 5111
www.webberwentzel.com

JP Pretorius SC
Acting Special Director of Public Prosecutions
Priority Crimes Litigation Unit
National Prosecuting Authority
Victoria and Griffiths Mxenge Building (Corner Westlake & Hartley)
123 Westlake Avenue
Weavind Park, Silverton
Pretoria
0184

URGENT

By hand:
By email: skabrahams@npa.gov.za; kbenjamin@npa.gov.za
By fax: 012 843 2220

Your reference	Our reference	Date
Summons No 574/16 CAS: Brooklyn 427/05/2015	V Movshovich / P Dela / D Cron / D Rafferty / T Dyo 3012807	14 October 2016

Dear Sirs

Summons in criminal case against, *inter alios*, the Honourable Minister of Finance Mr Pravin Gordhan: Summons 574/16; CAS: Brooklyn 427/05/2015

1. We act for Freedom Under Law NPC and the Helen Suzman Foundation, non-governmental organisations concerned with, amongst other things, the promotion of the rule of law and the protection of our constitutional project ("our clients").

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: RB Africa MS Alp OA Amposo-Addi RL Appelbaum AE Bennett DHC Botha AR Bowley PG Bradshaw EG Brandt JL Brink S Browne MS Burger RI Carrim T Cassim RS Coelho KL Collier KM Colman KE Costa K Couzyn CR Davidow JH Davies PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman KL Gawith MM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PM Kingston CJ Kok MD Kota J Lamb L Marais S McCafferty V McFarlane MG McIntosh SI McKenzie M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu J Moolman VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe A Ngubo ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips HK Potgieter S Rajah D Ramjettan GI Rapson NJA Robb DC Rudman M Seeber JW Scholtz KE Shepherd DMJ Simaan AJ Simpson J Simpson N Singh P Singh MP Spalding L Stein PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen M van der Walt H van Dyk A van Niekerk JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken Chief Operating Officer: SA Boyd

Webber Wentzel is associated with ALN

2. We address this letter on behalf of our clients acting in their own and in the public interest.

3. On 11 October 2016, summons no. 574/16 was served on, *inter alios*, the Honourable Minister of Finance, Mr Pravin Gordhan, MP. In terms of annexures A, B and E thereto ("**the charge sheet**"), the Honourable Minister is charged with:

3.1 fraud, alternatively theft, in relation to the alleged payment by the South African Revenue Service ("**SARS**") to the Government Employees' Pension Fund ("**the Fund**") of R1,141,178.11 on behalf of Mr Visvanathan Pillay, where such sum was allegedly a penalty payable by Mr Pillay to the Fund (count 1 and the alternative to count 1 of the charge sheet); and

3.2 fraud in relation to the re-hiring of Mr Pillay in or around April 2014 (count 4 of the charge sheet),

(collectively, "**the charges**").

4. As prefaced in our previous correspondence, your conduct in pressing baseless charges against the Minister of Finance has, and continues to have, devastating consequences for the Republic and its economy. This is a matter of paramount public interest and our clients intend to review and set aside your decisions to institute the charges against the Minister of Finance, under the constitutional principle of legality and otherwise, unless you withdraw the decisions or furnish a cogent basis for the actions taken. It has been held in a long line of cases that our clients have standing and an interest to bring such proceedings.

5. The charges, such as they are, are unsustainable in law and fact, and may be actuated by conscious recklessness or ulterior purposes on the part of the National Prosecuting Authority ("**NPA**").

6. In respect of charge 1 (fraud, alternatively theft), we note the following:

6.1 Mr Pillay was clearly entitled under the relevant legislation governing public servants' retirement to retire from the age of 55. This was an integral part of his employment relationship with the South African Revenue Service ("**SARS**").

6.2 In terms of the Rules of the Government Employees Pension Fund ("**GEPF**"), however, a retirement before 60 years of age constitutes retirement prior to the

pension retirement date and a penalty (by way of a deduction) would normally be applicable to the payout on such early retirement.

6.3 All the relevant legislation, however, provides for that penalty or deduction to be paid by SARS or the Government of the Republic of South Africa:

6.3.1 Rule 20 of the Rules to the Government Employees Pension Fund Law, 1996, ("**GEPF**") states that "***Compensation to the fund on retirement or discharge of a member prior to attainment of the member's pension retirement date.*** *Without detracting from the generality of section 17(4) of the Law, the Government or the employer or the Government and the employer shall, if a member, except for a reason in rule 14.1.1(a), retires, becomes entitled in terms of Rule 14.8 to the pension benefits in terms of a severance package, referred to in that Rule, or is discharged prior to his or her pension retirement date and at such retirement, entitlement or discharge in terms of the rules becomes entitled to the payment of an annuity or gratuity or both an annuity and a gratuity in terms of the rules, and any of these actions result in an additional financial liability to the Fund, pay to the Fund the* ***additional financial obligations as decided by the Board acting on the advice of the actuary.*** *Such payment to the Fund, with interest to account for any delay in payment, shall be in accordance with a schedule approved by the Board.*"

6.3.2 Section 17(4) of the Government Employees' Pension Fund Law, 1996, which states that: "*If any action taken by the employer or if any legislation adopted by Parliament places any additional financial obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be* ***shall pay to the Fund an amount which is required to meet such obligation***";

6.3.3 Government Employees Pension Fund Members' Guide, page 34, which reads "*Where the employer granted permission for your early retirement, your benefits will not be scaled down. However,* ***your employer will pay an additional liability.***"

6.4 In light of the above alone, the charges are unsustainable.

6.5 The position is simply reinforced by the following contemporaneous documentation related to the retirement of Mr Pillay:

6.5.1 The interoffice memorandum dated 27 November 2009 from Mr Pillay to the then Commissioner of SARS (annexed marked "A");

6.5.2 The Legal and Policy Division memorandum dated 17 March 2009 (annexed marked "B");

6.5.3 The memorandum dated 12 August 2010, and approved by the Minister on 18 October 2010 referred to in count 1 (annexed marked "C").

6.6 The above correspondence not only references the relevant legislation, but also:

6.6.1 sets out cogent reasons for Mr Pillay's circumstances; and

6.6.2 cites the fact that over 3000 government employees have taken early retirement with full benefits.

6.7 It is plain from the legislation that the retirement of Mr Pillay did not require the Minister's approval at all: SARS and the government would be liable to pay any early retirement penalty. But to the extent that the Minister gave his approval, it was clearly in line not only with a raft of legislation but also ample precedent.

6.8 The allegation that the NPA could ever prove fraud or theft in those circumstances in relation to the payment of the penalty is preposterous.

7. In respect of charge 4 (fraud), we note the following:

7.1 The charge is inchoate and incomprehensible.

7.2 It is initially alleged that SARS was not authorised to employ Mr Pillay as Deputy Commissioner for a period of four years from 1 April 2014 to 31 December 2018. The alleged issue is thus authority. There is nothing in law or fact, however, which states that SARS was not empowered to hire Mr Pillay as Deputy Commissioner for this period.

7.3 Under the relevant legislation, SARS is, in fact, empowered to employ its Deputy Commissioner. Section 5(1)(a) of the SARS Act empowers SARS to "*determine its*'

own staff establishment, appoint employees and determine their terms and conditions of employment in accordance with section 18".

7.4 In respect of senior management SARS employees, the Minister of Finance is statutorily charged with approving the terms and conditions of their employment (under section 18(3) of the SARS Act).

7.5 That is precisely what happened in this case. SARS appointed Mr Pillay and the Minister of Finance approved his terms and conditions. The employment agreement is attached marked "D".

7.6 Thus the alleged representation (if it occurred at all) is correct in law and is in no way unlawful.

7.7 There is also no basis for the alleged prejudice. Mr Pillay, with a proven track record and years of exemplary service to SARS, would be rendering services as the Deputy Commissioner for the amounts which would be paid to him under the employment agreement. In any event, Mr Pillay's employment with SARS could be cancelled on one month's written notice - accordingly, if SARS ever felt aggrieved or prejudiced by Mr Pillay's employment, this could have been remedied on one month's notice.

7.8 The fraudulent intention is allegedly grounded in the fact that the Minister of Finance knew that SARS was under no obligation to enter into a new employment agreement. But the alleged misrepresentation is that the Minister of Finance stated that SARS was empowered (not obliged) to hire Mr Pillay, and so this intention is irrelevant to the alleged fraudulent conduct.

7.9 Ultimately, the charge of fraud is nonsensical, is bad in fact and law, and cannot be sustained.

8. In respect of both charges, even if it is assumed (contrary to the dispositive analysis above) that the conduct of the Minister of Finance was not strictly in accordance with the law, there is no basis for imputing a fraudulent or furtive intention to him and none has been suggested.

9. Indeed, in previous correspondence from the Directorate for Priority Crime Investigation, it has never been alleged that Minister Gordhan committed fraud or theft. Rather, the

allegations were breaches of the Prevention and Combating of Corrupt Activities Act, 2004, Public Finance Management Act, 1999 and National Strategic Intelligence Act, 1994.

10. In light of the above, please confirm, in writing and by no later than 16:00, 21 October 2016, that the charges against Minister Gordhan will be withdrawn.

11. Should you refuse or fail to withdraw the charges as set forth above, then, for the purposes of assessing their position and the breaches of your constitutional and statutory obligations, our clients require you to furnish the following information and reasons, by no later than 16:00, 21 October 2016:

11.1 the record of decision in respect of the decision to issue the summons and prefer the charges against Minister Gordhan ("**the Decisions**");

11.2 full written reasons, and substantiating documents, which support the Decisions;

11.3 without derogating from the above, all reasons explaining why, despite the factual matrix in relation to the charges being known (and being in the public realm) for many years, the Decisions were taken now;

11.4 without derogating from the above, the evidence (alternatively a summary thereof) proving:

11.4.1 the unlawful intention required successfully to prosecute the charges;

11.4.2 that Minister Gordhan made any misrepresentation as required for the purposes of establishing fraud and that such misrepresentation induced the persons cited in counts 1 and 4 of the charge sheet to act to their prejudice;

11.4.3 the act of appropriation (or *contrectatio*) attributed to Minister Gordhan in respect of the alternative charge of theft.

11.5 whether any other instances of State employees taking early retirement with full pension (without any penalty payment being paid by the employee) are / have been investigated and are being considered for criminal prosecution on the basis of fraud or theft;

11.6 whether any other instances of State employees being hired after taking early retirement are / have been investigated and are being considered for criminal prosecution on the basis of fraud;

11.7 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement with full pension (and no penalty payment by such employee); and

11.8 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement and being rehired.

12. Should you not unconditionally withdraw the charges against the Minister or furnish the information sought within the time periods set forth above, our clients will assume that no reasons for the Decisions, and no documents other than the documents annexed to this letter, exist in support of the charges.

13. Our clients may then, without further notice, seek to exercise their rights in law on an urgent basis.

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

CONFIDENTIAL

Internal Memorandum

"A"

Dear Cupa

PURPOSE

The purpose of this memorandum is to explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the Minister certain related matters that will flow from my decision to take early retirement.

DISCUSSION

As you know, I have been working in the Public Sector for the past 15 years, 10 years which have been spent with SARS. For the most part of this period, especially my tenure with SARS, I was expected to perform at a very high level accompanied by the accountabilities that go with the performance of such a high level job. This exacted its toll from me in the sense that my health condition is slowly deteriorating. Added to this, my family responsibilities, for a long time, suffered on account of the dedication required by my job. With the aforementioned in mind, although still not easy, I have decided to take early retirement

However, I am still enthusiastic about SARS and the tremendous contribution it makes towards the establishment of an even better South Africa for all its citizens. With a view thereto, I am willing to serve in SARS in a different capacity where the demands of such a job will positively support the reasons why I am in the first instance taking early retirement.

Should you favorably consider my proposal to serve SARS in a different capacity, such service will have to be subject to that I be appointed as a contract employee. This will allow me more flexibility in terms of making a decision to finally part ways with SARS, should I come to such a decision. The second condition will be that my early retirement is approved in terms of the provisions of section 16(6)(a) and (b) of the Public Service Act, meaning that the Minister, in terms of the provisions of the aforementioned section approve that the penalty imposed on my pension benefits per Rule 14.3.3 (b) of the GEPF Rules, be paid by SARS to the GEPF. The GEPF has indicated that the penalty amount on my pension benefits that the employer has to pay on my behalf is R1 292 732,66.

RECOMMENDATION

My recommendations are that you please:

- Take note that I intend to take early retirement
- Consider to approve that I be reappointed in a different capacity in SARS on a contract basis; and
- Consider to recommend to the Minister that he approves that the penalty on my pension benefits be paid on my behalf to the GEPF by the employer.

Regards

Ivan Pillay

27/11/2009

"B"

Memorandum	South African Revenue Service Suid-Afrikaanse Inkomstediens Uphiko lwezimali Ezinganayo eNingizimu Afrika Tirelomatlotla ya Afrika-Borwa
Legal and Policy Division	Pretoria Head Office 299 Bronkhorst Street, Nieuw Muckleneuk, 0181 P O Box 402, Pretoria, 0001 Telephone (012) 422-4000 E-mail: vsymington@sars.gov.za

TO	COMMISSIONER		
FROM	Vlok Symington	TEL	(012) 422-4929
2009 march 17	2009 March 17	FAX	(012) 422-4952
SUBJECT	EARLY RETIREMENT: MR IVAN PILLAY		

Dear Commissioner,

Background

Mr Ivan Pillay requested me to consider certain elements that form part of his decision to apply for early retirement from the Government Employees Pension Fund (the GEPF). These elements are:

1. His application for early retirement from the GEPF;
2. His application to the Minister of Finance to waive the early retirement penalty; and
3. His request to be appointed on contract after his early retirement from the GEPF.

The technical position

Approached individually, all three elements are technically possible under the rules of the GEPF read together with the employment policies of SARS. Mr Pillay has reached the required age for early retirement, he is entitled to request the Minister to "waive" the early retirement penalty, and no technicality prevents SARS from appointing him on a contract after his retirement from the GEPF.

Financial risk

I am not a registered financial advisor and my views in this document is therefore not intended to be financial advice and should not be construed as such.

Mr Pillay opted for the early retirement package to be paid in the form of a monthly pension and a once-off gratuity. Because of the current global financial turmoil and his personal adversity to risk his choice in favour of a pension and gratuity split is prudent.

However, the financial soundness of his decision to apply for early retirement is dependent on whether the Minister approves the SARS payment of the benefit penalty to the GEPF as well as whether SARS contracts with him for a period of post-retirement employment. This is so because of the relatively young age at which he will be retiring vis-à-vis his projected life expectancy. If the Minister does not approve his request or if SARS does not contract with him after his retirement, the financial risk of his decision will increase substantially and my advice then would be for him to review his application for early retirement and to possibly withdraw it.

Summary

Mr Pillay's application for early retirement should be considered together with his application for the Minister to approve the benefit penalty payment by SARS as well as his request for post retirement contract employment at SARS. If his application is approved as a package the financial risks in the context of his circumstances are probably minimal. However, if the Minister is unable to approve his request relating to the penalty or if SARS is not in a position to contract with him after retirement; then his decision to apply for early retirement should probably altogether be withdrawn.

Kind regards

Vlok Symington

Office of the
Commissioner

Office
Pretoria

Enquiries
Tania Kirby

Telephone
(012) 422 5100

Facsimile
(012) 422 5189

Room
Block A2

Reference

Date
12 August 2010

Mr PJ GORDHAN
Minister of Finance

South African Revenue Service

Pretoria Head Office
299 Bronkhorst Street,
Nieuw Muckleneuk, 0181
Private Bag X923, Pretoria, 0001
SARS online: www.sars.gov.za
Telephone (012) 422 4000

Dear Minister

EARLY RETIREMENT OF DEPUTY COMMISSIONER IVAN PILLAY WITH FULL RETIREMENT BENEFITS

1. PURPOSE

The purpose of this memorandum is to request approval from the Minister for the early retirement of Deputy Commissioner Ivan Pillay with full retirement benefits from the GEPF as contemplated in Rule 14.3.3(b) of the Government Employees Pension Law, 1996, read with section 19 of the SARS Act and section 16(2A)(a) of the Public Service Act, 1994, as amended, with effect from 1 September 2010.

In addition, approval is requested to retain Mr Pillay as Deputy Commissioner of SARS on a three year contract with effect from 1 September 2010.

2. BACKGROUND

Ivan joined the Public Service in January 1995 and has been in the employ of SARS for more than 10 years. For the majority of this period especially during his tenure in SARS, he has held a very senior position with the accompanying accountabilities that go with such a high level job.

Ivan has always excelled at his job and made a significant contribution towards the establishment of SARS as the highly respected organisation it is today.

For personal reasons, he has requested to take early retirement with effect from 1 September 2010. He is currently 56 years old.

Given Ivan's critical skills, experience and leadership, he has agreed to remain in the employ of SARS as Deputy Commissioner after his retirement on a three year contract to assist with the on-going leadership transition.

3. MOTIVATION FOR RETIREMENT WITH FULL BENEFITS

In the light of Ivan's exemplary service and sacrifice in the service of the people of South Africa, it is requested that he be granted early retirement with full retirement benefits as provided for in section 19 of the SARS Act, 1997, read with section 16(2A)(a) of the Public Service Act, 1994.

Over the past 6 years the GEPF has approved over 3000 requests from various government departments for staff members to retire before the age of 60 with full benefits. The statistics are attached to this memorandum as received from the GEPF (Appendix A)

In addition, the former and current Minister of Finance have approved at least five such requests over the past two years (see Appendix B).

4. MOTIVATION FOR REAPPOINTMENT ON A THREE YEAR CONTRACT

Ivan's wealth of knowledge and experience within SARS and his leadership position as Deputy Commissioner is an invaluable asset to the organisation. This is particularly important given the on-going leadership transition within the organisation following the departure of the Minister and the recent restructuring of the top leadership of the organisation as part of the revised Operating Model

Ivan's continued guidance, leadership and knowledge over the next three years will provide critical continuity as well as playing an important mentoring role in developing the next generation of SARS leaders.

In addition, it should be noted that there is precedent for the termination of employment and immediate rehiring of the same person under different conditions of employment within the public sector.

In this regard, advice was sought from the Acting Director-General of the Department of Public Service and Administration (DPSA) Mr. Kenny Govender regarding the proposed early retirement of Mr Pillay and his retention on a three year contract. He confirmed that there is no restriction on the appointment to the public service or to the same department of a person who has left on an Employee Initiated Severance Package (EISP) and that he was aware of previous such cases.

5. FINANCIAL IMPLICATIONS

The financial implications of early retirement with downscaled benefits for Ivan will be considerable as his lump sum benefit will decrease by R243 805 to R2 121 443 and his monthly pension by R4 740 to R48 563.

The financial implications for SARS, should approval be granted to allow Ivan to take early retirement with full retirement benefits, will be an amount of R1 268 345.99 which SARS will be liable to pay the GEPF in terms of the provisions of section 17 (4) of the GEPF Law, 1996.

Should the Minister approve this submission, the authorisation and allocation for this payment will follow the normal governance process within SARS including engagement with the SARS Human Resources Committee and the SARS EXCO.

[Note: The above figures reflect the costs as at 1 August 2010. These costs reduce each month which elapses.]

6. RECOMMENDATION

It is recommended that the Minister approve Mr Pillay's early retirement from SARS with effect from 1 August 2010 without downscaling of his retirement/pension benefits as provided for in GEPF Rule14.3.3 as well as section 19 of the SARS Act, 1997, as amended, read with section 16(2)(a) of the Public Service Act, 1994, as amended.

In addition it is recommended that the Minister approve the retention of Mr Pillay as Deputy Commissioner of SARS on a three year contract with effect from 1 August 2010. The remuneration of Mr Pillay in terms of the contract will be at the same cost to company as his current package.

OUPA MAGASHULA
COMMISSIONER: SARS
DATE: 12 August 2010

RECOMMENDED/NOT RECOMMENDED

N NENE
DEPUTY MINISTER OF FINANCE
DATE:

APPROVED/NOT APPROVED/NOTED

PJ GORDHAN
MINISTER OF FINANCE
DATE: 13 October 2010

SARS

FIXED TERM EMPLOYMENT CONTRACT

entered into between:

THE SOUTH AFRICAN REVENUE SERVICE
("the Employer")

and

Visvanathan Pillay
Identity number: 5304185734085
("the Employee")

1. APPOINTMENT

1.1 The Employer employs the Employee and the Employee accepts the appointment and shall render services to the Employer in the capacity set out in Employee's offer of employment, or any other similar capacity required by the Employer from time to time.

2. DURATION

2.1 The Employee's employment with the Employer is for a fixed term period.

2.2 This fixed term contract of employment shall commence on 01 April 2014 ("the Commencement Date") and shall continue until 31 December 2018 ("the Termination Date") and shall terminate on completion of the aforesaid period by the effluxion of time.

2.3 In the event that the duration of this contract of employment between the Employer and Employee is linked to the performance and/or completion of a particular task or project, the task or the project concerned will be clearly specified and identified in the Employee's offer of appointment,

Visvanathan Pillay

which forms part of this contract.

2.4 On the Termination Date this contract and the Employee's employment will expire automatically through the effluxion of time. It is specifically agreed that as termination of this contract of employment is through the effluxion of time, the termination will not constitute a dismissal in terms of the Labour Relations Act, 1995.

2.5 It is specifically agreed and recorded that on the termination of the Employee's employment s/he will have no expectation of continued employment with the Employer and no expectation of being engaged on a further fixed term contract either on the same or similar terms or on less favourable terms.

2.6 Operational requirements may necessitate a reduction of staff levels prior to the effluxion of the fixed term and the Employer reserves the right to act accordingly.

3. FUNCTIONS AND DUTIES OF EMPLOYEE

3.1 The Employee will perform functions and duties in a professional manner and to the best of his/her ability as set out in the job profile contained in offer of employment. Any change in the job profile will be set out in a letter which will replace the Employee's offer of employment.

3.2 In addition to the functions and duties contained in the role profile, the Employee will:

3.2.1 perform such duties as the Employer or its duly authorised representative may from time to time assign to him or her;

3.2.2 perform his or her duties in a timely, professional and responsible manner as the Employer or other authorised representative of the

Visvanathan Pillay

Employer may direct from time to time:

3.2.3 in the discharge of his or her duties, observe and comply with all resolutions, directives, rules, orders, policies and procedures as the Employer may give from time to time;

3.2.4 devote all his or her time and attention to his or her duties under this agreement during normal working hours;

3.2.5 not communicate, publish or distribute to any person outside the Employer's employ, either during the continuance of his or her employment under this agreement or thereafter, any official documents, reviews, research results, articles and/or publications whether produced by the Employee or not, without the prior written permission of the Employer or other duly authorised representative of the Employer;

3.2.6 at such intervals as the Employer may direct, report fully on the results obtained and knowledge acquired by him/her in any research work done by him/her both during and outside working hours;

3.2.7 use his or her best endeavours to properly conduct, improve, extend, promote, protect and preserve the interests and reputation of the Employer;

3.2.8 not engage in activities that would detract from the proper performance of his or her functions and duties.

3.2.9 comply with all the laws of the Republic of South Africa.

3.2.10 undertakes to inform the Employer forthwith of any substantive criminal or civil proceedings which may be instituted against him or

Visvanathan Pillay

her and the nature thereof.

3.3 The Employer may, after consulting with the Employee, change or amend the Employee's duties and responsibilities from time to time in accordance with the Employer's operational requirements.

4. REMUNERATION

4.1 The Employee will be paid an all-inclusive remuneration.

4.2 The Employee agrees that his/her remuneration package will be reviewed annually in line with the Employer's Pay policy and procedures, as applicable from time to time and copies of which are available to the Employee from the HR department. A key element of this review will be the measurement of the Employee's performance against the standards of performance agreed to with the Employer represented by the Employee's line manager. The Employee will be advised of any increase to his/her remuneration package by means of a letter.

4.3 The Employee is excluded from the Government Employees' Pension Fund Membership in accordance with section 5 (d) of the Government Employees' Pension Law, 1996 (Proclamation 21 of 1996).

4.4 The Employer and the Employee may, by agreement, structure an all-inclusive remuneration package to allow for a medical aid allowance and a car allowance according to the Employer's rules and guidelines as applicable. In the event that the Employee structures a medical aid allowance into his/her package, the Employee may only belong to one of the Employer's accredited medical aid schemes selected from time to time and the Employer will only process the Employee's contributions to such accredited medical aid schemes on behalf of the Employee and at the Employee's request, monthly in arrears, the cost of which shall form part of the Employee's remuneration package reflected in the Offer of employment.

4.5 The Employee will receive his/her remuneration in twelve equal monthly payments on the 15th of every month. Should the 15th fall on a weekend or public holiday the Employee will be paid on the day immediately preceding such weekend or public holiday.

4.6 The Employer does not provide any post-retirement medical aid benefits.

5. PERFORMANCE MANAGEMENT

5.1 The Employee's performance contract will be agreed to with a person appointed by the Minister. Copies of the performance management policy are available from the HR department and the employee is expected to familiarise himlherself with it.

6. PERFORMANCE BONUS

6.1 The terms and conditions of the Employee's participation on the above scheme are set out in more detail on the Employer's Performance Management and/or Incentive Scheme Policies, if applicable from time to time to the Employee, who agrees to access such policies, from the HR department.

7. WORKING HOURS AND OVERTIME

7.1 The Employee's ordinary hours of work are 9 hours per day, inclusive of a 60 minute meal interval. However the Employee will be required to work such additional time as is necessary to properly perform all the functions of the job.

7.2 Overtime is paid only to those employees who are entitled to overtime in terms of the Overtime policy and in accordance with the policy.

8. LEAVE

8.1 All leave is regulated by the Employer's Leave Policy, applicable from time to time, a copy of which is available from the HR department.

9. CONFIDENTIALITY

9.1 The Employee agrees not to divulge or discuss his or her remuneration package with colleagues, as the Employer regards such matter as confidential.

9.2 The Employee shall not, either during the term of this agreement or thereafter, use any Employer related information including third party information, for his or her own benefit or otherwise to the detriment or prejudice of the Employer, except in the proper course of his or her duties, divulge to any person any trade secret or any other confidential information concerning the business or affairs of the Employer which may come to the Employee's knowledge during his or her employment.

9.3 In particular, the Employee shall not at any time during or after termination of his or her employment, reveal to any person, firm or corporation, any of the trade secrets, technical know-how and data, drawings, systems, methods, software, processes, lists, programs, marketing and/or financial information, confidential information, or any information concerning the organisation, functions, transactions or affairs of the Employer, and shall not use or attempt to use any such information in any manner which may injure or cause loss either directly or indirectly to the Employer or may be liable to do so.

9.4 The Employee agrees to sign and execute the Employer's Oath of Secrecy as a precondition to this contract of employment. Failure by the Employee to execute the said Oath will render this agreement null and void

10. EMPLOYER RESOURCES

10.1 The Employee acknowledges and accepts that the Employee's resources, including but not limited to servers, computers, printers, telefax machines, telephones/fixed lines, mobile phones, postal services, e-mail facilities and internet facilities ("the resources") are for conducting the Employer's business.

10.2 The Employee shall have no expectation of privacy in relation to the use of the resources provided by the Employer.

10.3 The Employee understands and accepts that the Employer may, at its discretion, monitor the Employee's use of the resources and intercept, acquire, read, view, inspect, record and/or review any and all communications created, stored, transmitted, spoken, sent, received or communicated by the Employee on, over or in the resources or otherwise. The Employee hereby consents to the Employer doing so.

10.4 The Employee shall not remove, or cause to be removed by any means including electronic transfer from any of the Employer's premises, any documents, data, material, equipment or property without the written consent of the Employer

11. SECURITY

11.1 The Employee agrees to submit his/her personal belongings and office or workstation to a search by any person designated by the Employer whenever the Employer deems it necessary and reasonable.

Visvanathan Pillay

12. EMPLOYER PROPERTY

12.1 All catalogues, correspondence, letters, memoranda, note books, order books, documents, papers, goods, samples, equipment and any other articles of any kind whatsoever that may be made available to or come into the possession of the Employee during the period of his employment under this agreement, shall belong to and remain the property of the Employer, both during the Employee's employment and after termination of his employment, at which time the Employee shall deliver to the Employer all such items in his or her possession with the assurance that no such articles remain in his or her possession.

12.2 Upon the termination of the Employee's employment, s/he must return to the Employer all property, of whatsoever nature, in his or her possession which belongs to the Employer.

12.3 In addition, the Employee must return to the Employer all other material containing information relating to the affairs of the Employer, regardless of whether or not such material was originally supplied by the Employer to the Employee, including but not limited to: records, discs, accounts, letters, notes or memoranda.

13. INTELLECTUAL PROPERTY

13.1 Intellectual property rights include, but are not limited to, trademarks, service marks, trade names, domain names, designs, patents, petty patents, utility models and like rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing, copyright (including, without limitation, rights in computer software and data bases, and moral rights), rights in inventions, designs, know-how, confidential information, trade secrets, other intellectual property rights and all rights or forms of protection having equivalent or

similar effect to any of the foregoing which may subsist in any country in the world.

13.2 Any intellectual property rights of whatsoever nature arising out of the performance by the Employee of his obligations in terms hereof are, to the extent that they do not vest automatically in the Employer, hereby irrevocably ceded and assigned in perpetuity to the Employer, it being further recorded that the Employer shall be entitled to cede and assign all such rights to any other person without limitation.

13.3 The Employer and/or such other person, as the case may be, shall be entitled to dispose of any and all intellectual property rights in their sole discretion, anywhere in the world, without the payment of any additional consideration to the Employee.

13.4 The Employee undertakes to sign all documents and to do all things necessary, at the cost of the Employer, to obtain or to record such intellectual property rights at any intellectual property rights registry in the world.

14. TERMINATION OF EMPLOYMENT

14.1 This fixed term contract of employment shall terminate on the Termination Date by the effluxion of time.

14.2 Notwithstanding 14.1 above, either party may terminate this contract by giving the other party one (1) month's written notice of termination.

14.3 The Employer may also terminate this contract by paying the Employee the amount of salary s/he would have received during the required period of notice in lieu of giving him that period of notice.

14.4 If the Employee is incapable of performing his/her duties under this contract because of mental or physical illness or injury, the Employer may terminate his/her employment for incapacity. To assist the Employer in deciding whether to terminate employment on these grounds the Employer may require the Employee to undergo (at the Employer's expense) a medical examination by a registered medical practitioner. The Employer may rely on any report or recommendations made available to the Employer as a result of that examination, along with any other relevant medical reports or recommendations received.

14.5 Nothing in this contract prevents the Employer from exercising its right to dismiss the Employee without notice at any stage for misconduct, incapacity, poor performance or the operational requirements of the Employer, or for any other reason justified in law and in accordance with the Employer's Disciplinary Code and Procedure.

14.6 On termination of employment, the Employee must return all the equipment and property of the Employer in a satisfactory condition before his final remuneration shall be paid.

15. CONFLICT OF INTEREST

15.1 Employee is required to ensure at all times that s/he does not put him/herself in a situation where their own personal interests conflict or may potentially conflict with the interest of the Employer.

15.2 Conflicts of interest are regulated by the Employer's Declaration of Private Interests Policy applicable from time to time, a copy of which is available from the HR department.

16. EMPLOYER'S POLICIES AND PROCEDURES

16.1 All the Employer's policies and procedures as applicable from time to time form part of the terms and conditions of employment. The Employee undertakes and agrees that on signing this agreement, he or she will abide by such policies.

16.2 The Employee further agrees and undertakes to comply with Employer's policies, rules, regulations and procedures applicable from time to time. Copies of the Employer's policies and procedures are available from the HR department. It is the Employee's responsibility to familiarise himself/herself therewith.

16.3 Transgression or non-compliance with any of the provisions of Employer's policies and procedures may result in disciplinary action being taken against the Employee which may result in termination of the Employee's employment relationship with the Employer.

16.4 The Employer reserves the right to amend its policies at its discretion, from time to time.

17. GENERAL

17.1 Nothing in this agreement shall be deemed to constitute a partnership between the parties or constitute any party the agent of any other party for any purpose.

17.2 This document contains the entire agreement between the parties with regard to the matter dealt with herein and no representations, terms, conditions or warranties not contained in this agreement shall be binding on any of the parties.

17.3 No latitude, relaxation, indulgence or extension of time which may be allowed to the Contractor or any of its employees by SARS in respect of any performance or breach or any other matter in terms of this contract shall in any circumstances be deemed a waiver by SARS of its rights.

17.4 No variation, addition to or cancellation of this agreement and no waiver of any right in terms of this agreement shall be of any force and effect unless reduced to writing and signed by or on behalf of both partres to this agreement.

17.5 An expression which denotes any gender includes the other genders, a natural person includes an artificial person and *vice versa* and the singular includes the plural and *vice versa*.

17.6 This agreement shall, for all purposes, be construed and governed by the laws of the Republic of South Africa.

17.7 Any matter arising from this agreement, which is not specifically provided for herein, shall be dealt with in accordance with the provisions of the South African Revenue Service Act of 1997.

Visvanathan Pillay

SIGNED BY THE EMPLOYER AT _____ ON THIS THE ___ DAY OF _____ 2014.

AS WITNESSES:

1. _____
2. _____

_____

For and on behalf of:
The Employer, duly authorised

SIGNED BY THE EMPLOYEE AT PRETORIA ON THIS THE DAY OF 26 March 2014.

AS WITNESSES:

1. _____
2. _____

_____

The Employee

Employee Witness 1 _____ Employer Witness 1 _____ Employee _____
Employee Witness 2 _____ Employer Witness 2 _____ Employer

"FA8117

Print this page (#)

'Shaun Abrahams won't give me a fair hearing' - Pravin Gordhan

Oct 14, 2016 | TMG Digital

Finance Minister Pravin Gordhan does not have any confidence in the National Director of Public Prosecutions's ability or willingness to afford him a fair hearing.

South African Finance Minister Pravin Gordhan. File photo.
Photograph by: Siphiwe Sibeko

"

Finance Minister Pravin Gordhan does not have any confidence in the National Director of Public Prosecutions's ability or willingness to afford him a fair hearing. This is according to his lawyer Tebogo Malatji.

"

This is according to his lawyer Tebogo Malatji.

- Corruption buster Willie Hofmeyr aligns himself with Gordhan (http://www.timeslive.co.za/politics/2016/10/14/Corruption-buster-Willie-Hofmeyr-aligns-himself-with-Gordhan)

National Director of Public Prosecutions Shaun Abrahams announced on Tuesday that Gordhan, former SARS commissioner Oupa Magashula and former deputy commissioner of SARS Ivan Pillay will be charged with fraud.

- NPA faces legal challenge over Gordhan charges (http://www.timeslive.co.za/politics/2016/10/14/NPA-faces-legal-challenge-over-Gordhan-charges)

The charges relate to Pillay's early retirement from SARS and of entering into a new employment contract with Pillay for a period of four years from April 1 2014 and terminating on December 31 2018. Gordhan is due to appear in court early next month.

Abrahams told the Parliamentary Portfolio Committee on Justice and Correctional Services on Wednesday that Gordhan is welcome to approach him to make representations regarding the charges that have been preferred against him.

Rejecting this, Gordhan's lawyer said in a statement on Friday: "Minister Gordhan has taken legal advice on the matter and decided not to make representations to the NDPP."

"The main reason for his decision is that he does not have any confidence in the NDPP's ability or willingness to afford him a fair hearing.

"First, we repeatedly asked the NPA to afford the Minister an opportunity to make representations to them before they decided whether to prosecute the Minister but they spurned our requests.

"Second, the NDPP's conduct at his press conference announcing the decision to charge the Minister made clear his commitment to the prosecution.

"Third, having now had an opportunity to study the charges against the Minister, it is also clear to us that they manifest a resolute and not well founded determination to prosecute the Minister at all costs. Any representations to the NDPP would accordingly be pointless."

"Minister Pravin Gordhan continues to take legal counsel in regard to ways and means to bring the matter to an expedited finality."

Malatji said eminent lawyer Advocate Wim Trengove SC as well as advocates Hamilton Maenetje SC and Ziyaad Navsa will be assisting the minister's defence team.

~oOo~

"FA9" 119

URGENT

POLICE REFERENCE: CAS BROOKLYN 427/03/2015

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF PRETORIA HELD AT PRETORIA

SUBPOENA IN TERMS OF SECTION 205 ACT 51/1977

A TO: **CEO Mr Krishen Sukdev** (Full names)

(Company and Address) **Government Pensions Administration Agency, 34 Hamilton Street, Arcadia, Pretoria**

1. Whereas it appears to me that you are the person who can furnish material or relevant information to wit: (Nature of the information required) **See annexure A**

2. You are hereby required to appear in person before me or any other Magistrate in Court **A at the Pretoria Magistrates Court, Cnr Sophia De Bruyn and Francis Baard Streets** on the **10** day of **November 2016 at 08H30** to be examined by the Public Prosecutor duly authorized thereto and to testify about all that you know about the alleged offence to wit: suspected to have been committed the offence of **Contravening of Regulation of Interception of Communication Act, 2002, Contravention of the National Strategic Intelligence Act, 1994, Corruption Act 12 of 2004, and Contravention of Public Finance Management Act 1 of 1999.**

3. Provided that if you have furnished the required information to the satisfaction of the Public Prosecutor or Investigating Officer to wit: **Captain Mlageni Freddy Sewele** with contact particulars **071 481 2406** on or before **21/10/2016** prior to the date on which you are required to appear before me or another Magistrate, you shall be under no further obligation to appear before me or another Magistrate.

4. WARNING: Failure to comply with this subpoena may result in [illegible]. Such failure may also constitute an offence in terms of [illegible] sections 170(1), 189 and [illegible] of the Criminal Procedure Act 51 of 1977.

B. **To the authorised official**: Serve this subpoena on the named person and report back to the authorised Senior/Control Public Prosecutor on what you have done in this regard.

SIGNED BY ME AT PRETORIA ON THIS 24 **DAY OF AUGUST 2016**

JE [illegible] MAGISTRATE: PRETORIA

MAGISTRATE 2016 -10- 20

I, [illegible], the Senior/Control Public Prosecutor, with the National Prosecuting Authority duly authorised in writing by the National Director/Director of Public Prosecutions to request a Magistrate to issue subpoenas in terms of the provisions of s205 of the Criminal Procedure Act 51/1977 confirm that I have submitted a formal request for the above subpoena on a separate document that now forms part of the record of proceedings in respect of this application.

Signature: Authorised Prosecutor ______ Date ______

PROSECUTION 2016 -10- 20

BROOKLYN CAS 427/05/2015: INVESTIGATING OFFICER: CAPTAIN MT SEMELE: 0716481240

URGENT!

ANNEXURE A

KINDLY SUPPLY US WITH THE FOLLOWING INFORMATION:

1. Copies of the statistics (Appendix A) attached to the South African Revenue Service memorandum dated 12 August 2010 in respect of the early retirement of Deputy Commissioner Mr Ivan Pillay with full benefits as well as an 18 days explaining the approval of 3000 requests from various government departments for staff members who retired before the age of 60 with full benefits for period between 12 August 2005 and 12 August 2010.

2. Copies of Appendix B for five requests of staff members who retired before the age of 60 with full benefits as approved by the Finance Ministers for period between 12 August 2005 and 12 August 2010.

3. In the affidavit the following must be clarified:

3.1 Whether SCPF approves requests from various departments for staff members who retire before the age of 60 with full benefits.

MINISTRY OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
CAPE TOWN
2003 -03- 25
KAAPSTAD
MINISTERIE VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING

PROCLAMATION
BY THE
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

No. ....., 2003

NATIONAL PROSECUTING AUTHORITY ACT, 1998

Determination of Powers, Duties and Functions of a Special Director of Public Prosecutions

Under section 13(1)(c) of the National Prosecuting Authority Act, 1998(Act No. 32 of 1998), I hereby confer, impose and assign the following powers, duties and functions on or to Advocate ANTON ROSSOUW ACKERMAN SC, a Special Director of Public Prosecutions, appointed in terms of the said provisions:

To exercise the powers, carry out the duties and perform the functions necessary, within the Office of the National Director of Public Prosecutions as directed by the National Director and—

(a) in particular, to head the Priority Crimes Litigation Unit and to manage and direct the investigation and prosecution of crimes contemplated in the implementation of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), and serious national and international crimes, which include acts of terrorism and sabotage committed under the Internal Security Act, 1982(Act No. 74 of 1982), high treason, sedition, foreign military crimes committed by mercenaries, or such other priority crimes to be determined by the National Director; and

(b) generally, giving such advice or rendering such assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred or imposed on or assigned to him by the Constitution or any other law.

Given under my Hand and the Seal of the Republic of South Africa at PRETORIA on this 26th day of MARCH Two Thousand and Three.

T. M. MBEKI
President

P. M. MADUNA
Minister of the Cabinet

"FA11" 122

Wesley Timm

From: Wesley Timm
Sent: 01 November 2016 13:09
To: 'presidentrsa@presidency.gov.za'; 'president@po.gov.za'; 'president@presidency.gov.za'; 'ntoeng@presidency.gov.za'; 'nmajake@presidency.gov.za'
Cc: 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za'; 'jppretorius@npa.gov.za'; Vlad Movshovich; Dylan Cron; Pooja Dela; Daniel Rafferty; Tayla Dye
Subject: RE: Impropriety and unfitness for office of the National Director of Public Prosecutions
Attachments: Annex A part 3.PDF

I attach part 3 of annex A.

From: Wesley Timm
Sent: 01 November 2016 13:08
To: 'presidentrsa@presidency.gov.za'; 'president@po.gov.za'; 'president@presidency.gov.za'; 'ntoeng@presidency.gov.za'; 'nmajake@presidency.gov.za'
Cc: 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za'; 'jppretorius@npa.gov.za'; Vlad Movshovich; Dylan Cron; Pooja Dela; Daniel Rafferty; Tayla Dye
Subject: RE: Impropriety and unfitness for office of the National Director of Public Prosecutions

I attach part 2 and annex A.

From: Wesley Timm
Sent: 01 November 2016 13:08
To: 'presidentrsa@presidency.gov.za'; 'president@po.gov.za'; 'president@presidency.gov.za'; 'ntoeng@presidency.gov.za'; 'nmajake@presidency.gov.za'
Cc: 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za'; 'jppretorius@npa.gov.za'; Vlad Movshovich; Dylan Cron; Pooja Dela; Daniel Rafferty; Tayla Dye
Subject: Impropriety and unfitness for office of the National Director of Public Prosecutions

Dear Sirs

I attach a letter for the attention of His Excellency, President JG Zuma.

The letter has two annexes, A and B. Due to the size of annex A, I will send this annex in several parts. Attached to this email are parts 1 and 4 of annex A as well as annex B. Parts 2 and 3 of annex A will follow in separate emails.

Yours faithfully

Wesley Timm
Associate

WEBBER WENTZEL
in alliance with > Linklaters

T: +27116305367 F: +27 11 530 6367
E: wesley.timm@webberwentzel.com
www.webberwentzel.com

This email is confidential and may also be legally privileged. If you are not the intended recipient, please notify the sender immediately and then delete it. Please do not copy, disclose its contents or use it for any purpose. Webber Wentzel will not be liable for any unauthorised use of, or reliance on, this email or any attachment. This email is subject to and incorporates our standard terms of engagement. Please contact the sender if you have not already received a copy hereof.

Wesley Timm

From:	Wesley Timm
Sent:	01 November 2016 13:08
To:	'presidentrsa@presidency.gov.za'; 'president@po.gov.za'; 'president@presidency.gov.za'; 'ntoeng@presidency.gov.za'; 'nmajake@presidency.gov.za'
Cc:	'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za'; 'jppretorius@npa.gov.za'; Vlad Movshovich; Dylan Cron; Pooja Dela; Daniel Rafferty; Tayla Dye
Subject:	RE: Impropriety and unfitness for office of the National Director of Public Prosecutions
Attachments:	Annex A part 2.PDF

I attach part 2 and annex A.

From: Wesley Timm
Sent: 01 November 2016 13:08
To: 'presidentrsa@presidency.gov.za'; 'president@po.gov.za'; 'president@presidency.gov.za'; 'ntoeng@presidency.gov.za'; 'nmajake@presidency.gov.za'
Cc: 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za'; 'jppretorius@npa.gov.za'; Vlad Movshovich; Dylan Cron; Pooja Dela; Daniel Rafferty; Tayla Dye
Subject: Impropriety and unfitness for office of the National Director of Public Prosecutions

Dear Sirs

I attach a letter for the attention of His Excellency, President JG Zuma.

The letter has two annexes, A and B. Due to the size of annex A, I will send this annex in several parts. Attached to this email are parts 1 and 4 of annex A as well as annex B. Parts 2 and 3 of annex A will follow in separate emails.

Yours faithfully

Wesley Timm
Associate

WEBBER WENTZEL
in alliance with > Linklaters

T: +27 11 5305367 F: +27 11 530 6367
E: wesley.timm@webberwentzel.com
www.webberwentzel.com

This email is confidential and may also be legally privileged. If you are not the intended recipient, please notify the sender immediately and then delete it. Please do not copy, disclose its contents or use it for any purpose. Webber Wentzel will not be liable for any unauthorised use of, or reliance on, this email or any attachment. This email is subject to and incorporates our standard terms of engagement. Please contact the sender if you have not already received a copy thereof.

Wesley Timm

From:	Wesley Timm
Sent:	01 November 2016 13:08
To:	'presidentrsa@presidency.gov.za'; 'president@po.gov.za'; 'president@presidency.gov.za'; 'ntoeng@presidency.gov.za'; 'nmajake@presidency.gov.za'
Cc:	'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za'; 'jppretorius@npa.gov.za'; Vlad Movshovich; Dylan Cron; Pooja Dela; Daniel Rafferty; Tayla Dye
Subject:	Impropriety and unfitness for office of the National Director of Public Prosecutions
Attachments:	Letter to the President 01112016.pdf; Annex B.PDF; Annex A part 1.PDF; Annex A part 4.PDF

Dear Sirs

I attach a letter for the attention of His Excellency, President JG Zuma.

The letter has two annexes, A and B. Due to the size of annex A, I will send this annex in several parts. Attached to this email are parts 1 and 4 of annex A as well as annex B. Parts 2 and 3 of annex A will follow in separate emails.

Yours faithfully

Wesley Timm
Associate

WEBBER WENTZEL
in alliance with > Linklaters

T: +27115305367 F: +27 11 530 6367
E: wesley.timm@webberwentzel.com
www.webberwentzel.com

This email is confidential and may also be legally privileged. If you are not the intended recipient, please notify the sender immediately and then delete it. Please do not copy, disclose its contents or use it for any purpose. Webber Wentzel will not be liable for any unauthorised use of, or reliance on, this email or any attachment. This email is subject to and incorporates our standard terms of engagement. Please contact the sender if you have not already received a copy thereof.

WEBBER WENTZEL

In alliance with > Linklaters

His Excellency, Mr JG Zuma
The President of the Republic of South Africa
Union Buildings
Government Avenue
Pretoria
0001

By email: presidentrsa@presidency.gov.za; president@po.gov.za; president@presidency.gov.za; ntoeng@presidency.gov.za; nmajaka@ presidency.gov.za

90 Rivonia Road, Sandton
Johannesburg, 2196,
PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 11 530 5000
F +27 11 530 5111

www.webberwentzel.com

Your reference	Our reference	Date
	V Movshovich / P Dela / D Cron / D Rafferty / W Timm / T Dye 3012607	1 November 2016

Dear Sir

Impropriety and unfitness for office of the National Director of Public Prosecutions ("NDPP")

1. We act for Freedom Under Law NPC and the Helen Suzman Foundation, non-governmental organisations concerned with, amongst other things, the promotion of the rule of law and the protection of our constitutional project (**"our clients"**).

2. We address this letter on behalf of our clients acting in their own and in the public interest.

Background

3. As you must be aware, on 11 October 2016, summons no. 574/16 was served on the Honourable Minister of Finance, Mr Pravin Gordhan, MP (**"the Minister"**), Mr Visvanathan "Ivan" Pillay and Mr George "Oupa" Magashula (collectively, together with the Minister, **"the accused persons"**). In terms of the annexes to the summons (**"the charge sheet"**):

3.1 the accused persons were charged with fraud, alternatively theft, in relation to the alleged payment by the South African Revenue Service (**"SARS"**) to the Government Employees' Pension Fund (**"the Fund"**) of R1,141,178:11 on behalf of Mr Pillay (count 1 and the alternative to count 1 of the charge sheet);

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: RB Africa NG Alp OA Amaolo-Anti RL Appelbaum AE Bennett DHL Booysen AL Bowley EG Brandt JL Brink S Browne MS Burger RI Carrim T Cassim RS Coelho KL Collier KN Colman KE Coster K Couzyn CR Davidow JH Davies PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman CP Gaul KL Gawith MM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XMC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser MN Kingston CJ Kok J Lamb L Marais S McCafferty MC McIntosh SJ McKenzie M McLaren ST Moiloa SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu S Mogale J Moolman VM Movshovich M Moshoko SP Naicker RA Nelson BP Ngoepe A Ngobo ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMF Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips D Ramjettan GI Rapson NJA Robb DC Rudman M Sader AW Scholtz KE Shepherd DMJ Simaan AJ Simpson N Singh P Singh MP Spalding L Stein PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakker A Toefy PZ Vanda SE van der Meulen A van Niekerk JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wiltshire RH Wilson M Yudaken Chief Operating Officer: SA Boyd

Webber Wentzel is associated with ALN

3.2 Mr Pillay and Mr Magashula were charged with contravention of section 86 of the Public Finance Management Act, 1999 in that they failed to prevent SARS from incurring irregular, fruitless and wasteful and unauthorised expenditure (count 2 of the charge sheet);

3.3 Mr Pillay and Mr Magashula were charged with fraud, in that they represented to Human Resources of SARS that SARS was authorised to enter into an employment contract with Mr Pillay (count 3 of the charge sheet); and

3.4 the Minister and Mr Pillay were charged with fraud in relation to the re-hiring of Mr Pillay in or around April 2014 (count 4 of the charge sheet);

(collectively, **"the charges"**).

4. Our clients launched an urgent application in the Gauteng Division of the High Court, Pretoria to review and set aside the charges which related to the Minister essentially as unlawful (**"the application"**). The notice of motion and founding affidavit are attached marked **"A"** (**"the founding papers"**).

5. During a press conference on 31 October 2016 (**"the 31 October press conference"**), the charges were withdrawn by the NDPP. Though Mr Abrahams attempted to obfuscate his errors, which will be discussed in more detail below, by lengthy and irrelevant legal ramblings, Mr Abrahams was forced, in effect, to admit that the National Prosecuting Authority (**"the NPA"**) never had sufficient evidence to prefer charges against the accused persons. This is despite the NDPP's vehement assertions, a mere 20 days before, that the NPA had a solid case against the accused persons.

Mr Abrahams

6. In light of the circumstances surrounding the preferring and withdrawal of the charges, Mr Shaun Abrahams has misconducted himself and is not a fit and proper person to hold the office of the NDPP, in that he lacks the required conscientiousness and integrity to be entrusted with the responsibilities of the office of the NDPP. He has also brought the administration of justice and his high office into disrepute.

7. Mr Abrahams has plainly displayed his lack of conscientiousness and integrity, and has committed serious misconduct. In addition to the submissions made in respect of Mr Abrahams' conduct in the founding papers, the following is noteworthy:

7.1 at a press conference held on 11 October 2016 ("**the 11 October press conference**"), Mr Abrahams violated the rights of the accused persons, and the Minister in particular and abused his position in an attempt to use the media to influence public opinion against the accused persons and the Minister in particular (see paragraph 72 of the founding affidavit);

7.2 Mr Abrahams stridently defended and justified the charges at the 11 October press conference including stating that any suggestion that the charges are groundless and constitute political mischief is "*as you will come to learn, that can be nothing further from the truth*" (see paragraph 73 of the founding affidavit). This was not only a vehement assertion of the validity of the charges, but, in effect, a personal assurance by Mr Abrahams as the NDPP. He reiterated that the charges were solid and fully sustainable a day later, in response to a question from a journalist, mentioning that "*the NPA do not take matters to court if they don't believe there are reasonable prospects of a prosecution ... I implore you to wait until the trial in respect of the matter, when the evidence is presented.*" Mr Abrahams now clearly believes that no such delay is necessary. So much for the earlier exhortation;

7.3 Mr Abrahams has since, at the 31 October press conference, admitted that he had never applied his mind to the charges prior to 11 October 2016 and that he had seen no documents to support them – and that he did not seek to call for or interrogate any documents in support of them. Assuming that Mr Abrahams' statement in this respect is true (which our clients do not concede), then, at best Mr Abrahams:

7.3.1 was reckless in the extreme;

7.3.2 showed a spectacular dearth of conscientiousness; and

7.3.3 in asserting facts as unequivocally true while he was aware that he had no knowledge of those facts or the documents to support them, was plainly dishonest;

7.4 there was every indication in the 11 October press conference that the decision to prefer charges was that of the NPA, and the NDPP clearly lent the imprimatur of his office to the charges. Only Mr Abrahams spoke during that press conference. If Mr Abrahams' version that he had nought to do with the charges, and did not know the

facts or the evidence, is correct, then Mr Abrahams' presentation and defence of the charges was misleading at best and potentially disingenuous;

7.5 the NDPP has the power, and in appropriate circumstances the duty, to review, supervise, control, correct or vary charges even before they are formally brought against any of the accused. The paradigm case where such a review should have been undertaken is the present matter, and before convening the 11 October press conference. The matter:

7.5.1 is of enormous public importance;

7.5.2 entails an investigation riddled with allegations of bad faith and ulterior purpose (by a broad range of stakeholders);

7.5.3 concerns a very high ranking member of the National Executive;

7.5.4 has national and international ramifications of the highest order; and

7.5.5 is not characterised by urgency and involves facts dating back to 2010, where there was no evidence of imminent irreparable harm in the future;

7.6 Mr Abrahams, however, consciously or recklessly ignored all of these signal features and proceeded to take a course of action, in the most public fashion, which he must have known would throw the South African economy into a tailspin;

7.7 had Mr Abrahams applied his mind to the facts and law pertaining to the charges, as any rational NDPP would have done before 11 October 2016, he would have realised that there was no basis, in law or in fact, for the charges and should not have persisted with them. His failure to do so, at best, shows a stupefying, disabling and disqualifying lack of competence; at worst, his failure betrays ulterior purpose and a lack of integrity;

7.8 the Priority Crimes Litigation Unit, which ostensibly investigated and preferred the charges, was not even legislatively mandated to deal with cases of fraud and theft and the charges are not within such Unit's specific expertise. The fact that this Unit handled the case, instead for instance of the Specialised Commercial Crimes Unit which would ordinarily deal with charges such as these, is irregular and confounding; and

7.9 In fact, after the shortcomings of the charges, and the lack of evidence in support of those charges, were pointed out to him in our clients' letter of 14 October 2016 (which is annexed to the founding papers), Mr Abrahams did not withdraw the charges as a conscientious NDPP of requisite integrity and objectivity would, but instead ordered further investigations after the fact (see the supplementary affidavit attached as "B"). These investigations were not competent and were, in any event, impermissibly aimed at finding new evidence which could sustain the then unsustainable charges. The NDPP's review should have been based on the contents of the docket as it stood at the time the charges were laid. Instead, Mr Abrahams clearly recognised the fatal deficiencies of the charges and the investigations appear to have been embarked on so as to rescue the charges from inevitably being set aside. Ultimately, even those desperate attempts were futile, since the charges were ill-conceived and stillborn from the outset. At best, this shows Mr Abrahams fundamentally misunderstood the laws applicable to his powers as NDPP, which in itself demonstrates a wanton lack of conscientiousness; at worst, this shows Mr Abrahams intentionally and unlawfully sought to prop up insupportable charges after the fact so as to rescue them from review.

8. It is important to recall that Mr Abrahams, as the NDPP, is no mere civil servant. He is entrusted with the independent exercise of immense public power; the type of public power which can be used to curtail the liberty of every person and entity in the Republic. This is a power that the NDPP is enjoined, constitutionally, to exercise without fear or favour. When the NDPP abuses this power, or even when he is perceived to be abusing this power, it fundamentally undermines the public confidence in the integrity of the institution. Accordingly, Mr Abrahams' conduct in the above matter, even if his conduct was a *bona fide* blunder (which our clients deny), has brought the NPA into disrepute; continues on a daily basis to erode public confidence in law enforcement institutions, and casts a long shadow of doubt over Mr Abrahams' future conduct. Mr Abrahams is tasked with making dozens of critical, and potentially irreversible, decisions on a daily basis, which reinforce the potential for irreparable harm. Indeed, Mr Abrahams has alluded to potential future important investigations in the 31 October press conference.

9. Mr Abrahams is not a fit and proper person to continue to occupy his high office and should be suspended and disciplined urgently.

JP Pretorius SC and S Mzinyathi

10. It is plain that the prosecution of the charges was pursued either for ulterior purposes or in a breathtakingly reckless fashion, without proper investigation or any regard to the evidence and proper legal analysis. After the charges came to be publically criticised, and despite seeking the limelight for himself in announcing the charges at the press conference on 11 October, Mr Abrahams has shifted all responsibility to Dr JP Pretorius, SC and Sibongile Mzinyathi (collectively, **"the Prosecutors"**) (with Dr Pretorius allegedly taking the decision in consultation with Mr Mzinyathi).

11. The Prosecutors clearly failed in their fundamental constitutional and statutory duty to ensure that charges were properly grounded and to take an impartial, independent and objective view of all the facts, including taking account of the questionable investigative work performed by the Directorate of Priority Crime Investigation in this matter.

12. In addition to what is stated above in relation to Mr Abrahams (which applies with equal force here), had the Prosecutors applied their mind to the facts and law relevant to the charges, as a rational and conscientious prosecutor of integrity would have done before the decision to prefer the charges was taken, they would have realised that there was no basis, in law or in fact, for the charges and would never have taken the decision to prefer charges.

13. According to the 31 October press conference, the Prosecutors failed to take account, *inter alia*, of the most basic legal requirement for a successful prosecution of fraud or theft: the fraudulent or furtive intention. This is inexcusable. The Prosecutors' failures, at best, show a startling lack of competence; and at worst, betray ulterior motive and a lack of integrity. The seniority of the Prosecutors augments the case for ulterior purposes.

14. The Prosecutors were obliged to take great care, in the interests of the integrity of the NPA, the execution of their official duties and the interests of the Republic, before theatrically broadcasting the scandalous allegations against the accused persons to the world. This was especially the case in the present circumstances, having regard to the factors set forth in 7.5 above. It would also have been especially incumbent upon them to do so in light of Mr Abrahams' proclaimed *modus operandi* in this matter (which is not conceded), namely, that he trusted his Prosecutors to do the work properly and would not apply his mind to the charges prior to his press conference on 11 October 2016 or see the documents to support them.

15. Similarly to Mr Abrahams, as explained at 8 above, the Prosecutors bungling of this matter has severely undermined public confidence in the integrity of the NPA. It is thus imperative to restoring public confidence in institution that they be suspended and disciplined as a matter of utmost urgency.

16. It is thus plain that the Prosecutors misconducted themselves and lack the conscientiousness (including competence) and integrity to continue to serve their official functions.

Conclusions

17. In light of the above, please confirm, in writing, by no later than 16:00 Monday, 7 November 2016, that you will provisionally suspend Mr Abrahams, JP Pretorius SC and S Mzinyathi from their office, pending enquiries into their fitness to hold office as contemplated in section 12(6)(a), read with, *inter alia*, section 14(3), of the National Prosecuting Authority Act, 1998, and that you will forthwith institute such enquiries.

18. Our clients also invite Mr Abrahams and the Prosecutors (who are copied on this letter) to resign from their offices without delay, so as not to harm our law enforcement institutions any further. This invitation should, however, in no way delay or influence the exercise of your powers under the above legislation.

19. Should you fail to suspend Mr Abrahams and the Prosecutors and institute enquiries into their fitness for office by 7 November 2016, our clients will assume that you have decided not to suspend the NDPP and the Prosecutors and/or initiate such enquiries. Our clients may then, without further notice, seek to exercise their rights in law on an urgent basis.

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

Cc: The National Director of Public Prosecutions, by email: skabrehams@npa.gov.za; hzwart@npa.gov.za

Dr JP Pretorius SC, by email: kbenjamin@npa.gov.za; jppretorius@npa.gov.za

Sibongile Mzinyathi, by email: skabrahams@npa.gov.za; hzwart@npa.gov.za; kbenjamin@npa.gov.za; jppretorius@npa.gov.za

"FA12" 132

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA
Private Bag X1000, Pretoria, 0001

Messrs Webber Wentzel
P O Box 61771
Marshalltown
2107
For Attention: V Movshovich

Dear Sirs,

RE: IMPROPRIETY AND UNFITNESS FOR OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS (NDPP)

1. The Presidency acknowledges receipt of your letter dated 01 November 2016, which was subsequently referred to the Legal & Executive Services Unit to liaise with your office regarding an extension.

2. Whilst we were obliquely aware of media reports pertaining thereto, your letter came to the attention of the President and his legal advisors only today due to the fact that the only correct addressee was Ntoeng@presidency.gov.za.

3. None of the purported addressees are authorised to receive correspondence for and on behalf of the President, nor does it fit into their portfolios and we suggest that you liaise with our office to provide you with the correct details so as to avoid a recurrence and the attendant delay.

4. In light of the above, the Presidency requests an extension until 21 November 2016. This will afford President Zuma a proper opportunity to address what no doubt is a serious matter with the effected parties in

anticipation of any action he may contemplate, after having considered such in its entirety.

Yours faithfully

Mr Geofrey Mphaphuli
Acting Head: Legal & Executive Services
Date: 07/11/2016

WEBBER WENTZEL

In alliance with > Linklaters

His Excellency, Mr JG Zuma
The President of the Republic of South Africa
Union Buildings
Government Avenue
Pretoria
0001

90 Rivonia Road, Sandton
Johannesburg, 2196

PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 11 530 5000
F +27 11 530 5111

www.webberwentzel.com

By email: presidentrsa@presidency.gov.za; president@po.gov.za; president@presidency.gov.za; ntoeng@presidency.gov.za; nmajake@ presidency.gov.za; Angeline@presidency.gov.za; geofrey@presidence.gov.za; sello@presidency.gov.za

Your reference	Our reference	Date
	V Movshovich / P Dela / D Cron / D Rafferty / W Timm / T Dye 3012607	7 November 2016

Dear Sir

Impropriety and unfitness for office of the National Director of Public Prosecutions ("NDPP")

1. We act for Freedom Under Law NPC and the Helen Suzman Foundation (**"our clients"**), non-governmental organisations concerned with, amongst other things, the promotion of the rule of law and the protection of our constitutional project.

2. We refer to our clients' letter to the Presidency, dated 1 November 2016, and the reply thereto, received 7 November 2016 (**"your letter"**).

3. The contents of your letter, respectfully, beggar belief. Without limitation, our clients point out that the email addresses used:

3.1 appear from the Presidency's own website (where both presidentrsa@presidency.gov.za and president@presidency.gov.za are listed as email addresses for the President) (a printout of which is attached marked "A");

3.2 appear from the National Government Directory dated 1 November 2016 (the relevant extracts of which are annexed marked "B");

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley EG Brandt JL Brink S Browne MS Burger RI Carrim T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman CP Gaul KL Gawith MM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PR Kingston CJ Koh J Lamb C Marais S McCafferty MC McIntosh SJ McKenzie M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu C Moraitis J Moolman VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe A Ngubo ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips D Ramjettan GI Rapson NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DMJ Simaan AJ Simpson N Singh P Singh MP Spalding L Stein PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen A van Niekerk JE Veeran D Venter B Vessio MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken Chief Operating Officer: SA Boyd

Webber Wentzel is associated with ALN

3.3 are addresses which have been used previously, without objection (and which have elicited an reply);

3.4 include an email address (presidentrsa@presidency.gov.za) expressly identified, in correspondence by the Private Office of the President, as an address to which correspondence may be addressed for the attention of the President (the relevant email is annexed marked "C", which related to another recent matter of paramount public importance); and

3.5 at least in respect of ntoeng@presidency.gov.za, is conceded as being correct.

4. The allegations of non-delivery made in your letter are thus denied, as is the request for an extension. This conduct smacks not only of dilatory tactic, but is disingenuous in the extreme. Your letter, combined with the related release on the website of the Presidency, regretfully, fell short of the standard expected of the State and the leader of the nation.

5. Due to, *inter alia*, the urgency and national importance of the matter, our clients will be launching urgent proceedings to secure the suspension of Mr Abrahams, JP Pretorius SC and S Mzinyathi ("**the Prosecutors**") and have enquiries instituted into their fitness for office.

6. The urgency of the matter may require that papers be served electronically on your office after hours.

7. Please advise urgently, and by no later than 15:00 on Tuesday, 8 November 2016, if there are any additional email addresses (in addition to those identified in this letter) to which papers should be emailed.

8. Our clients will seek the urgent hearing of this matter on 22 November 2016 (which, our clients note, is after the date requested in your letter for the President to make a decision in this matter). Without committing to the below timeline, our clients envisage launching papers tomorrow; requiring all respondents (who elect) to answer by no later than Tuesday, 15 November 2016, so as to allow our clients to reply and prepare the court file by 12:00, 17 November 2016.

WEBBER WENTZEL
In alliance with > Linklaters

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

Cc: The National Director of Public Prosecutions, by email: skabrahams@npa.gov.za; hzwart@npa.gov.za

Dr JP Pretorius SC, by email: kbenjamin@npa.gov.za; jppretorius@npa.gov.za

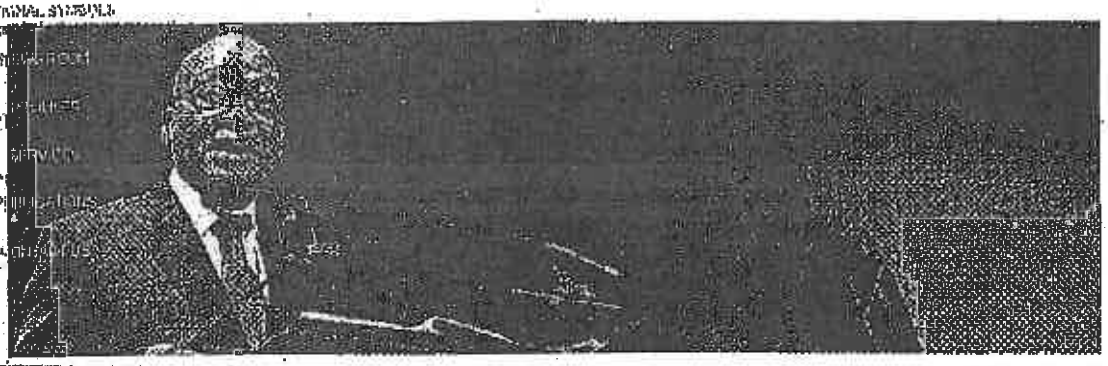
Sibongile Mzinyathi, by email: skabrahams@npa.gov.za; hzwart@npa.gov.za; kbenjamin@npa.gov.za; jppretorius@npa.gov.za

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA

THE PRESIDENCY

Home | Contact Us | [illegible]

Contact Us



President Jacob Zuma at the Black Business Tribute Dinner

President Jacob Zuma at the Black Business Tribute Dinner hosted by Telkom Ltd in Sandton, Johannesburg

Search The Presidency | In the Info

Send Email

Phone Us

Union Buildings (Pretoria)
Telephone: +27 (0)12 300 5200
Fax: +27 (0)12 323 8246

Tuynhuys (Cape Town)
Telephone: +27 (0)21 464 2100
Fax: +27 (0)21 462 2038

Write to Us

Union Buildings
Private Bag X1000,
Pretoria,
0001

Tuynhuys
Private Bag X1000,
Cape Town
8000

Complaints / Public Enquiries

Toll Free: 17737
E-Fax: 086 691 0837
Email: president@presidency.gov.za

View Maps

Union Buildings
Government Avenue,
Pretoria

Tuynhuys
Plein Street,
Cape Town

Contacts

Mosa Sejoslingoe

Telephone: (Union Buildings) 17737

Fax: (Union Buildings) 086 691 0837

Communication

For all media enquiries for the President contact:
Chief Director: Communication
Bongani Majola

Telephone: (Union Buildings) 012 300 5242

Mobile: 082 339 1993

E-mail: BonganM@presidency.gov.za

For all media enquiries for the Deputy President contact:
Spokesperson
Ronald Monnapula
Telephone: (Union Buildings) Switchboard: 012 300 1700
Telephone: (Cape Town) Switchboard: 021 464 2100
Mobile: 082 690 4693
Email: ronnie@presidency.gov.za

Private Office of President Jacob Zuma
Deputy Director General and Acting Spokesperson
Dr Bongani Ngqulunga
Telephone: (Union Buildings) 012 300 5469
Mobile 082 308 9373
E-mail: bongani@presidency.gov.za

Deputy Director: Researcher to the Spokesperson
Mr Jonas Mashigo
Telephone: (Union Buildings) 012 300 5314
Mobile: 082 679 0464
E-mail: jonas@presidency.gov.za

Chief Director: Support Services
Charmaine Fredricks
Telephone: (Union Buildings) 012 300 5200
Fax: (Union Buildings) 086 683 5200
E-mail: presidencyqa@presidency.gov.za
charmaine@presidency.gov.za

Director: Support Services (for correspondence related matters)
Michael Louw
Telephone: (Union Buildings) 012 300 5332
Fax: (Union Buildings) 0866 683 5332
E-mail: presidencyqa@presidency.gov.za
mike@presidency.gov.za

Private Secretary to the President
Nkosi Sikelela Sekoto
Telephone: (Union Buildings) 012 300 5235
Telephone: (Tuynhuys) 021 464 2184
Mobile: 071 361 4570
Fax: (Union Buildings) 012 323 3231
E-mail: presidencyqa@presidency.gov.za

Assistant Private Secretary to the President
Nomfanelo Majake
Telephone: (Union Buildings) 012 300 5226
Telephone: (Tuynhuys) 021 464 2161
Mobile: 082 308 9966
Fax: (Union Buildings) 012 323 3231
E-mail: nomfanelom@presidency.gov.za

Assistant Private Secretary to the President
Mike Besoga
Telephone: (Union Buildings) 012 300 5224
Telephone: (Tuynhuys) 021 464 2103
Mobile: 082 450 4120
Fax: (Union Buildings) 012 323 3231
E-mail: mike@presidency.gov.za

Office of Deputy President Cyril Ramaphosa
Deputy Director General: Office of the Deputy President
Dumisi Ngcawani
Telephone: (Union Buildings) 012 300 5316
E-mail: Deputypresident@presidency.gov.za

Personal Assistant to the Deputy President
Nelisiwe Sibiya
Telephone: (Union Buildings) 012 300 5271
Fax (Union Buildings) 012 323 3614

E-mail: mlobe@presidency.gov.za

Correspondence to the Deputy President

Telephone: (Union Buildings) 012 300 5275

E-mail: Deputypresident@presidency.gov.za

Office of Minister for Planning, Performance, Monitoring & Evaluation as well as Administration, Jeff Radebe

Chief of Staff
Lingiswe Pakati

Telephone: (Union Buildings) 012 300 5372
Mobile: 082 905 3051
E-mail: Lingiswe@presidency.gov.za

Private Secretary to Minister Radebe
Kgomotso Matibe

Telephone: (Union Buildings) 012 300 5327
Mobile: 082 327 1467
E-mail: Kgomotso@presidency.gov.za

Special Advisor to the Minister
Jabulani Mzaliya

Telephone: (Union Buildings) 012 300 5335
Mobile: 082 906 0660
E-mail: Jabulani@presidency.gov.za

Speech Writer
Phillip Mumekwa

Telephone: (Union Buildings) 012 300 5327
Mobile: 082 903 1739
E-mail: Phillip@presidency.gov.za

Cabinet Services
Puzuka Baba

Telephone: (Union Buildings) 012 300 5257
Mobile: 078 430 8975
E-mail: Puzuka@presidency.gov.za

Office of minister responsible for Women, Susan Shabangu

Chief of Staff
Monica Zako

Telephone: (Union Buildings) +27 12 300 1552
Mobile: 082 466 2647
E-mail: monica@presidency.gov.za

Personal Assistant
Gili Maseko

Telephone: (Union Buildings) +27 12 300 0011
Mobile: 082 371 2251
E-mail: gili@dwcpd.gov.za

Assistant Private Secretary
Sindiswa Gcilo

Telephone: (Union Buildings) +27 12 300 1818
Mobile: 082 674 0144
E-mail: sindiswa@dwcpd.gov.za.

Senior Secretary
Adelaide Raitape

Telephone: (Union Buildings) +27 12 300 1832
Mobile: 060 978 3050
E-mail: adelaide@dwcpd.gov.za

Office of Deputy Minister for Planning, Performance, Monitoring & Evaluation as well as Administration, Obed Mlaudzeta

Telephone: (Union Buildings) +27 12 300 1700
Telephone: (Tuynhuys) +27 21 464 2100

Head of Office
Lindile Sibeko

Telephone: (Union Buildings) 012 300 1746
Mobile: 076 521 7189
E-mail: Lindile@presidency.gov.za

Media Liaison Officer
Malehoyo Sweetel

Telephone: (Union Buildings)	012 300 5326
Mobile:	082 679 0473
E-mail:	Malehopo@presidency.gov.za

Office of Director-General: Dr Cassius Reginald Lubisi

PA to the Director-General
Nokukhanya Kubheka

Telephone: (Union Buildings)	012 300 5354
Telephone: (Tuynhuys)	021 464 2431
Mobile:	082 971 7700
Fax: (Union Buildings)	086 683 5354
E-mail:	nokukhanya@presidency.gov.za
Director-General	
Telephone: (Union Buildings)	012 300 5354
Telephone: (Tuynhuys)	021 464 2111
Fax: (Union Buildings)	012 300 5755

Chief Operations Officer Ms Lukela Kganda

Senior Secretary
Princess Malahlela

Telephone:	012 300 5218/7
Fax: (Union Buildings)	086 683 5439
E-mail	Lukela@presidency.gov.za Princess@presidency.gov.za

Chancery (Nominations for National Orders)

Deputy Director: Protocol and Ceremonial Services
Fulhi Nshingila

Telephone: (Union Buildings)	012 300 1619
Fax: (Union Buildings)	086 683 5433
E-mail:	Fulhi@presidency.gov.za

Table of Contents

Presidency (The)

The Presidency

Website: www.thepresidency.gov.za
E-mail: president@po.gov.za

Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: 012 300 5200
Fax: 012 323 8246

Mail: Private Bag X1000, CAPE TOWN, 8000
Street: Tuynhuys Building, Parliament Street, CAPE TOWN
Tel: (021) 464 2100
Fax: (021) 461 2836

President
Mr Jacob Gedleyihlekisa Zuma
Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: 012 300 5200
Fax: 012 323 8246
E-mail: presidentrsa@presidency.gov.za

Spokesperson
Mr Bongani Majola (Acting)
Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: 012 300 5200
Fax: 012 323 8246
Cell: 082 339 1993
E-mail: bonganim@presidency.gov.za

Assistant Private Secretary to the President
Ms Nonhlanhla Majeke
Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: 012 300 5200
Fax: 012 323 8246
Cell: 082 308 9965
E-mail: nmajeke@presidency.gov.za

Private Secretary to the President
Ms Ntoeng Sekhoto
Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: 012 300 5200
Fax: 012 323 8246
Cell: 071 361 4570
E-mail: Ntoeng@presidency.gov.za

Deputy President
Mr Matamela Cyril Ramaphosa
Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: 012 300 5200
Fax: 012 323 8246

Assistant Private Secretary
Ms Milka Boeoge
Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: 012 300 5200
Fax: 012 323 8246
E-mail: milka@presidency.gov.za

Spokesperson
Mr Ronnie Mamoepa
Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: 012 300 5200
Fax: 012 323 8246
Cell: 082 990 4853

Private Secretary to the Deputy President
Ms Malebo Sibiya
Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: (012) 300 0601 / (021) 464 2128
Fax: (012) 323 3114
Cell: 079 885 9136
E-mail: malebo@po.gov.za

Assistant Private Secretary to the Deputy President
Ms Lerato Zimbili
Mail: Private Bag X1000, PRETORIA, 0001
Street: Union Buildings, Government Avenue, PRETORIA
Tel: (012) 300 5271 / (021) 464 2128
Fax: (012) 323 3114
Cell: 082 781 9332
E-mail: leratoz@po.gov.za

"143

"PN5"

Chloë Woodin

Subject: FW: Attention: Hon JG Zuma (President)

From: Mike Louw [mailto:Mike@presidency.gov.za]
Sent: Monday, 19 September 2016 12:23 PM
To: Madeniyah Hendricks <madeniyah@casac.org.za>
Cc: Charmaine Fredericks <Charmaine@presidency.gov.za>; Robert Ngobeni <Robert@presidency.gov.za>; President RSA <PresidentRSA@presidency.gov.za>; Vukosi Nkuna <Vukosi@presidency.gov.za>
Subject: RE: Attention: Hon JG Zuma (President)

Dear Ms Hendricks,

We acknowledge with thanks, receipt of your correspondence addressed to the President of the Republic of South Africa, His Excellency, President Jacob Zuma.

The matter will receive the required attention and a response will be communicated soonest.

Please direct future correspondence to PresidentRSA@presidency.gov.za

Thank you

Michael Louw
Director: Support Services
Private Office of the President
West Wing, Union Buildings
PRETORIA

tel: +27 12 300 5200
fax: +27 86 683 5332
e-mail: mike@presidency.gov.za
web: www.thepresidency.gov.za

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from any computer.

From: Madeniyah Hendricks [mailto:madeniyah@casac.org.za]
Sent: 19 September 2016 11:59 AM
To: Mike Louw; Mike Louw
Subject: Attention: Hon JG Zuma (President)

Dear Mr Louw

Please see attached correspondence for the attention of President Zuma.

Please acknowledge receipt of email.

Thank you and kind regards

Madeniyah Hendricks
Senior Administrator
CASAC: Council for the Advancement of the South African Constitution
Tel: 021 685 8809
Fax:021 685 8819
Cell: 078 785 2918
Email: madeniyah@casac.org.za
Website: www.casac.org.za

Email Disclaimer: http://www.thepresidency.gov.za/pebble.asp?relid=97

"FA14"145

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA
Private Bag X1000, Pretoria, 0001

Ref: 9/30/1 Vol 194 (467948) 2016 (jm)

08 November 2016

Mr Wesley Timm
Associate: Webber Wentzel
90 Rivonia Road
Sandton
JOHANNESBURG
2196

Per E-mail: Wesley.Timm@webberwentzel.com

Dear Mr Timm

IMPROPRIETY AND UNFITNESS FOR OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS ("NDPP")

We write to acknowledge with thanks, receipt of your letter addressed to the President of the Republic of South Africa, His Excellency, Mr Jacob G Zuma.

Kindly be advised that the content of your letter has been noted and will be brought to the President's attention.

Kind regards,

Mr Michael Louw
Director: Support Services

Enquiries: Mr Robert Ngobeni
Administrative Secretary: Support Services
Tel.: +27 12 300 5219 Fax: 012 323 8246/3231 E-mail: robert@presidency.gov.za

"FA15"146

WEBBER WENTZEL

in alliance with > Linklaters

State Attorney
Mr NR Baloyi
Attorney of the President of the Republic of South Africa and the National Director of Public Prosecutions
SALU Building
316 Thabo Sehume Street
Pretoria

By email: RonBaloyi@justice.gov.za

10 Fricker Road, Illovo Boulevard
Johannesburg, 2196

PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 11 530 5000
F +27 11 530 5111

www.webberwentzel.com

URGENT

Your reference	Our reference	Date
	V Movshovich / P Dela / A De Meyer 3001134	19 September 2016

Dear Sir

Freedom Under Law (RF) NPC ("FUL") // National Director of Public Prosecutions ("the NDPP") / Nomcgobo Jiba ("Jiba") / President of the Republic of South Africa ("the President") / Lawrence Sithembiso Mrwebi ("Mrwebi") and others (GP case no: 89849/2015) ("the Application")

1. As you know, we act for FUL (**"our client"**) in the Application.

2. You will also know that the matter between the General Council of the Bar of South Africa and Jiba and Mrwebi was heard on 30 May 2016 - 1 June 2016 (GP case no 23576/2015). Judgment in that matter was handed down on 15 September 2016 by the Honourable Legodi and Hughes JJ (**"the Judgment"**) in terms whereof Jiba and Mrwebi were struck from the roll of advocates on the basis that they were not fit and proper. The effect of the Judgment, as set forth in section 9(1) of the National Prosecuting Authority Act, 1998 and para [23] of the Judgment, is that Jiba and Mrwebi may no longer occupy their positions within the National Prosecuting Authority (**"NPA"**).

3. Over the weekend, it was reported that Jiba and Mrwebi have indicated that they would seek leave to appeal against the Judgment. It was also reported that, pursuant to Jiba and Mrwebi's requests, they have been placed on "*special leave*" by the NPA.

4. The Court found Jiba and Mrwebi to be dishonest and lack integrity and probity required of officers of court. The findings are damning and conclusive.

5. Pursuant to the Judgment, our client reiterates its position, as articulated in the Application, that Jiba and Mrwebi are not fit and proper to hold their high office. You will remember that the Application seeks for Jiba and Mrwebi to be suspended and disciplined under section 12(6) of the Act; and for the criminal charges against them to be reinstated.

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: RB Africa NG Alp OA Ampofo-Anti RL Appelbaum DA Baillie JM Bellew AE Bennett DHL Booysen AR Bowley PG Bradshaw EG Bruwer JL Brink MS Burger RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies ME Davis PM Daya JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley KZ Diniso G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans GA Fichardt DT Fisher-Jeffes JB Forman MM Gibson JI Goolam CI Gouws JP Gouws PD Grealy A Harley VW Harrison JM Harvey MH Hathorn JS Henning KR Hillis NA Hlatshwayo XNC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser MD Kota J Lamb PSG Leon PG Leyden L Marais S McCafferty MC McIntosh M McLaren SJ Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu VS Moodaley LA Morphet VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips C Pillay HK Potgieter S Rajah D Ramjettan NJA Robb DC Rudman JW Scholtz KE Shepherd DMJ Simaan AJ Simpson J Simpson M Singh AA Sourivas MP Spalding L Stein PS Stein LJ Swaine ZR Swanepoel Z Swanepoel A Thaker A Toefy D Visagie PZ Vanda GE van der Meulen BP van der Vyver M van der Walt N van Dyk A van Niekerk MM von Schnarrenburg JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson JWL Westgate KL Williams K Wilson RH Wilson M Yudaken Chief Operating Officer: SA Boyd

Webber Wentzel is associated with ALN

6. It is imperative for Jiba and Mrwebi (even if they institute applications for leave to appeal against the Judgment) to have disciplinary processes instituted against them, as contemplated in section 12(6) of the Act, without any further delay. Such relief is sought in the Application. It is simply unacceptable for persons who have been found to be plainly unfit for office to continue for months or years to be classified as Deputy National Director of Public Prosecutions and Director of Public Prosecutions and to draw a salary. There must be a disciplinary process and it must happen immediately.

7. The prosecution into Jiba's misconduct, as contemplated in the Application, must likewise be reinstated without delay.

8. Our client calls on the President of the Republic of South Africa, the National Director of Public Prosecutions and the National Prosecuting Authority to confirm, by no later than 26 September 2016, that the steps in paras 6 and 7 above will be implemented forthwith, failing which our client will take steps to exercise its rights, including approaching the Honourable Deputy Judge President for the Application to be heard by way of special allocation as a matter of urgency.

9. The implementation of steps in paras 6 and 7 above may also obviate substantial time and costs in the Application, which would clearly be in the public interest. Should those steps not be implemented, our clients will supplement their papers to seek punitive costs orders against your clients in their individual capacities.

Yours faithfully

WEBBER WENTZEL
V Movahovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movahovich@webberwentzel.com

DESTINY connect.com

Dust and Water resistant (IP68*)

SAMSUNG

HOME | NEWS | BUSINESS | MENTORSHIP | ENTREPRENEUR | STYLE | ENTERTAINMENT | LIFESTYLE | MULTIMEDIA | LATEST ISSUE | WHEELS REPORT 2016

HOME > NEWS > NXASANA WILLING TO GIVE UP R17M TO GET BACK HIS JOB

Nxasana willing to give up R17m to get back his job

BY THANDI GRADE
November 4, 2016

CAPE TOWN, SOUTH AFRICA - OCTOBER 21: National Prosecuting Authority boss Advocate Mxolisi Nxasana during a media briefing on the financial performance of the NPA on October 21, 2014 in Cape Town, South Africa. (Photo by Gallo Images / Foto24 / Karen Sandison)

Former National Prosecuting Authority (NPA) head Mxolisi Nxasana says he won't oppose a court bid that seeks to recover the R17,3 million golden handshake he received to leave the organisation

Nxasana believes that he is fit and proper to hold the position of National Director of Public Prosecutions and he's willing to pay back some of the millions he received to step down if that's what it takes to get his old job back, Business Day reports.

"I would like to go back to my old job as head of the NPA. I believe that I am fit and I can do the work to the best of my ability. When I was removed it was clear that I was not removed because I could not do my job without fear or favour," he was quoted saying.

"In fact, I was pressured to go specifically because I was not malleable. I was threatened with a commission of inquiry into my fitness to hold office."

READ MORE: Presidency terminates Mxolisi Nxasana inquiry

Corruption Watch and Freedom Under Law have launched a court application to have the R17,3 million golden handshake declared invalid because the parties believe that the decision to authorise the deal was unlawful and unconstitutional.

They are also requesting the court to reinstate Nxasana to his old position because they argue that he was forced out of the organisation and for current NPA head Shaun Abrahams's appointment to be reversed on the grounds that the position was in fact not vacant at the time of his appointment.

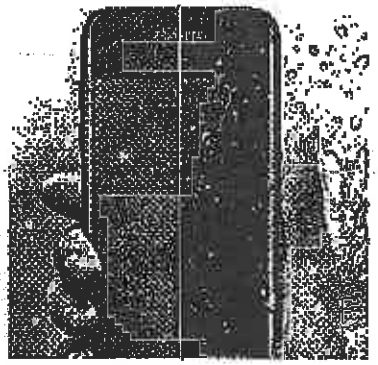
SAMSUNG

Dust and Water resistant (IP68*)

Galaxy S7 | S7 edge

*Terms and Conditions apply

MORE INFO >



SIGN UP TO OUR NEWSLETTERS

Get access to exclusive media news and insight into from DestinyConnect

Email address

Destiny Insider

Destiny Weekly

Our Events

SUBSCRIBE NOW!

Find out more about our digital and print subscriptions

UPCOMING EVENTS VIEW ALL

Luxury Collections Event 2016

Venue: The Park house of Events

15 November 2016 14:00 — 16 November 2016 20:30

Should their application be successful, the court could order that the full amount of the golden handshake or a portion of it be recovered and it could pave the way for Nxasana to return.

"I am not going to oppose the application by Corruption Watch and Freedom Under Law simply because I believe that the commission by the president into my fitness to hold office would have cleared me," Nxasana said, adding that none of the decisions he had undertaken while at the NPA have been successfully challenged because they were all above board.

READ MORE: Nxasana faces the chop

According to legal counsel for Corruption Watch, President Jacob Zuma is in fact not in the position to hire or fire anyone to the post since the decision on whether to reinstate the 783 charges of fraud and corruption is still pending.

Section 96(2)(b) of the constitution provides that the president is not to act in a manner which exposes himself/herself to a situation involving the risk of a conflict between his official responsibilities and his private interests, Leanne Govindsamy told the newspaper.

Tags: Corruption Watch, Freedom Under Law, golden handshake, Mxolisi Nxasana, National Prosecuting Authority (NPA), R17,3 million, Simon Abrahams

0 Comments Sort by Oldest

Add a comment...

Facebook Comments Plugin

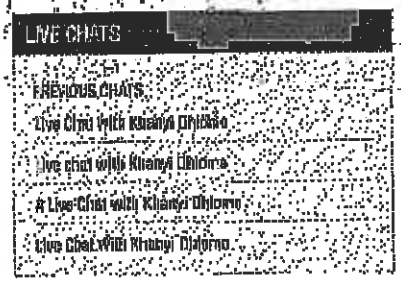
RELATED ARTICLES

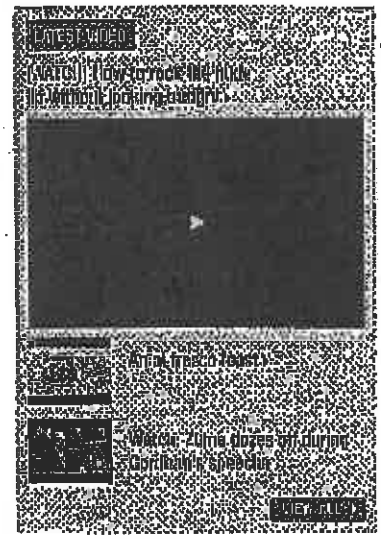
NPA not captured by anyone – Abrahams

Abrahams says he won't step down as NPA boss

NPA head's actions are cowardice: Phosa

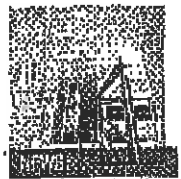
DA calls for NPA boss's resignation



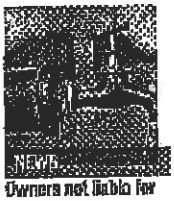


LATEST ON DESTINY MAGAZINE

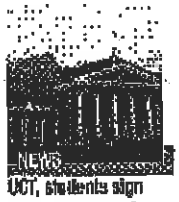
Sthembiso Khoza on his role in The Queen



Domestic workers' 2017 wage increases inadequate, says union



Owners not liable for municipal debt incurred by previous homeowners



UCT, students sign peace agreement

POPULAR ON DESTINY MAGAZINE

News24 | OLX | PROPERTY24 | CAREERS24 | SPREE |

Login / SignUp

Weather Update: Showers to hit most of SA
Rain is expected in all but the coastal regions.

Search

Cape Town Wednesday 16-21°C
More sun than clouds. Mild.
3 DAY FORECAST
Brought to you by: weather24

LAST UPDATED: 2013-11-06, 17:01.

Exclusive: Pravin to be charged again

2013-11-06 06:05

Abram Mashego - City Press

Finance minister Pravin Gordhan is expected to be charged again next month.

And this time, a determined Hawks and National Prosecuting Authority (NPA) team want to make sure they have a strong case against him and his co-accused.

The new charges will relate to the establishment of the so-called rogue unit in 2007, when Gordhan was commissioner of the SA Revenue Service (Sars).

Two senior Hawks officials and an NPA executive close to the investigation have told City Press that Gordhan and his former Sars deputy, Ivan Pillay, will be charged "before Christmas".

"This is not overnight work. There is a lot that we still have to do, but they will be charged before Christmas," said a senior Hawks official this week.

Another senior Hawks officer said: "The charges laid against them will include fraud, defeating the ends of justice and contravention of the Regulation of Interception of Communications and Provision of Communication-Related Information Act."

City Press has learnt that the Hawks and the NPA are aiming to list Gordhan as "accused number 1" on the charge sheet.

Finance Minister Pravin Gordhan..

Multimedia · User Galleries · News in Pictures
Send us your pictures · Send us your stories

Related Links

'Gordhan mustn't think he is off the hook'
NPA carrying out ruling party's mandate - ANC MP
Resign, apologise - opposition MPs tell Ahrefiams

National Director of Public Prosecutions Shaun Abrahams surprised many on October 11, when he announced charges against Gordhan, Pillay and former Sars commissioner Oupa Magashula.

He spent most of that press briefing speaking about the alleged illegal Sars unit – but opted instead to charge the three with fraud and contraventions of the Public Finance Management Act relating to Pillay's early retirement.

City Press has also established that the Hawks team investigating Sars' High Risk Investigation Unit, dubbed the rogue unit, has been beefed up with an additional two investigators as it scrambles for further evidence against Gordhan and several other former Sars employees, including former group executive for investigations Johann van Loggerenberg.

The Hawks detectives "recently" approached former deputy finance minister Jabu Moleketi for a statement, and asked him to provide information about the formation of the investigation unit, which he initially opposed.

According to a "secret" information note sent by the Hawks to State Security Minister David Mahlobo on January 20, Moleketi had expressed misgivings about the unit's establishment in February 2007, when Gordhan approved it and then finance minister Trevor Manuel signed it off.

In the note, it states that Moleketi wrote on Gordhan's application: "Supported – however, this is a strange way of executing what I consider to be an economic mandate of NIA (the National Intelligence Agency). It seems as though it is an add-on rather than part of NIA's mandate."

Moleketi yesterday confirmed he was approached to provide a statement to the Hawks.

Welcome to News24 | Log in

Get Published! | UPLOAD

MOST READ | NEWS IN YOUR AREA | EDITOR'S CHOICE

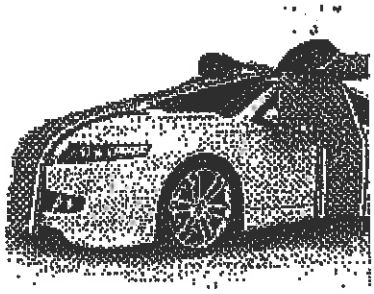
Which city has the worst potholes in SA? More than 16 000 reported
Madonsela sorry for 'Oros' comment
LIVE: Americans queue up to vote in the US elections
No, I would not return to the ANC - Madonsela
Chappell under fire for Robala 'village' comment

More..

OUT CLICK HERE

Auto Trader

Spoil yourself this festive season



Shop Car deals

PARTNER CONTENT

How much food do you need to concentrate?
We have been taught that we need three meals a day in order to make it through the day and while most of us indulge in more than our fair share there is a large portion of South Africans who are living off barely enough to sustain them.

A senior Hawks officer said the probe into the unit was a "prosecutorial-led investigation", and the NPA was providing the team with guidance and instructions.

The information note sent to Mahlobo by lead investigating officer Brigadier Nyameka Xaba alleges that Gordhan and Pillay were instrumental in the creation of the rogue unit. Xaba heads up a specialised Hawks unit, which has been set up to probe crimes against the state.

City Press has learnt that the NPA has allocated four prosecutors – all from the Priority Crimes Litigation Unit, which Abrahams used to head – to lead the investigation team.

Abrahams told Parliament during his grilling before the justice portfolio committee on Friday that the investigation into the rogue unit was at an advanced stage, "and we will make sure we do not make the same mistakes here".

A senior prosecutor, based at the NPA's headquarters in Silverton in Pretoria, said it was the "first time I have seen four prosecutors being allocated to one case".

The prosecutor, who spoke on condition of anonymity, said Hawks detectives Xaba – as well as a Colonel H Malulaka, a Lieutenant Colonel S Peleza and a Captain M Sewele – were "regulars" in Abrahams' office.

"They always meet in Shaun's office. Lately, they have been given access cards. They are no longer required to sign the visitors' registry and are no longer escorted through the building," the prosecutor said.

NPA spokesperson Luvuyo Mfaku said no decision to prosecute Gordhan had yet been taken, adding: "The investigation is still under way."

Read more on: treasury | npa | sars | hawks | pravin gordhan

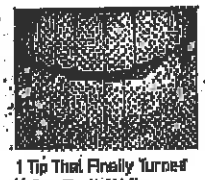
Join the conversation!

24.com encourages commentary submitted via MyNews24. Contributions of 200 words or more will be considered for publication.

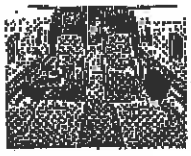
We reserve editorial discretion to decide what will be published.
Read our comments policy for guidelines on contributions.

YOU MIGHT ALSO LIKE

Making Money 24/7: A Fast and Exclusive Glimpse into ...
Bizness247



1 Tip That Finally Turned Yellow Teeth White
Health & Beauty



South African Binary Options trader gives us a private tour of his
24 Business News

Against All Odds: 110 People Won the Same Lottery
LottoSix

MORE FROM NEWS24

Zuma slashes ANC veterans

Essop Pahad: Who is Kebby Maphatsoe anyway?

Where did Zwane adviser get R10m for Tegeta deal?

M&G won't apologise to Zuma after Press Ombud's ruling

Zuma to Mugabe: Deal with "murky" investment policy

PROMOTED STORIES

This Guy Just Bought one of ZA most expensive penthouses, and we still can't believe how he made his money! Insane story! 24 Business News

Brexit earned me a Fortune...See here how! Bizness247

Spoiler Alert! As a complete newbie to trading, I was shocked... Why We Like it

How South Africans Are Changing the Gobal Lottery Industry? LottoSix

The Weirdest Cars Coming In 2017 autodailynow.com

Recommended by

24.com publishes all comments posted on articles provided they adhere to our Comments Policy. Should you feel a comment is offensive please click on the 'Report Comment' button to the right of each comment.

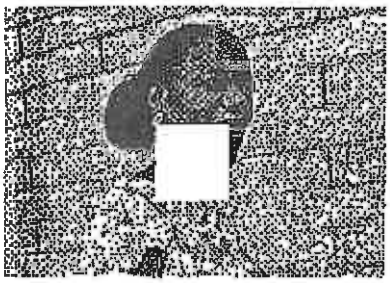
COMMENT ON THIS STORY 24 comments

Comments have been closed for this article.

JOHANNESBURG

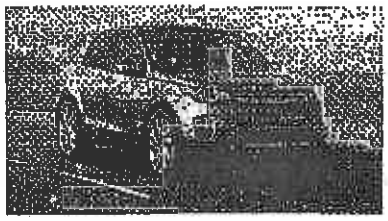
News

WATCH: Some didn't want the truth to come out - Madonsela



LAND ROVER DISCOVERY SPORT

> BOOK A TEST DRIVE



We're launching November 21

The Huffington Post will launch their 17th digital edition in South Africa, with a mission to provide a platform for local voices and communities while also delivering the best of global and local news, politics, lifestyle, entertainment for South Africans, by South Africans.

The new www.huffingtonpost.co.za will go live on 21 November 2016.

Follow us on Social Media

Follow us on Facebook

Book flights
Compare, Book, Fly

FROM:

DEPARTURE DATE:
10 Nov 2016

TO:

RETURN DATE:
17 Nov 2016

TRAVELLERS
1

Click here for multi city

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

CASE NO: 87643/16

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 JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned

WESLEY JONATHAN TIMM

do hereby make oath and say that:

1. I am an attorney of this Honourable Court, practising as such as in the firm Webber Wentzel, the applicants' attorneys of record, whose principal place of business is at 90 Rivonia Road, Sandton, Johannesburg. I am duly authorised to depose to this affidavit on behalf of Webber Wentzel.

WT

2. The facts herein contained fall within my own personal knowledge, save where the contrary is stated or appears from the context, and are true and correct.

3. I have read the founding affidavit of Francis Antonie and I confirm the content thereof insofar as it relates to me and Webber Wentzel.

DEPONENT

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Rosebank on 08 November 2016, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS
Full names: Mabokela Malobe
Address: 15 Sturdee avenue Rosebank
Capacity: C/S

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2016 -11- 08
CSC
ROSEBANK
SUID-AFRIKAANSE POLISIEDIENS

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

CASE NO: 87643/2016

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 JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

SUPPLEMENTARY FOUNDING AFFIDAVIT

I, the undersigned

FRANCIS ANTONIE

do hereby make oath and say that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("**HSF**"), situated at 2 Sherborne Road, Parktown, Johannesburg and I was the deponent in the founding affidavit in this application ("**the founding affidavit**").

2. I am duly authorised to depose to this affidavit on behalf of the applicants.

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

4. All legal submissions are made on the advice of the applicants' legal representatives.

5. This short supplementary affidavit is necessary to file in light of a citation error discovered at paragraph 113 of the founding affidavit. In that paragraph I refer to the "*Booysen*" matter erroneously, instead of a matter concerning Mr Richard Mdluli. There is also an erroneous reference to "*Mr*" instead of "*Ms*" Jiba. Paragraph 113 should have read as follows:

> "Subsequently, this Court, in the matter of *the General Council of the Bar South Africa v Jiba and Others* [2016] ZAGPPHC 833 (5 September 2016), struck Ms Jiba off the roll of advocates on the basis of, *inter alia*, her dishonesty in the case of Mdluli[1]. Following that judgment, on 19 September 2016, the applicants wrote to Mr Abrahams to request the immediate reinstatement of the charges against Ms Jiba (the letter is annexed marked "**FA15**"). Mr Abrahams has, to date, failed to act in this respect." (Additions and replacements underlined)

6. I submit that the filing of this short affidavit does not prejudice the respondents in any way and does not necessitate an extension of the time periods for the filing of the answering affidavit. The substance of this affidavit is merely to correct an incorrect citation, and has been filed as soon as the

---

[1] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP).

applicants became aware of the error. This minor error is, itself, very limited and will not require any substantial rethinking of the respondents' answer.

WHEREFORE, the applicant prays for the relief set forth in the notice of motion to which this affidavit is attached.

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2016 -11- 11
SUID-AFRIKAANSE POLISIEDIENS

FRANCIS ANTONIE

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Rosebank on 11 November 2016, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS
Full names: N S Mulaudzi
Address: 15 Sturdee Ave
Capacity: Rosebank

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2016 -11- 11
SUID-AFRIKAANSE POLISIEDIENS

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 87643/2016

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 JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

T.J.S

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and state that:

1. I am the President of the Republic of South Africa duly appointed in terms of section 87 of the Constitution of the Republic of South Africa, 108 of 1999 ("**the Constitution**"). I am the first respondent in this application.

2. The facts contained herein fall within my personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, both true and correct.

3. Any legal submissions that are made by me are made on the advice of my legal representatives.

THE RELIEF SOUGHT

4. The applicants seek, on an urgent basis:

   4.1 to review and set aside my alleged *failures* to institute an enquiry as against the second to fourth respondents and to provisionally suspend them pending the enquiry;

T.J.S J

4.2 to direct me to institute an enquiry as against the second to fourth respondents and to provisionally suspend them pending the enquiry;

4.3 a punitive costs order, if this application is opposed.

5. The applicants also seek that my *failures* be declared unlawful in terms of a Rule 16A Notice.

THE BASIS OF MY OPPOSITION

6. I oppose this application on the following grounds namely:

6.1 The matter is not urgent. I say so for the following reasons.

6.1.1 Urgency relates to form and not substance and is not a prerequisite to a claim for substantive relief. An applicant must set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at the hearing in due course. The fact that an applicant wishes to have a matter resolved urgently does not render the matter urgent.

6.1.2 The applicants will be able to obtain substantial redress in the normal course, should there be good grounds to do so, when I make a decision as to whether to place the second to fourth

TJS

respondents on suspension and whether I will institute an enquiry into their fitness to hold office. This decision, even though it is executive action, can be reviewed. Therefore the applicants will have, if good grounds exist, a real remedy once I have exercised my power in terms of section 12(6) of the NPA Act, should I do so. Despite the anxiety of the applicants, this matter can obtain substantial redress in the normal course and therefore does not qualify to be enrolled on the urgent roll.

6.1.3 The applicants cite in the founding affidavit, that if the second to fourth respondents were to continue in their performance of their official duties this *will* jeopardise dozens of critical prosecutions and investigations daily and bring the law into disrepute and make a mockery of the office. The applicants do not take the Court into their confidence in:

6.1.3.1 Disclosing which dozens of critical prosecutions and investigations stand to be jeopardised;

6.1.3.2 Why those dozens of critical prosecutions and investigations stand to be jeopardised;

6.1.3.3 When those dozens of critical prosecutions and investigations stand to be jeopardised;

T.S.S J.G.C.

6.1.3.4 These allegations are not based on any fact and are merely based on speculation and conjecture. Therefore the basis for their urgency is not grounded in fact.

6.1.3.5 The prejudice to me and other respondents is that we are placed in an impossible position to meet a case that is obscure. We are not afforded an opportunity to give clear and lucid answers when details necessary point to urgency is not disclosed. I am advised that it is not open to the applicants to make out their case in their replying affidavit.

6.1.3.6 The applicants also cite a possible further charging of Minister Gordhan as another basis as to why this matter is urgent. This allegation is also bad since:

6.1.3.6.1 No basis is offered for this suspicion. The fact that the second respondent has intimated that there are ongoing investigations of the SARS rogue unit does not mean that investigation will necessarily result in any prosecution;

6.1.3.6.2 In any event the fifth respondent has the constitutional power to proceed with any

T.J.S J.G.

investigation and prosecution where good grounds exist for doing so;

6.1.3.6.3 This again is no basis at all for urgency.

6.1.4 The applicants, without any substantiation, allege that the decision of the third and fourth respondents to charge Minister Gordhan wiped R50 billion rand off the economy and that the second respondent expects to *"undermine the integrity of the NPA even further and perhaps wipe another R50 billion of(sic) the stock exchange soon"*. I am advised that it would be a sad day and in fact unconstitutional if prosecutorial decisions are, taken or not taken, influenced by how the market is likely to respond to such decisions. The decisions are to be made purely guided by the Constitution and the law.

6.1.5 The urgency of the matter is alleged to have been also based on the *"real potential to cause irreparable harm to the functioning of the NPA, actual and perceived."* This conclusionary statement is offered without any factual support. The Honourable Court is not told what irreparable harm to the functioning of the NPA is said to result. Again, it is unfair as a respondent for me to answer to such a bald allegation which lacks sufficient specificity to attract a proper answer. Other respondents must

T.J.S J.C.

be similarly prejudiced by these generalised statements which the applicants make for urgency.

6.1.6 Whether the third respondent is a *"person of potentially redoubtable character and competence"* whatever that may mean offers no basis for urgency, apart from that being a decision that can only be made by a section 12(6) inquiry if one were to be established.

6.1.7 I am advised that it is not sufficient to state without more that *"substantial redress cannot be obtained in due course and as such the matter is patently urgent"*. The conclusion is made in bald broad terms because there is no factual axis underpinning that conclusion.

6.1.8 It is unhelpful to also allege without facts that there *"is a real risk that this will result in continuing irreparable harm to the reputation of the NPA and the rule of law."* The applicants must place facts, which when considered, would enable the Court to come to that conclusion that there is indeed such a "*real risk*". Equally the respondents and I must be afforded an opportunity to give countervailing facts in refutation of those allegations.

6.1.9 It is utterly unacceptable that the urgency of the matter is also sought to be based on "*decisions*" which "*may be irreversible or will only be reversible with a great amount of difficulty*" or "*will have numerous*

T.J.S J.G.Z

irreversible consequences". Surely the applicants must tell us what decisions are these so that the Court can be able to determine whether the applicants' opinion is well founded or not.

6.1.10 The applicants do not lay a basis for any real apprehension of harm if the second to fourth respondents were to remain in office pending the outcome of my decision. There is no allegation that the second to fourth respondents are conducting themselves in a dishonest or biased manner in discharging their duties and/or a real apprehension that they will conduct themselves in a dishonest or biased manner in the discharge of their duties. Even the allegation that the public perception of the fifth respondent is affected by their presence is not supported by any objective and empirical facts. In any event the decisions of the fifth respondent cannot be driven by whether such decisions enjoy public support or not.

6.1.11 I have informed the applicants in a letter dated 7 November 2016, being annexure **FA12** to the founding affidavit, that I require more time to decide whether to exercise the power vested in me in terms of section 12 of the National Prosecuting Authority Act, 32 of 1998 ("**the NPA Act**"). In this letter I requested from the applicants an extension to 21 November 2016 in order for me to be given a "*proper opportunity to address*

T.J.S

what no doubt is a serious matter with the effected(sic) parties in anticipation of any action [I] may contemplate, after having considered such in its entirety". The applicants, on 7 November 2016 being annexure **FA13** to the founding affidavit, in reply to this letter stated that they will be launching urgent proceedings within the next day to secure the suspension of the second to fourth respondents and have enquiries instituted into their fitness for office and that they will take my *failure* to comply with their demands as a *failure* to take a decision.

6.1.12 The launching of this urgent application, well knowing that I am in the process of considering exercising my power in terms of section 12 of the NPA Act, is an abuse of the court process and is at best for the applicants, premature. The Honourable Court should show its displeasure against the applicants and dismiss the application with costs.

6.1.13 I have written to the second to fourth respondents on 14 November 2016, affording them an opportunity as to why I should not place them on suspension pending the outcome of the enquiry into their fitness to hold office by 28 November 2016. Copies of these letters are annexed to this affidavit as "**AA1 – AA3**". I did so in order to provide the second to fourth

respondents' sufficient time to provide me with the reasons as requested.

6.1.14 I am advised that any exercise of my powers in terms of section 12(6) of the NPA Act, will constitute administrative action and the second to fourth respondents have a right to be heard prior to me exercising any power in terms of section 12(6) of the NPA Act. This is a constitutional right which second to fourth respondents have. There will be no basis to abrogate that right.

6.1.15 At the drafting of this answering affidavit I would have not received the reasons from the second to fourth respondents as the deadline for such reasons had not expired. I deal with this issue under the heading of ripeness.

6.1.16 Therefore I submit that this matter is not urgent as the applicants are able to obtain substantial redress in the normal course once a decision has been made and that there are no factual averments which necessitate urgency.

6.2 The matter is not ripe for hearing. I say so for the following reasons:

6.2.1 The Constitution does not confer on me an obligation to suspend or enquire into the fitness of the second to fourth respondents to hold office. The Constitution requires that

national legislation be promulgated which must ensure that the prosecuting authority exercises its function without fear or favour. It is the NPA Act which gives me the powers to suspend and enquire into the second to fourth respondents' fitness to hold office. Thus the Constitution and the NPA Act do not impose a duty on me but confers on me a power which, properly exercised, I may exercise at my discretion. Therefore any allegation that my alleged *failure* to appoint an enquiry or to suspend the second to fourth respondents do not amount to a *failure* to fulfil a constitutional obligation.

6.2.2 The applicants appear to conflate a constitutional power and a constitutional duty. The powers of the President under section 12(6)(a) of the NPA Act has to it jurisdictional facts which must be present for that power to be exercised. I am still considering whether those jurisdictional facts are present once the second to fourth respondents have furnished me with their reasons why I should or should not consider establishing a section 12(6)(a) enquiry.

6.2.3 I have initiated the process as laid down in terms of section 12 (6)(a) of the NPA Act which provides that *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*

T.J.S

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.

6.2.4 Section 14(3) of the NPA Act provides that the process to follow when removing a director is, *inter alia*, in terms of section 12(6) of the NPA Act.

6.2.5 I have therefore required of the second to fourth respondents to provide me with reasons as to why I should not suspend them in terms of section 12(6)(a), together with section 14(3), of the NPA Act, and that process has not been completed as yet. I am advised that the business of courts is to decide matters which have already ripened or crystallised and not with prospective or hypothetical ones. This matter is clearly premature as I have not as yet completed the process of receiving representations and considering all the relevant facts and circumstances as I am enjoined by law to do.

6.2.6 The applicants contend that my not responding to them by their deadline means that I have *failed* to take a decision. Until such time as I have received the reasons from second to fourth respondents; have considered those reasons; have engaged the Minister responsible for the fifth respondent; considered his inputs and made the decision, any court processes are premature.

6.2.7 I have already stated to the applicants as early as 7 November 2016, that I am in the process of making a decision and therefore I have not *failed* to take a decision.

6.2.8 Not only were the applicants aware that I have started the process to consider exercising the power in terms of section 12(6) of the NPA Act, should such a process be grounded the applicants still saw fit to launch these proceedings by 9 November 2016 even on an urgent basis.

6.2.9 I aver that I should be given the opportunity to perform my constitutional mandate in a proper way so that I may exercise my discretion personally, in good faith and without misconstruing my power. This application at its heart seeks to undermine the process required for a rational decision.

6.3 The application breaches the separation of powers principle. I say so for the following reasons:

6.3.1 I am advised that the constitutional power to suspend an NDPP is a power in terms of section 84(2)(e) of the Constitution read with section 12(6) of the NPA Act. This power can only be exercised by the President. It is therefore an executive constitutional power. To ask of courts that they must substitute my decision and to make that decision themselves, would amount to a breach of the rule of law, namely, separation of powers.

6.3.2 I am also advised that it cannot behove a non-governmental organisation or a member of the public, to demand that I must exercise a constitutional executive power. Any President who "*misgoverns*" will in a democratic state be "*punished*" by the electorate. It is a very perilous route to permit a culture where members of the public or entities such as the applicants are allowed to govern through the courts. This is what the applicants are seeking to do. The applicants are inviting the Court to run the country through the courts.

6.3.3 This application seeks to bypass my executive power as contained in section 12 of the NPA Act, by requiring of this

T.G.S

Honourable Court, to suspend the second to fourth respondents and to compel me to institute an enquiry. The applicants do not allege that section 12(6) of the NPA Act is unconstitutional or that section 12(6) of the NPA Act has not been complied with.

6.3.4 It is trite that the principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense, it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.

6.3.5 This Honourable Court should allow the process that I have started to unfold and for me to exercise my discretionary power in a rational manner. This Honourable Court should not be seen to interfere in an ongoing process, in which the law demands that procedural fairness be observed. To do so would be to blur the lines between the executive and the judiciary in matters that have not been finalised.

6.3.6 Therefore, the declaratory orders sought by the applicants, in prayers 2 to 4 of the Notice of Motion, are not competent in that, the section 12(6) process has not been finalised and all the relevant facts and circumstances have not been provided in order for me or this Honourable Court to make any decision. It is precisely this predicament that the principle of separation of powers seeks to address.

6.4 The application seeks to unlawfully fetter my discretionary power. I say so for the following reasons:

6.4.1 The applicants contend in paragraph 139 of the founding affidavit that "*[E]ach and every step in the process must be rationally related to the outcome. A failure to take into account relevant material or properly to apply one's mind to the facts and law renders the decision reviewable.*" Yet the applicants seek that I do precisely the opposite of that and that is to make a decision without taking into account relevant material or to properly apply my mind to the facts and the law.

6.4.2 The law requires in the exercise of a discretion that the decision maker must be independently satisfied and must consider each case individually and to justify every decision, as the law requires nothing less. I am therefore bound by law, to exercise

T.J.S J.G

my discretionary power, in a rational manner. I am in the process of doing so.

6.4.3 This application seeks to demand of me to exercise my discretion in a manner which is not rational but in accordance with what the applicants want without allowing me to consider all the relevant facts and the law before I make a decision which I must be able to justify. This Honourable Court should not be seen to condone that kind of conduct of the applicants. In fact, this Honourable Court should show its displeasure with the conduct of the applicants and to dismiss the application with costs.

6.4.4 Again, the relief sought by the applicants in prayers 2 to 4 of the Notice of Motion, is not competent as to do so would be to fetter my discretion in a matter that has as yet not been finalised and no decision has been taken.

6.5 The applicants seek to have this Honourable Court substitute my decision in terms of section 12 of the NPA Act with that of the Court. This approach is incorrect for the following reasons:

6.5.1 The applicants contend that this Honourable Court should substitute my power on the grounds that the Court is in as good a position as the original decision maker to make the decision;

and that the decision is a foregone conclusion and that these two factors must be considered cumulatively. What this argument misconceives is the difference between an administrative decision and an executive decision. Courts do substitute administrative decisions in exceptional circumstances but can never substitute executive decisions without offending the rule of law namely separation of powers. I am advised that the only thing a court can do is to set aside an executive decision if such a decision is inconsistent with the Constitution and the law but never replace that decision with its own.

6.5.2 The applicants argue that the Court is in as good a position as me to make a decision to institute disciplinary proceedings and to suspend the second to fourth respondents as these decisions are largely of a legal nature. This is incorrect. The decision to provisionally suspend or to institute an enquiry is based on the facts of the case and the circumstances surrounding it. It is therefore a factual enquiry and not a legal enquiry. Moreover, courts do not institute disciplinary proceedings. They only decide disputes that can be resolved by the application of law.

6.5.3 Further the NPA Act has elaborate process for the removal or suspension of an NDPP. This again, is to secure the independence of the fifth respondent.

6.5.4 It is untrue that the decision to suspend or to hold an enquiry is a foregone conclusion as alleged by the applicants. The decision is not a foregone conclusion as all relevant facts and circumstances should be taken into account and these facts and circumstances are not before this Honourable Court and/or me. In fact I have not received all the facts and circumstances to make a decision.

SECTION 12(6) REQUIREMENTS

7. As I have indicated earlier, section 12(6) of the NPA Act, requires certain jurisdictional facts to be present in order to suspend an NDPP. These are that:

7.1 the first ground to suspend/remove an NDPP is the ground of misconduct. The applicants do not seek to make that case that the second to fourth respondents are guilty of any misconduct. In any event, if such a case could be made, it would not be in the province of the Court to decide that matter. Such a decision lies with an enquiry established in terms of section 12(6) of the NPA Act.

7.2 the second ground for suspending or removing an NDPP is on account of continued ill-health. The applicants do not assert this as the basis for any possible suspension or removal from office of the second to fourth respondents. For that reason I make no further submissions in this regard.

7.3 the third ground for suspending or removing an NDPP is on account of incapacity to carry out his or her duties of office efficiently. This is not a case the applicants seek to mount. On the contrary, the applicants seem to question the soundness of the decision made by the third and fourth respondents and criticize the second respondent for doing so, without evaluating the correctness of the decision, in a press conference.

7.4 the fourth and last ground on which an NDPP can be suspended or removed from office is on account thereof that he or she is no longer a fit and proper person to hold the office concerned. "*Fit and proper*", I am advised, have two elements to it. The one relates to formal qualification and the other to integrity. The applicants are not questioning the formal qualifications of the second to fourth respondents the only thing they seek to impugn is the integrity of the second to fourth respondents.

8. It is therefore important to then examine the bases which the applicants offer in impugning the integrity of the second to fourth respondents. I do so purely to show that the applicants have not provided the factual predicate for the conclusions they seek. I do not deal with these assertions on their merits as I have not received the responses from the second to fourth respondents.

8.1 In respect of the third and fourth respondents their integrity is questioned merely on the basis that the decision to charge Minister Gordhan is manifestly wrong and without substance. This can never ground a basis under section 12(6) of the NPA Act for their suspension or removal from office. It is natural to expect that one or other decisions made by office bearers may prove to be wrong, even, spectaculatly wrong, that in and of itself can never be a ground to question the second to fourth respondents' integrity as a basis for them being "*fit and proper*", without more.

8.2 Then in respect of the second respondent, his fitness and propriety to hold office is questioned on the basis of him having "*acted grossly negligently and recklessly*", "*breath-taking incompetence*" and "*ulterior motive*" I am advised that any negligence or recklessness even, if established, does not point to lack of integrity.

8.3 To the extent that the applicants seek to impute ulterior motive, one would expect that the applicants would furnish facts which, when established, would point to ulterior motive. This they do not do. At the very least this attack appears to find inspiration from the fact that the second respondent attended a meeting at Luthuli House with, amongst others, myself. That meeting had nothing to do with the charges that were to be proffered against Minister Gordhan. That meeting concerned the student protests.

TJS

8.4 Although the applicants are obliged to make their case in the founding papers, I still invite the applicants in the reply to give concrete facts which, if established, would point to any ulterior motive, utter recklessness and incompetence. Because of the importance of this assertion of ulterior motive I will approach the above Honourable Court to grant me leave to supplement my answering affidavit, this is crucial. I still invite the applicants to disclose those facts which inform their conclusion that there was ulterior motive in contrast to an incorrect decision in charging Minister Gordhan.

WHY THE RELIEF SOUGHT IS INCOMPETENT

9. I deny that I have *failed* alternatively refused to act in accordance with section 12 (6) of the NPA Act. The clear uncontested facts show that this allegation is clearly incorrect. I say so because:

9.1 The *failures*, alternatively refusal by me to institute an enquiry, under section 12(6)(a) of the NPA Act, into the second respondent's fitness to hold the office of the National Director of Public Prosecutions is not competent. Annexure **FA12** read with annexure **AA1** demonstrably show on the facts that I have initiated the process in terms of section 12(6)(a) of the NPA Act. These facts cannot be disputed by the applicants. These facts clearly evinces that I have not *failed* to institute an enquiry. These facts clearly show that I have not refused to institute

an enquiry. In fact what is inescapable is the fact that I have chosen to exercise my discretion in a rational manner.

9.2 The *failures*, alternatively refusal by me to provisionally suspend the second respondent from his office, under section 12(6)(a) of the NPA Act pending the finalisation of the enquiry is not competent. Annexure **FA12** read with annexure **AA1** demonstrably show on the facts that I have initiated the process in terms of section 12(6)(a) of the NPA Act. These facts cannot be disputed by the applicants. These facts clearly evinces that I have not *failed* to suspend the second respondent. These facts clearly show that I have not refused to suspend the second respondent. In fact what is inescapable is the fact that I have chosen to exercise my discretion in a rational manner.

9.3 The *failures*, alternatively refusal by me to institute an enquiry, under section 12(6)(a) of the NPA Act, into the third respondent's fitness to hold the office of Acting Special Director of Public Prosecutions is not competent. Annexure **FA12** read with annexure **AA2** demonstrably show on the facts that I have initiated the process in terms of section 12(6)(a) of the NPA Act. These facts cannot be disputed by the applicants. These facts clearly evinces that I have not *failed* to institute an enquiry. These facts clearly show that I have not refused to institute an enquiry. In fact what is inescapable is the fact that I have chosen to exercise my discretion in a rational manner.

T.S.S

9.4 The *failures*, alternatively refusal by me to provisionally suspend the third respondent from his office, under section 12(6)(a) of the NPA Act pending the finalisation of the enquiry is not competent. Annexure **FA12** read with annexure **AA2** demonstrably show on the facts that I have initiated the process in terms of section 12(6)(a) of the NPA Act. These facts cannot be disputed by the applicants. These facts clearly evinces that I have not *failed* to suspend the third respondent. These facts clearly show that I have not refused to suspend the third respondent. In fact what is inescapable is the fact that I have chosen to exercise my discretion in a rational manner.

9.5 The *failures*, alternatively refusal by me to institute an enquiry, under section 12(6)(a) of the NPA Act, into the fourth respondent's fitness to hold the office of Director of Public Prosecutions is not competent. Annexure **FA12** read with annexure **AA3** demonstrably show on the facts that I have initiated the process in terms of section 12(6)(a) of the NPA Act. These facts cannot be disputed by the applicants. These facts clearly evinces that I have not *failed* to institute an enquiry. These facts clearly show that I have not refused to institute an enquiry. In fact what is inescapable is the fact that I have chosen to exercise my discretion in a rational manner.

9.6 The *failures*, alternatively refusal by me to provisionally suspend the second respondent from his office, under section 12(6)(a) of the NPA

TGS

Act pending the finalisation of the enquiry is not competent. Annexure **FA12** read with annexure **AA3** demonstrably show on the facts that I have initiated the process in terms of section 12(6)(a) of the NPA Act. These facts cannot be disputed by the applicants. These facts clearly evinces that I have not *failed* to suspend the fourth respondent. These facts clearly show that I have not refused to suspend the fourth respondent. In fact what is inescapable is the fact that I have chosen to exercise my discretion in a rational manner.

10. I deny that this Honourable Court is in a position to declare the alleged *failures* and/or refusal to act, as unlawful and to substitute those alleged *failures* and/or refusal to act and to direct me to institute an enquiry or to suspend the second to fourth respondents. It is clear from what I have stated above, that this process has not run its course and this Honourable Court should demand of me to ensure that the steps in the process are rationally related to the end sought to be achieved and that there must be a connection between a particular step and the end in order to ensure that the whole process is rational. The applicants seek to derail this clear constitutional imperative and to upset the principle of legality.

11. The applicants seek a punitive costs order as against me in the event of opposition. I deny that the applicants are entitled to this relief for the following reasons:

11.1.1 The applicants were well aware before the launching of this application that I required additional time to make my decision after providing the second to fourth respondents with their constitutional right to *audi alteram partem*. This request was ignored out of hand by the applicants.

11.1.2 The extension required is not unreasonable in the circumstances especially since the alleged misconduct complained about culminated on 31 October 2016. Therefore the extension would have meant that there would be a period of 3 weeks before any decision would be taken.

11.1.3 I therefore aver, that that extension was reasonable in light of the independence of the office of the fifth respondent and that I follow the proper procedures when exercising my power in terms of section 12 (6) of the NPA Act. This period would seem extremely reasonable.

11.1.4 I therefore aver, that the matter is not urgent and more importantly that the matter is not ripe for hearing.

AD FOUNDING AFFIDAVIT

12. I turn to deal with the founding affidavit of **FRANCIS ANTONIE** together with the annexures to the extent that it relates to me only. I <u>will not</u> be dealing

with any matter that relates to the fitness or otherwise of the second to fourth respondents in this answering affidavit as to do so would be to prejudge the decision before I am in receipt of all the facts and circumstances surrounding the second to fourth respondents.

13. Ad Paragraphs 1 to 2

13.1 I admit the content of these paragraphs.

14. Ad Paragraph 3

14.1 I deny that the facts are both true and correct.

15. Ad Paragraph 4

15.1 I note the content of this paragraph.

16. Ad Paragraphs 5 to 12

16.1 I am not in a position to deal with these averments as I have not received any representations from the second to fourth respondents.

17. Ad Paragraphs 13 to 14

17.1 I deny that the applicants are entitled to the relief sought.

17.2 I repeat what I have stated in paragraphs 9 to 11 above.

18. Ad Paragraph 15

18.1 I deny that I have *failed* to take a decision.

18.2 **FA13** of the founding affidavit clearly states that I require time in order to request representations before a decision can be made. The applicants are well aware that that process is unfolding and yet still chose to come to Court, well knowing that the matter is not ripe for hearing.

18.3 I repeat what I have stated in paragraphs 6 to 11 above.

19. Ad Paragraph 16

19.1 I deny that the Court has to take prompt and clear action in circumstances where the matter is not ripe for hearing.

20. Ad Paragraph 17 - 26

20.1 I admit that the fifth respondent must be independent and its offices must be fit and proper.

20.2 I repeat what I have stated above in paragraphs 6 – 8.

21. Ad Paragraph 27

21.1 I deny that the duty vested in me in terms of section 12(6) of the NPA Act is not discretionary. In fact, the section is in mandatory terms and therefore I have a discretion based on the facts and circumstances of each case as to whether to provisionally suspend someone pending an enquiry or not. That discretion also extends to whether that suspension should be on full pay or on no pay.

21.2 I deny that all the jurisdictional facts are before me to exercise that power in terms of section 12(6) of the NPA Act.

22. Ad Paragraph 28

22.1 I deny that I have *failed* to exercise my constitutional power.

22.2 I told the applicants before the launching of these proceedings that I have initiated the process and that I will require time in which to exercise my power in a rational manner.

23. Ad Paragraphs 29 - 30 and 32

23.1 I admit the content of these paragraphs.

24. Ad Paragraph 31

24.1 I deny the conclusions made by the applicants in respect of the decisions of the fifth respondent as the applicants have not sought to provide a factual predicate for these conclusions.

25. Ad Paragraphs 33 to 37

25.1 I admit the content of these paragraphs.

26. Ad Paragraphs 38 to 40

26.1 I admit that the applicants have standing.

26.2 I deny the allegations contained in these paragraphs.

27. Ad Paragraph 41

27.1 I deny that I have *failed* to act as alleged by the applicants. In fact the applicants are misleading this Honourable Court and the public in stating that I have *failed* to act in circumstances where they have been informed that I have started the process in terms of section 12(6) of the NPA Act.

28. Ad Paragraph 42

28.1 I admit the content of this paragraph to the extent it accords with the judgment of the Constitutional Court.

28.2 I further aver that I am not being afforded an opportunity to exercise my constitutional mandates, in circumstances where I have initiated a process in terms of section 12(6) of the NPA Act.

29. Ad Paragraphs 43 to 47

29.1 I deny that I have *failed* to act in terms of my constitutional mandate and my statutory duty. The applicants aver that I must exercise my powers where the necessary jurisdictional facts exist and that I must act lawfully and rationally when exercising those powers.

29.2 The applicants approbate and reprobate with regard to how I should exercise my constitutional mandate and statutory duty. They would want me to exercise this in a rational and lawful manner taking into consideration all relevant facts and circumstances. Yet the applicants have launched this application, attempting to deny me the opportunity to exercise my discretion in a rational and lawful manner especially when I am awaiting the necessary jurisdictional facts to be placed before.

30. Ad Paragraph 48

30.1 I have no knowledge of the allegations contained in this paragraph.

31. Ad Paragraphs 49 to 50

31.1 I admit that the various persons were appointed in the position of Minister of Finance.

31.2 I deny the allegations contained in these paragraphs.

32. Ad Paragraphs 51 – 53

32.1 I have no knowledge of the allegations contained in these paragraphs.

33. Ad Paragraphs 54 – 56

33.1 I have no knowledge of the allegations contained in these paragraphs.

34. Ad Paragraphs 57 – 70

34.1 I repeat what I have stated above in paragraphs 6 to 8.

35. Ad Paragraphs 71 – 78

35.1 I repeat what I have stated above in paragraphs 6 to 8.

36. Ad Paragraphs 79 – 91

36.1 I repeat what I have stated above in paragraphs 6 to 8.

37. Ad Paragraphs 92 to 94

37.1 The attendance at Luthuli House does not, without more, impugn the independence of the second and fifth respondents.

38. Ad Paragraphs 95 to 100

38.1 I repeat what I have stated above in paragraphs 6 to 8.

39. Ad Paragraphs 101 to 103

39.1 I note the content of these paragraphs.

39.2 I aver that in the exercise of my discretion I have to consider all relevant facts and circumstances and not only one version as this would mean that any decision I make would not be rational.

39.3 I can only exercise my discretion if I independently on all the facts exercise my mind and take a decision that I can justify. The applicants correctly state that a person is presumed innocent until proven guilty. I therefore have a duty to require responses from the second to fourth

respondents before I make any adverse decisions against them. This, the applicants contend, in paragraph 99, would be to understand simple constitutional principles. It is unfathomable that the applicants would now demand of me to not follow the simple constitutional principles.

40. Ad Paragraph 104

40.1 I deny that the application launched by the applicants is urgent and that the application is ripe for hearing.

40.2 I refer to what I have stated in paragraphs 6 to 8 above.

41. Ad Paragraphs 105 to 107

41.1 I deny the inferences contained in this paragraph.

42. Ad Paragraph 108

42.1 I admit that a further extension was required by me to 21 November 2016, in order to allow me to follow the constitutional principles of *audi alteram partem* before I exercise my power in terms of section 12(6) of the NPA Act.

T.J.S

42.2 I deny that the matter is urgent and that the circumstances are plain. The extension sought was not unreasonable nor is it inappropriate.

42.3 It is clear that any decision made by me, other than a decision predetermined by the applicants, will be challenged. It is therefore of utmost importance, as well as the fact that constitutional imperatives would demand, that I exercise my power in a rational and lawful manner, which decision I have to justify based on all the relevant facts and circumstances. To not do so, would be to invite further challenges on the basis of rationality.

43. Ad Paragraph 109

43.1 I note the content of this paragraph.

44. Ad Paragraphs 110 to 116

44.1 This matter was decided in the case *Democratic Alliance v President of the Republic of South Africa* in an unreported judgment dated 23 May 2016 by Judge Dolamo in the Western Cape Division, Cape Town. In that matter Judge Dolamo found that my decision not to place Jiba on suspension and to institute an enquiry was rational based on all the facts before me, despite the allegations raised by the Democratic Alliance that on first blush it would seem a foregone conclusion that I should place Jiba on suspension and to institute an enquiry. The

difference in that case and this application is that I had taken a decision in terms of section 12(6) of the NPA Act and that that decision was a balanced one in terms of all the facts before me. In this case I have not as yet taken a decision in terms of section 12(6) of the NPA Act and all the facts are not as yet before me.

45. Ad Paragraphs 117 to 130

45.1 I am not in a position to deal with these averments as I have not received any representations from the second to fourth respondents.

45.2 I repeat what I have stated above in paragraphs 6 to 8.

46. Ad Paragraphs 131 to 136

46.1 I admit the content of these paragraphs to the extent that it accords with the Constitution; the NPA Act and the current positions held by the second to fourth respondents.

47. Ad Paragraph 137

47.1 I admit the content of this paragraph.

48. Ad Paragraph 138

48.1 I deny the content of this paragraph.

48.2 The exercise of a discretionary power is one only a President can make based on the facts and circumstances of each case.

49. Ad Paragraphs 139 to 140

49.1 I admit the content of these paragraphs.

50. Ad Paragraphs 141 to 142

50.1 I deny the content of these paragraphs.

50.2 I have initiated the process in terms of section 12(6) of the NPA Act and am awaiting the necessary representations before I am able to apply my mind and make an independent decision.

50.3 I refer to what I have stated in paragraphs 6 to 8 above.

51. Ad Paragraphs 143 to 148

51.1 I deny the content of these paragraphs.

51.2 I refer to what I have stated in paragraphs 6 to 8 above.

52. Ad Paragraph 149

52.1 I deny the content of this paragraph.

52.2 I further deny that there has been an unreasonable delay. The second respondent withdrew the charges on 31 October 2016 some 9 days before this application was launched. I requested an extension to 21 November which is some 3 weeks. I aver that this is not an unreasonable delay.

52.3 Even if I to act swiftly, the swiftness of that action should not compromise the constitutional imperatives that are to be accorded to the second to fourth respondents.

53. Ad Paragraph 150

53.1 I have no knowledge of the allegations contained in this paragraph.

53.2 However, I aver that should such charges be brought and are found to be without substance, the applicants have the necessary remedies in law to deal with that matter if and when it may arise.

T.J.S

54. Ad Paragraph 151

54.1 I deny that there are compelling grounds for this Honourable Court to grant the substituted relief.

54.2 I refer to what I have stated in paragraphs 9 to 11 above.

55. Ad Paragraphs 152 to 164

55.1 I deny the allegations contained in these paragraphs.

55.2 I refer to what I have stated in paragraphs 6 to 8 above.

56. Ad Paragraph 165

56.1 I deny that the applicants are entitled to the relief sought.

WHEREFORE, the first respondent prays that the application be dismissed with costs.

JACOB GEDLEYIHLEKISA ZUMA

T.J.S

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at PRETORIA on this the 15 day of NOVEMBER 2016, the regulations contained in Government Notice No 3619 of 21 July 1972 and No 1648 of 19 August 1977 having been complied with.

SOUTH AFRICAN POLICE SERVICE
BRYNTIRION
STATIC GUARD SERVICES
2016 -11- 15
PROTECTION AND SECURITY SERVICES
PRETORIA
SOUTH AFRICAN POLICE SERVICE

COMMISSIONER OF OATHS

14 November 2016

Dear Dr Pretorius,

NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO.32 OF 1998)

I have been requested by Freedom Under Law and the Helen Suzman Foundation to provisionally suspend you pending an enquiry into your fitness to hold office.

Freedom Under Law and the Helen Suzman Foundation raised concerns with the manner in which you conducted the prosecution of Minister Pravin Gordhan, Mr Visvanathan Pillay and Mr George Magashula. According to them, your conduct in relation to prosecution of the above mentioned people brought the NPA into disrepute, and consequently rendered you unfit to hold office as Director of Public Prosecutions.

The letter from Freedom Under Law and the Helen Suzman Foundation is attached hereto.

Section 9 (1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 (the Act), provides that "*Any person to be appointed as National Director, Deputy National Director or Director must-*

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and

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

According to section 12(6) of the Act, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold office.

The provisions of section 12(6) of the Act are *mutatis mutandis* applicable to suspension of the Director of Public Prosecutions.

F.J.S

As you are aware, the National Prosecuting Authority is an important constitutional institution in the administration of Justice and maintaining public confidence in the institution is of necessity.

I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Dr Torie Pretorius
Acting Special Director of Public Prosecutions
Private Bag X 752
Pretoria
0001

cc: Minister TM Masutha: Minister of Justice and Correctional Services

14 November 2016

Dear Adv. Abrahams,

NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO.32 OF 1998)

I have been requested by Freedom Under Law and the Helen Suzman Foundation to provisionally suspend you pending an enquiry into your fitness to hold office.

Freedom Under Law and the Helen Suzman Foundation raised concerns with the manner in which you conducted the prosecution of Minister Pravin Gordhan, Mr Visvanathan Pillay and Mr George Magashula. According to them, your conduct in relation to prosecution of the above mentioned people brought the NPA into disrepute, and consequently rendered you unfit to hold office as National Director of Public Prosecutions.

The letter from Freedom Under Law and the Helen Suzman Foundation is attached hereto.

Section 9 (1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 (the Act), provides that "*Any person to be appointed as National Director, Deputy National Director or Director must-*

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and

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

According to section 12(6) of the Act, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold office.

As you are aware, the National Prosecuting Authority is an important constitutional institution in the administration of Justice and maintaining public confidence in the institution is of necessity.

I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Advocate Shaun Abrahams
National Director of the Public Prosecutions
Private Bag X752
Pretoria
0001

cc: Minister TM Masutha: Minister of Justice and Correctional Services

14 November 2016

Dear Adv. Mzinyathi,

NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO.32 OF 1998)

I have been requested by Freedom Under Law and the Helen Suzman Foundation to provisionally suspend you pending an enquiry into your fitness to hold office.

Freedom Under Law and the Helen Suzman Foundation raised concerns with the manner in which you conducted the prosecution of Minister Pravin Gordhan, Mr Visvanathan Pillay and Mr George Magashula. According to them, your conduct in relation to prosecution of the above mentioned people brought the NPA into disrepute, and consequently rendered you unfit to hold office as Director of Public Prosecutions.

The letter from Freedom Under Law and the Helen Suzman Foundation is attached hereto.

Section 9 (1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 (the Act), provides that "*Any person to be appointed as National Director, Deputy National Director or Director must-*

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and

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

According to section 12(6) of the Act, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold office.

The provisions of section 12(6) of the Act are *mutatis mutandis* applicable to suspension of the Director of Public Prosecutions.

As you are aware, the National Prosecuting Authority is an important constitutional institution in the administration of Justice and maintaining public confidence in the institution is of necessity.

I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Advocate Sibongile Mzinyathi
Director of Public Prosecutions
Gauteng North
Pretoria
0001

cc: Minister TM Masutha: Minister of Justice and Correctional Services

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 87643/16

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 JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

ANSWERING AFFIDAVIT OF SECOND, THIRD AND FIFTH RESPONDENTS

I, the undersigned,

SHAUN KEVIN ABRAHAMS

do hereby make oath and state as follows:

INTRODUCTION

1 I am the National Director of Public Prosecutions of the Republic of South Africa (**the "NDPP"**). I was appointed by the First Respondent (the "President") on 18 June 2015, in terms of section 179 (1) of the Constitution of the Republic of South Africa (**"the Constitution"**), read with sections 10 and 12 of the National Prosecuting Authority Act, 32 of 1998 (**"NPA Act"**).

2 Save where otherwise stated, or the context indicates otherwise, the contents of this affidavit are within my personal knowledge and belief and are both true and correct.

3 This application concerns prosecutions instituted against the Minister of Finance (**"the Minister/Gordhan"**), Mr. Ivan Pillay (**"Pillay"**) and Mr. Oupa Magashula (**"Magashula"**). For convenience, and to the extent that the context requires, I refer to these individuals together as **"GP&M."**

4 The applicants contend that prosecutions ought not to have been brought in the first instance. In support of this contention, they make unsubstantiated allegations against me and the other Respondents. On

the basis thereof they contend that I and the other Respondents are not fit to remain in office, and that we should be suspended pending an enquiry. We dispute this.

5 For the convenience of the Court, I have quoted extensively from the documents upon which I rely in this answering affidavit, in particular, the documents which justified the decision to bring charges against GP&M.

6 The second to fifth Respondents oppose this application. I also depose to this answering affidavit on behalf of the fifth respondent. The third respondent files a supporting and confirmatory affidavit attached hereto marked Annexure "**SA1**" The fourth respondent is filing a separate affidavit. I understand that the first respondent also opposes this application.

7 A word about the third Respondent, Dr Pretorius ("**Pretorius**"), who made the decision to prosecute, in consultation with Mzinyathi, the Fourth Respondent. Pretorius, having received his LLB in 1981 from the University of Pretoria, obtained a Masters of Law at the University of London and an LLD at the University of Pretoria. He joined the Department of Justice in 1976, and has been employed in prosecution since then. He was an evidence leader at the Goldstone Commission. He was a member of the Scorpions and a former member of the Priority Crimes Litigation Unit. Since October 2015 he has been Special Director at the PCLU, in an acting capacity.

8 I observe that the Applicants make reference to "charges" having been laid against GP&P. That is not accurate. In fact, a summons was issued for them to appear in Court. A charge would be formally laid only in Court. Nonetheless, to minimize confusion, I have in this affidavit followed Applicants' usage of the term in its loose sense.

THE APPLICATION IS NOT URGENT

9 The applicant offers no more than broad-brush generalised reasons why this matter should be heard as a matter of urgency. The applicant's *per se* based upon the fact that the second, third and fourth Respondents occupy senior positions in an important organ of state falls short. One finds no claim that for them to remain in place until such time as the application is heard in the ordinary course would hinder, scupper or prejudice any particular ongoing or pending prosecution.

10 It helps not for the applicant to anticipate "potential" harm. The burden is upon the applicant to set out *particular* facts that establish an *actual or well-grounded* apprehension of irreparable loss if no relief is granted. It is trite that the degree of abridgment of times and deviation from Rule 6 of the Uniform Rules should be no greater than the necessary exigency of the case. One must carefully analyse the facts of each case to determine the degree of urgency for purposes of setting down the application for hearing.

11 The aforementioned principles were articulated in the well-known and often quoted decision in Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin's Furniture Manufacturers) -1977 (4) SA 135 (W):

> "Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

12 Applicants have fallen short. They allege that they are "a proven severe threat to the economy", and that I may "repeat my misconduct by bringing further ill-conceived charges in the near future." That is patently inadequate.

13 Similar language and unconvincing allegations were made in the application brought by the first applicant against Ms Jiba. Having made these allegations, the first applicant's urgent application was struck from the roll for want of urgency. Ms Jiba remained in office as the Deputy National Director of Public Prosecutions. The sky did not fall. In fact the first applicant, dragged its heels, notwithstanding their forebodings as to what was likely to happen if Jiba remained in office while the President was considering whether to suspend her.

14 Here, the applicants railroaded the matter into court, gave the President six days to suspend the Respondents and hold an enquiry, without the

Respondents having a reasonable opportunity to respond to the allegations, after having sent to the President the entire application in the earlier application brought to have the charges set aside as irrational (under Case No. 83058/16) in this Court. The affidavits in that matter, with Annexures, ran to some 198 pages.

15 It has been held that:

> "Practitioners would be well advised to be more realistic and to afford State departments a more reasonable time in which to file affidavits." In Re Several Matters on the Urgent Role 2013 (1) SA 549 (GSJ), para 17

16 Wepener J held that Applicants who abuse the court process should be penalised, their applications struck off the roll, with costs.

17 It is our respectful submission that the same result should follow here. For it was unreasonable in the extreme to expect the President to deal with this matter within a period of six days, including weekends, and at a time when it was reported in the media that he travelled outside the country. And when he did not comply, the applicants immediately, the next day – no doubt having prepared this application in anticipation of the President not complying within such a short period – launched it and claimed urgency.

Jeopardising "dozens of critical prosecutions"

18 The applicants say that our remaining in office would jeopardise "*dozens of critical prosecutions and investigations daily.*" But applicants have not

identified the prosecutions and investigations upon which they rely – nor have they suggested the basis on which they say we would jeopardise those. They effectively urge the Court to assume that, by virtue of Respondents being prosecutors, prosecutions and investigations will ipso facto be jeopardised.

19 The applicants are simply unhappy with the fact that a decision was made to prosecute the Minister. Assuming incorrectly that the decision to prosecute was unsustainable, they infer that, were the Respondents to remain at their posts, they would prejudice future prosecutions and investigations. This *non sequitur* cannot warrant the hearing of this application on an urgent basis.

"Rogue" Unit investigation

20 The applicants say that they fear that the Minister and others may be charged in respect of the rogue spy unit investigation. What is surprising is that they do not say why they should not be charged if there is a case against them to answer. It is implicit in paragraph 155 of the founding affidavit that the applicants are suggesting that any charges arising from the SARS rogue unit investigations would be ill-conceived. The investigation is not complete and no decision has been made one way or the other. However, it is patently clear that the real objective of the applicants in this application is to ensure that no charges are preferred against the Minister arising from the SARS rogue unit, irrespective of the merits of any such charges.

21 I emphasise that I have stated publicly that such investigation is still on-going. It is only once the investigation has been completed that a decision to prosecute or not to prosecute would be made. Until then, the Court should not allow the applicants to justify the hearing of this application on an urgent basis on speculation.

22 The fact that a decision to prosecute might be made does not justify the hearing of the application on an urgent basis. Furthermore, this does not justify the suspension of the prosecutors.

Destruction of Economy

23 The suggestion that R 50 billion was wiped out of the stock exchange or that it is going to be wiped out again if the Minister is charged in relation to the rogue spy unit investigation is based on speculation. There is no merit on this. I do not understand the markets to operate on the basis that a Minister should not be charged with an offence if there is evidence of wrongdoing on his part. One can only speculate as to how the markets are going to react when the circumstances which led to the charges being laid are now made public when this answering affidavit is filed in Court. The markets clearly cannot condone the burdening of the taxpayer with the penalty which Pillay ought to have paid himself by way of reducing his pension benefits – instead this penalty was paid on his behalf by SARS because the Minister said so, and not because it is lawful.

Allegation that President's "failure" to act warrants urgency

24 There is no merit in the ground that the President's failure to suspend and institute an enquiry must be addressed without delay.

25 The applicants' contention in this regard ignores the fact that the President has not failed to decide. The President has not refused to decide, nor has he refused to institute an enquiry. The President has simply asked for more time to consider the matter.

26 The President's request for more time to deal with the matter is not unreasonable. It is the applicants who were unreasonable by giving the President three working days to arrive at a decision favourable to them in circumstances where the President remains obliged to give us an opportunity to make representations as to why we should not be suspended.

27 Insofar as the application and the grounds of urgency are based on the fact that the President has not yet favourably answered the applicants' request, then the urgency was self-created once again to create negative atmosphere against the government and its institutions. The Court should not create a precedent by allowing this type of conduct to serve as a basis for hearing applications on an urgent basis.

Redress at hearing in due course

28 I deny that the applicants are not going to obtain substantial redress at a hearing in due course.

29 Applicants baldly state the conclusion that "*substantial redress cannot be obtained in due course*" and that this "*conclusion is fortified by the fact that the issues raised in this matter strike at the heart of our constitutional democracy ...*" In addition, the applicants say that the reputation of the NPA would suffer irreparable harm if the matter is not heard on an urgent basis.

30 The allegations that the reputation of the NPA would suffer prejudice are unfounded. At the heart of the complaint against the bringing of charges against GP&M is the allegation that the charges were politically motivated or that they have been brought in order to pursue a political agenda. I am not a politician. The other Respondents herein are also not politicians. We have nothing against the Minister. We have no interest as to where the Minister is deployed or is not deployed. The prosecutors were not influenced by any politician to bring the charges.

31 The Minister is a politician. He is in the best position to tell the Court if there is anyone in politics who is politically against him and who would have influenced the bringing of charges against him. He has not mentioned any names nor has he himself stated under oath that the prosecutors were influenced by this. The applicants who purport to speak for the Minister must in their replying affidavit bring the evidence of political interference or withdraw the allegations.

32 In the 25 October 2016 application in the Gauteng Division, Pretoria (Case No. 83058/16), which is no longer being pursued following the

withdrawal of the charges, in which the applicants sought an order that the charges against GP&M be withdrawn, the applicants advanced similar contentions of political interference - based also upon media speculation.

Next move against the Minister

33 In paragraph 162 of their founding affidavit, the applicants say that I am "*already contemplating his next move against Min. Gordhan and, indeed, the economy and the already-shattered reputation of the NPA.*" There is no merit in this reckless allegation. This is the type of unfounded allegation which casts unnecessary doubt on the NPA. If the value of the Rand is affected by such speculations, then the applicants are themselves guilty of the very conduct of which they accuse us.

34 I am not contemplating any move against the Minister. The decision whether the Minister should be prosecuted would be made once the relevant investigation has been completed. The NPA is not going to be held to a ransom by civic organisations such as the applicants in order to prevent prosecution where there is a basis to prosecute.

35 If the investigation reveals that there is a basis to prosecute, I have no doubt that the relevant prosecutors will take the appropriate decisions and take public interest into account.

36 The Court should not be pressed into hearing this application on an urgent basis, simply because there is a fear that the Minister is or is not going to be charged. The Minister is not the only person in this country

who is the subject of an investigation. The fact that he is the Minister does not justify the hearing of this application on an urgent basis.

37 In the premises, the application ought to be struck-off the roll with costs including the costs consequent upon the employment of three counsel.

THE APPLICATION IS PREMATURE

38 I have made the point above that the application is premature and that the applicants must simply wait for the President to make the decision which they have requested him to make. It is only once the President has refused to make the decision that the matter would then be ripe to be brought to Court for adjudication. Until then, the matter is not ripe for judicial review.

39 The President has not been given a reasonable opportunity to apply his mind as to whether or not he should act in terms of section 12(6) of the NPA Act. The notice of motion, in paragraph 1 challenges the "the failures, *alternatively*, refusal by the first respondent" to take steps under section 12(6)(*a*) of the NPA Act. But the President has in no sense *refused* to invoke his section 12(6) powers. Nor can he properly be said to have *failed* to have exercised those powers. Effectively, the applicants are abusing the process by attempting to stampede the exercise of a weighty discretion without affording either the opportunity for those affected to make representation, nor for the President properly to apply his mind.

40 The applicants' demand to the President came on 1 November, stating:

"Please confirm, in writing, by no later than 16:00 Monday, 7 November 2016, that you will provisionally suspend Mr Abrahams, JP Pretorius SC and S Mzinyathi from their office, pending enquiries into their fitness to hold office as contemplated in section 12(6)(a)", read with, inter alia, section 14(3) of the National Prosecuting Authority Act, 1998, and that you will forthwith institute such enquiries." (para 17)

41 The demand was acknowledged by way of a letter in which the Presidency stated that the demand required a proper investigation, that would take until 21 November.

42 A letter from the applicants, (a copy whereof is attached to the founding affidavit as Annexure **FA13**), rejected the extension request. This application was lodged on 9 November, setting the matter down to be heard on 22 November.

43 On 14 November, the President addressed letters (attached hereto together as **Annexure SA2)**, to the Second, Third and Fourth Respondents, requesting that we make representations as to why we should not be suspended, by 28 November. We are in the course of preparing same.

44 It would be inconsistent with our rights to be subjected to suspension and enquiry without the opportunity properly to state our case. The consequences of suspension are not trivial. As has been recognized by the courts, detrimental reputational consequences will almost invariably

follow a suspension, more so when unfounded serious allegations are made such as in this case.

45 Moreover, the suspensions may persist for a long duration, especially if the outcome of the investigation is subject to judicial review and potentially subsequent appeals. Reference will be made at the hearing of this matter to a case that remains pending in the Pretoria High Court, in which FUL challenged the decision of the President not to suspend Ms Jiba as Deputy National Director of Public Prosecutions. Pending final relief, FUL sought to have her suspended and further prevented from discharging her functions as a member of the National Prosecuting Authority. Dismissing the application for interim relief, Prinsloo noted that it was not possible to anticipate when the main application would be finally determined, and that it might result in an appeal process years into the future:

> "The impact of such relief, if it were to be granted, on the lives and careers of [the individual Respondents], let alone the NPA, is obvious." (Freedom Under Law v NDPP (Case No. 89849/15) (19 Nov 2015), para 26.)

46 The applicants appear unaware of the disruption in prosecutorial functions that could result from the steps they are demanding. Significantly, they have accepted that we "occupy positions at the very heart of the NPA's ability to function effectively to fulfil its constitutional mandate." The applicants' suggestion that there would be no harm if I

were suspended because the previous NDPP, Mr Nxasana, has indicated that he is willing to return as NDPP (para 120), is entirely frivolous. It is frivolous because the second applicant, Freedom Under Law, is also the second applicant in Case No. 62470/15 in this Honourable Court. In that case they, together with Corruption Watch NPC seek to review a settlement agreement pursuant to which Mr Nxasana left office.

47 They have cited me as a respondent in that matter. I mention that I was not involved at all in the termination of Mr Nxasana's appointment as NDPP. However, what is pertinent here is that in the founding affidavit, the second applicant makes reference to an enquiry which was instituted by the President against Mr Nxasana under section 12(6), although he was not suspended. When the enquiry commenced, it was immediately terminated and the settlement agreement was entered into. However, in the founding affidavit, Freedom Under Law makes reference to the allegations against Mr Nxasana which prompted the section 12(6) enquiry. They are aware of these allegations and yet now support his reappointment as NDPP. Irrespective of the settlement agreement, they are invited to tell this Honourable Court whether they honestly support his reappointment, taking into account the allegations against him of which they are aware, notwithstanding the content of his settlement agreement.

SEPARATION OF POWERS

48 The relief which the applicants seek would violate the doctrine of separation of powers which this Court has consistently protected. Directing the President to suspend employees of a constitutional institution would clearly violate the doctrine of separation of powers.

49 As I have stated above, the position would have been different if the applicants were asking the Court to direct the President to consider the matter within a reasonable time which time allows the affected parties a reasonable opportunity to be heard before the decision is taken.

50 The Constitutional Court has observed:

> *"Although there are no bright lines that separate the roles of the Legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation."*

51 This caution is pertinent in this instance because the section 12(6) power is exclusively vested in the President, who necessarily exercises a wide discretion, with an irreducible political component in this regard.

52 There is nowhere to be found in the applicants' papers an allegation that the President's decision under section 12(6) of the NPA Act constitutes administrative action. That is because it is clear that the power, being a corollary of the power to appoint, is quintessentially executive action. As

the Constitutional Court has held: "*It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government.*" (Masethla v President of Republic of South Africa, 2008 (1) 566 (CC), para 77).

53 It was necessary for the President to apply his mind in similar fashion when in late 2015, the Democratic Alliance invoked section 12(6)(2), in demanding that he takes steps against Advocate Jiba. Ultimately the Cape High Court dismissed their application. Dolamo J's words in his judgment are apposite:

> "*Unwarranted suspension brought about by untested allegations may disrupt the smooth running of the institution. While the President is empowered by section 12(6)(a) to take swift action when necessary to allay concerns about the integrity of the NPA or when the conduct of the DNDPP is called into question, he however, cannot do so without due consideration for all the relevant factors and circumstances. In this respect, he would call for, be guided by and rely on people who have intimate knowledge of the facts and their surrounding circumstances. He will be in a better position to exercise his discretionary powers on receipt of appropriate advice.*" [Citation para 88]

54 The judgment vindicates the President's decision *in casu* to await representations from the Respondents before exercising his decision. Dolamo J wrote that the President would also need to consider the other side of the story:

> "*Relevant factors which the President would consider would include inter alia, Adv Jiba's response to the criticism which had been levelled against her.*" [Para 89]

EQUALITY BEFORE THE LAW

55 The applicants are not incorrect in their contention that this matter implicates concerns of great political and legal import.

56 But the premise of applicants' position is that the Minister and other high-ranking officials who were the subject of the 11 October charges, must enjoy special treatment by virtue of their high office. That is entirely inconsistent with one of the most fundamental principles of the rule of law, which must always be foremost in a prosecutor's mind: Equality before the law. It is, of course, true that broader social and political consequences must be taken into account by a prosecutor under the heading of "public interest factors". It would be outrageous to suggest, however, that the latter confer a kind of impunity upon high public officials.

57 The applicants submissions regarding the adverse economic impact of the decision to charge the Minister is just another way of arguing that those holding high government positions must be treated with kid gloves.

The Respondents submit that a court should in any event give no weight to speculation about the effect of the prosecutorial decisions upon the aggregate capitalisation of the Johannesburg Stock Exchange ("JSE.") Prices on that exchange are notoriously volatile, and responsive to any number of social, economic, and political developments, both domestically and internationally.

58 The applicants tell us that some R50 billion was wiped off the Johannesburg Stock Exchange the day that the charges were announced, 11 October 2016. But, like the applicants' other apocalyptic allegations, this should be seen in context. Consideration of the total capitalisation of the JSE affords some context. I refer to a table (attached hereto **as Annexure SA3**), reflecting that the total market capitalisation of the JSE in 10 October was about R1 trillion. As intimated by the applicants, this fell to some R950 billion by close of business the next day, 11 October. What the applicants elide is that by the next week, the market had recovered all of its losses, and was back up at R1 trillion. But by 11 November, the market had dropped to R920 billion - significantly below where it stood prior to my announcement.

59 Against that backdrop, the suggestion that the institution of the charges has had an enduring effect upon the South African economy is belied by these short-term market movements – which saw the entire R50 billion "loss" to be swiftly recouped, then lost again for entirely independent reasons. The losses upon which the applicants place such store are notional, or "paper" losses.

60 I return to the principle of equality before law. That principle is enshrined in section 9(1) of the Constitution, whereunder all are equal before the law and have the right to equal protection and benefit of the law. Section 32(1)*(a)* of the NPA Act provides:-

> *"A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law."*

61 It is relevant in this regard that section 22(4)(f) of the NPA Act requires the National Director to bring the United Nations Guidelines on the Role of the Prosecutor to the attention of the Directors of Public Prosecutions, Special Directors and prosecutors and to promote their respect for and compliance with the principles contained therein, within the framework of our own national legislation.

62 The principle that like cases must be treated alike implies that there must be general rules that must be impartially applied, *"that is to say, that prosecutions apply statutes without discrimination, or fear or favour, to all those whose cases fall within the scope of the rules."*

63 Advocate Downer SC has written:

> *"Rule of law proponents want decisions regarding prosecutions to be as fair as possible. They want everyone who commits a crime to be prosecuted or not prosecuted equally, according to the same criteria. This means that they do not want prosecutors to decide arbitrarily to*

prosecute some people who commit crime, but not others who also commit similar crimes. In particular, they do not want the politically or socially powerful, those who have connections to the right people or groupings and those who are simply rich, to escape prosecution either because of their status or because they have the means to influence or control prosecutors."

"Prosecuting the powerful for serious offences is almost without exception the strongest prosecutorial imperative that trumps the other considerations of public policy."

ALLEGED ULTERIOR PURPOSE

64 For the reasons set out *infra*, based on the circumstances which led to the charges being brought, the decision to prosecute is eminently justified when tested against the threshold of prospects of success. That being so, all that remains is applicants' allegation that the prosecution was animated by improper purpose. By implication, it would appear that the alleged purpose was to serve the interests of the political function within the ruling party who are aligned against the Minister, and wish to see him removed from the Cabinet. That motivation is alleged in oblique and indeterminate language by the applicants; it is respectfully submitted that the court can attach no weight whatsoever thereto. I have dealt with vague, open ended allegations of political interference elsewhere.

65 But there is a further point. Even if the prosecution was animated by an improper purpose, that would not suffice to render the prosecution bad in

law. What is required, according to Harms DP is that the prosecution has used its powers for ulterior purposes.

66 Harms DP wrote:

> *"A prosecution is not wrongful merely because it was brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, which, in any event, can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions."* [National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA), Para 37.]

67 Harms DP added:

> *"This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality. The facts in Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others, illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits - they had enough exhibits already - but to put Highstead out of business. In other words, the confiscation had*

nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what 'ulterior purpose' in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction, the reliance on this line of authority is misplaced as was the focus on motive."

68 Although the applicants herein have not expressly alleged bad faith they suggest that there has been political interference in the decision making process. We deny this.

69 I take umbrage at the allegation that I was implacably committed to pursuing the prosecution, and relented only in the face of external pressure. In point of fact, as I told Parliament in my 4 November briefing, at the time I considered considering whether or not to withdraw the charges, I encountered resistance from Lieutenant-General Ntlemeza ("**Ntlemeza**"), Head of the Directorate for Priorities Crimes Investigations ("**the Hawks**") who strongly contended that the charges should not have been withdrawn.

70 I wrote to Ntlemeza on **17 October 2016** (in a letter attached hereto as Annexure **SA4**), advising that Magashula and Pillay had made representations in which they requested me to review the decision to prosecute. I invited Ntlemeza to make representation by no later than 19 October 2016.

71 In a letter of **18 October 2016** (attached hereto as Annexure **SA5**), Ntlemeza responded by saying that the DPCI would not be making any representations, but would await my decision.

72 On 30 October, a letter attached as Annexure **SA6** was hand-delivered to me. (It will be noted that the signature line incorrectly reflects 31 October; the NPA date stamp was affixed only 31 October.) I had hand-delivered to me received a letter from Ntlemeza saying:

> *"It is our considered view that your decision is not made in good faith on evidence that we have gathered as an investigative agency in this matter. Rather it seems to us that you make this decision based on the noise made by politicians, civil society lobby groups, and the media sympathetic to the accused.*
>
> ...
>
> *It is our considered view that we have a strong case against the accused, despite all contrary views of the so-called opinion makers and legal experts in the media. If the accused have any defences to the charges or any issues with regard to their prosecution the place to ventilate that is an open court through a criminal trial and be cross examined to expose the truth.*
>
> ...

We mention all these issues of which you are aware to highlight one issue: that it would be improper for you as NDPP to stall or withdraw the prosecution of the accused persons in this matter."

73 On **31 October 2016** (in a letter attached hereto as Annexure **SA7**), I informed Ntlemeza that I had reviewed the decisions to prosecute Magashula, Pillay and the Minister, having concluded that it would be difficult to prove intent beyond reasonable doubt. I indicated further that I would thereafter be responding more fully to him, as indeed I did on 8 November.

74 On **8 November 2016** (in a document attached hereto as Annexure **SA8**), I wrote further:

"Your view adopted in para 9 of your letter, dated 30 October 2016, is rather regrettable in that you alleged that my decision to withdraw the charges against Messrs Magashula, Pillay and Gordhan was 'based on the noise made by politicians, civil society lobby groups, and the media sympathetic to the accused'. In this regard you are completely incorrect and ill-informed. My decision was based purely on the merits of the matter after having reviewed the matter and having directed further investigations along with the applicable legal provisions."

THE STRUCTURE OF NPA

75 An overview of the structure of the NPA is useful in understanding the distinction between the power to institute a prosecution and the

subsequent exercise of the power to review and set aside, which is vested exclusively in the NDPP

76 Section 2 of the NPA Act provides for a single prosecuting authority. Section 3 reiterates that there is a single prosecuting authority consisting of "the Office of the National Director and the offices of the prosecuting authority at the High Courts, established by section 6(1)". Section 4 referred to above sets out the composition of the prosecuting authority. Section 5 established the office of the National Director of Public Prosecutions and places the National Director at its head. Section 6 established offices for the prosecuting authority at the seat of each High Court division.

77 The NDPP is appointed by the President and vested by section 179(2) of the Constitution and Chapter 4 of the NPA Act with the powers, functions and duties to institute criminal proceedings on behalf of the State and to carry out any necessary functions and duties incidental thereto. The NPA has Deputy National Directors of Public Prosecutions ("**DNDPP's**"); several Directors of Public Prosecutions ("**DPPs**") at the seat of each Provincial Division of the High Court and Special Directors of Public Prosecutions ("SDPPs") who are all accountable to the NDPP

78 A number of sections of the NPA Act deal with hierarchical appointments. Section 16 provides for the appointment of prosecutors. Section 20(1) states that the power to institute criminal proceedings contemplated in

s 179(2) of the Constitution "vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

79 Section 20 subsets (2)-(5) provide as follows:-

"(2) Any Deputy National Director shall exercise the powers referred to in subsection (1) subject to the control and directions of the National Director.

(3) Subject to the provisions of the Constitution and this Act, any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of: –

(a) the area of jurisdiction for which he or she has been appointed; and

(b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.

(4) Subject to the provisions of this Act, any Deputy Director shall, subject to the control and directions of the Director concerned, exercise the powers referred to in subsection (1) in respect of: –

(a) the area of jurisdiction for which he or she has been appointed; and

(b) such offences and in such courts, as he or she has been

authorised in writing by the National Director or a person designated by the National Director.

(5) Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director.'

80 Section 21, consistent with s 179(5) of the Constitution, provides for the National Director, with the concurrence of the Minister and after consultation with other Directors, to determine prosecution policy and issue policy directives which must be observed in the prosecution process. Section 22(1) of the NPA Act provides:-

"The National Director, as the head of the prosecuting authority, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law."

81 As will be argued at the hearing, this broad empowerment does not authorise or mandate the NDPP to continually insert himself into initial determinations to institute prosecutions.

THE NDPP'S POWERS OF REVIEW

82 Section 179(5)(d) of the Constitution, which empowers me as the National Director, when requested, to review a decision to prosecute or

not to prosecute. After consulting the relevant Director; and after taking representations, within a period as specified by me, from the accused persons, the complainant and any other persons or party whom I consider relevant.

83 This is in line with the provisions of section 179(5)(d) of the Constitution, read with section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 (the "NPA Act"), to review a decision to prosecute and to decide whether to continue or discontinue a prosecution.

84 The NPA receives representations from accused persons and/or their legal representatives in respect of matters in both the lower and High Courts, which are submitted to the Control Prosecutors, Senior Public Prosecutors, Chief Prosecutors, the DPP Offices and/or to Special DPPs.

85 Since my appointment in June 2015, I have reviewed numerous cases. In giving effect to my constitutionally entrenched review powers I have overruled the original decisions of Directors of Public Prosecutions and/or Special Directors to prosecute or to discontinue prosecutions in more than 16 instances: I have also agreed with the original decisions of Directors of Public Prosecutions and/or Special Directors in 97 matters.

86 Whilst I have the power to institute a prosecution, I would only do so in very rare instances. If I made a decision to prosecute, it would not be competent for me to review my own decision in terms of the Constitution or the NPA Act. (In National Director of Public Prosecutions v Zuma 2009 (2) SCA 277 (SCA) at 305, para 70, Harms DP said: "Section

179(5)(d) does not apply to reconsideration by the NDPP of his own earlier decision but is limited to a review of a decision made by the DPP or some other prosecutor for whom a DPP is responsible.")

87 Section 24 of the NPA Act sets out the powers, duties and functions of Directors and Deputy Directors. Section 24(1) provides as follows:-

"Subject to the provisions of section 179 and any other relevant section of the Constitution, this Act or any other law, a Director referred to in section 13(1)(a) has, in respect of the area for which he or she has been appointed, the power to –

(a) institute and conduct criminal proceedings and to carry out functions, incidental thereto as contemplated in section 20(3);

(b) supervise, direct and co-ordinate the work and activities of all Deputy Directors and prosecutors in the Office of which he or she is the head;

(c) supervise, direct and co-ordinate specific investigations; and

(d) carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of this Act."

THE RELIEF WHICH APPLICANTS SEEK IS NOT COMPETENT

88 In this application, the applicants seek, in the main, an order in terms of which the alleged President's *"failures, alternatively, refusal"* are

reviewed and set aside. If this relief is granted, then in that event, the applicants seek certain mandatory relief against the President.

89 All of the relief which the applicants seek is not competent in law for the following reasons:

No failure to decide, or refusal to decide

90 In a letter dated 1 November 2016, the applicants requested the President to suspend me and to conduct an enquiry into my fitness to remain in office. In this letter, the applicants gave the President until 7 November 2016 to "*please confirm, in writing, by no later than 16:00 Monday, 7 November 2016, that you will provisionally suspend Mr. Abrahams ...*"

91 It therefore appears that what the applicants want from the President is a decision to suspend me and the other Respondents and then conduct an enquiry into our fitness to remain in office. It is this decision which they say the President has failed to take or has refused to take. There is no merit in the applicants' suggestions in this regard. The suggestions are factually incorrect.

92 In a letter dated 7 November 2016 attached to the applicants' founding papers as **FA12,** the President requested the applicants to grant him "*an extension until 21 November 2016*" to respond to their letter.

93 The President further said that his extension would give him "*a proper opportunity to address what no doubt is a serious matter with the affected*

parties in anticipation of any action he may contemplate, after having considered such in its entirety."

94 It is clear that the President has not failed to take a decision. Nor has he refused to take a decision. On the contrary, on the evidence attached to the applicants' own founding papers, the President has asked for more time to consider the applicants' request and to address the request, which even on the applicants' version is a serious matter, *"with the affected parties in anticipation of any action he may contemplate ..."*

95 In the light of the above, the President has not failed to take a decision and has not refused to take a decision. The review relief is therefore, premature. The applicants cannot in law seek to review a decision or a failure to take a decision whilst the relevant processes are still in progress. The applicants must wait for the President to say: I refuse your request or they must wait for a reasonable time to lapse before they contend that there has been a failure to take a decision (within a reasonable time).

Legality review is not competent

96 In their founding affidavit, the applicants seek to review the alleged failure and refusal to take a decision on the ground that the alleged failure and refusal *"are irrational and unlawful."*

97 Insofar as the applicants rely on alleged irrationality, the relief which they seek can only be granted under what is now referred to as legality

review, i.e. judicial review other than in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**").

98 The decision which the applicants requested the President to take is a decision which they say must be taken in terms of the provisions of the NPA Act.

99 Insofar as the President is required to take a decision in terms of the NPA Act, such a decision would, once taken, constitute administrative action in terms of section 1 of PAJA. Similarly, the failure to take a decision in terms of the NPA Act would constitute an administrative action in terms of section 1 of PAJA. This being the case, judicial review of these administrative actions can only be conducted in terms of section 6 of PAJA and not under legality review.

100 In view of the fact that the decision and the failure to take a decision in issue would constitute an administrative action in terms of section 1 of PAJA, it follows that PAJA applies and legality review is not available in circumstances where PAJA applies.

101 The applicants cannot ignore PAJA and seek to rely on legality review where PAJA applies. In the premises, the relief which the applicants seek is not competent and the application ought to be dismissed with costs.

If relief is sought in terms of PAJA

102 Even if it may be assumed, in favour of the applicants, that the relief which they seek is sought under PAJA, the relief is still not competent in law for the reasons which I set out below.

102.1 Firstly, no administrative action has been taken. PAJA applies only if an administrative action has been taken. In this case, no administrative action has been taken.

102.2 The President has simply asked for more time to consider the applicants' request. This does not constitute an administrative action as defined in section 1 of PAJA and it is not reviewable. If that constitutes an administrative action, then in that event, that is what the applicants should be seeking to review – as it appears from their notice of motion, they do not seek to review the President's decision to request more time to deal with their request.

102.3 Secondly, the President has not failed or refused to take a decision for purposes of sections 1 and 6 of PAJA.

103 Section 6(2)(g) of PAJA of PAJA provides that a Court has the power to judicially review an administrative action if the action concerned "*consists of a failure to take a decision.*" This is not what happened in this case.

104 Section 6(3) of PAJA provides that if a person relies on section 6(2)(g) as a ground of review, such a person may, in respect of a failure to take a decision, where there is a duty to take a decision but there is no time prescribed for taking the decision (such as in this case), institute judicial

review proceedings on the ground that there has been an unreasonable delay in taking the decision. This is not what happened in this case. There has not been an unreasonable delay on the part of the President.

105 The applicants' request for the President to take a decision and respond to them within a matter of three business days is not only unreasonable but it is also irrational. The time frame prescribed by the applicants suggests that the President only has the applicants' matters to deal with and does not have other matters of the State to deal with. It also suggests that I and the other Respondents do not have a right to make representations to the President before the decision in issue is taken.

106 The applicants' unreasonable time frame prescribed for the President to take a decision to respond to them fails to take into account that I and the other Respondents are entitled to make representations to the President as to why we should not be suspended and why an enquiry into our fitness should not be held. For this purpose, the President must give us a reasonable time to make such representations. We would object to the President giving me a mere two days to respond to such an important matter.

107 The applicants clearly only have themselves to blame for not having received a response from the President – they simply have not given him time to consider their request and for him to give me and the other Respondents a reasonable opportunity to make representations as to why the President should not take the decisions they want the President

to take. This process on its own may take its own time depending on the issues which the President may want the other Respondents and me to respond to.

108 The time for the President to make a decision or to refuse to make a decision is still to come. It is premature to pre-empt the President's decision in this regard because such a decision can only be taken after I and the other Respondents have exercised out rights to make representations and to show cause why we should not be suspended and why the President should not agree to the applicants' request.

109 In relation to the above, the applicants have attached to their request to the President, founding papers in an application to which the other Respondents and I have not yet filed answering papers. In such founding papers, they make allegations of political interference, political influence and the like. The allegations of "*sinister ulterior purposes*" and "*political agenda of others*" are repeated in the present application. We are preparing a full response to the applicants request to the President to invoke section 12(6) and this will be submitted to the President. However, the fact that the applicants have repeatedly raised the issue of "*ulterior purposes*", "*political agenda*", "*political interference*" and "*political influence*", means that it is important in the decision they want the President to make. These are assertions which have been made purely as conclusions but where there are no facts to support this. In order to respond to these allegations, we would request the President to obtain from the applicants the evidence upon which this is based, other than

media hype. We must be placed in the position to meaningfully respond thereto.

Suspension and enquiry relief

110 As far as this relief is concerned, the applicants seek an order in terms of which the President is directed to suspend me and the other Respondents and then hold an enquiry into our fitness to hold office. This relief is not competent.

110.1 Firstly, this relief is not competent due to the fact that it depends on the review relief referred to above and I have demonstrated that the review relief is not competent for the reasons stated above.

110.2 Secondly, this relief is not competent for the following reasons:

111 The relief would result in the Court violating the doctrine of separation of powers. The decision to suspend and to hold an enquiry is vested upon the President. The Court has no power to interfere with the President's decision making process in that regard. At best for the applicants, the Court is competent to direct the President to consider whether or not to suspend and then hold an enquiry.

112 Section 12(6) upon which the applicants rely does not impose a peremptory obligation upon the President to suspend and hold an enquiry. The section says that the President "*may provisionally suspend*"

which means that the President is entitled to consider whether on the facts before him, a suspension should be ordered.

113 The President cannot be divested of that power and should be allowed a reasonable opportunity to consider whether or not to suspend. The judiciary cannot step into the President's shoes and then decide for the President that a suspension and an enquiry should be held.

114 Section 12(6) also says that the enquiry which the President may direct is one which "*the President deems fit*" and not one which "*the Court deems fit.*" The relief which the applicants seek, as presently formulated, does not make any provision for the President to consider as to which type of an enquiry "*the President deems fit*" and the Court is also not asked to determine the type of an enquiry which "*the Court deems fit*".

115 Section 12(6)(e) deals with the question whether we should be paid a salary if we are suspended. The applicants are silent on this issue in the relief which they seek. This makes it even more impossible for the Court to grant the relief which the applicants seek because doing so would divest the President of the power to determine if we should be paid or not and if we should not be paid why we should not be paid.

116 On a proper interpretation of section 12(6) of the NPA Act, it does not prescribe the reasons for which the President may suspend. This being the case, the Court cannot prescribe reasons for suspension in circumstances where the Legislature left that issue to the President.

117 The fact that charges were brought against the three individuals and have been withdrawn does not mean that the prosecutors must be suspended. Otherwise, that would, for example, result in prosecutors being dismissed for not obtaining convictions on the argument that they should not have initiated prosecutions. That would result in an absurd situation.

118 In the premises, the application ought to be dismissed with costs including the costs consequent upon the employment of three counsel representing the second, third and fifth Respondents.

119 I now turn to deal with lack of urgency and then respond to the other allegations contained in the applicants' founding papers to the extent that it is still necessary to do so. Where necessary, I would expand on some of the issues dealt with above insofar as it concerns the basis on which I state that the relief which the applicants seek is not competent in law.

BACKDROP TO THE PROSECUTIONS

120 During September 2016, Sello Maema ("**Maema**"), a Deputy Director of Public Prosecutions in the National Prosecutions Authority ("**NPA**"), who is responsible for providing guidance for the investigation of the so-called Rogue Unit, briefed the NPA management on the alleged involvement of the Minister in the unlawful authorisation of the following:

120.1 Firstly, the payment by the SARS of Pillay's penalty to the Government Employee's Pension Fund ("**GEPF**"), which arose as a result of him taking early retirement. The penalty amount

was in excess of R 1.2 million. There is no dispute that this amount was paid by the SARS on behalf of Pillay in circumstances where Pillay ought to have paid this amount himself by way of reducing his pension benefits as provided for in the Rules of the GEPF.

120.2 Secondly, the reappointment of Pillay to his very same position in circumstances where Pillay himself said he wanted to take early retirement.

120.3 Thirdly, the approval of Pillay's early retirement in circumstances where the intention behind such early retirement was to gain access to pension benefits for purposes of providing educational funding for Pillay's children and his reappointment at the same time – once the basis for him accessing the pension benefits had been created.

121 If there is nothing wrong with the above, there is no reason why the government does not allow all of its employees who are struggling to pay university fees for their children, to notionally take early retirement and then get reappointed at the same time so as to enable them to obtain access to their pension benefits to fund the university education of their children.

122 Maema's briefing revealed that:

122.1 There had been an initial retirement application interposed by Pillay in 2008, which is referred to in the affidavit of Coetzee.

122.2 In 2009 after Gordhan had been appointed as the Minister of Finance, Pillay submitted a memorandum dated 27 November 2009 to Magashula attached hereto as **SA9**, who was the Commissioner for SARS at the time ("**the first retirement application**").

122.3 In this memorandum, Pillay motivated his first retirement application as follows:

"*PURPOSE*

The purpose of this memorandum is to explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the Minister certain related matters that will flow from my decision to take early retirement.

DISCUSSION

As you know, I have been working in the Public Sector for the past 15 years, 10 which have been spent at SARS. For the most part of this period, especially my tenure with SARS, I was expected to perform at a very high level accompanied by the accountabilities that go with the performance of such a high-level job. This exacted its toll from me in the sense that my health condition is slowly deteriorating. Added to this, my family responsibilities, for a long time, suffered on account of the dedication required by my job. With the aforementioned in mind, although still not easy, I have decided to take early retirement.

However, I am still enthusiastic about SARS and the tremendous contribution it makes towards the establishment of an even better South Africa for all its citizens. With a view thereto, I am willing to serve in SARS in a different capacity where the demands of such a job will positively support the reasons why I am in the first instance taking early retirement.

Should you favourably consider my proposal to serve SARS in a different capacity, such service will have to be subject to that I be appointed as a contract employee. This will allow me more flexibility in terms of making a decision to finally part ways with SARS, should I come to such a decision. The second condition would be that my early retirement is approved in terms of the provisions of section 16(6)(a) and (b) of the Public Service Act, meaning that the Minister, in terms of the provisions of the abovementioned section approve that the penalty imposed on my pension benefits per Rule 14.3.3(b) of the GEPF Rules be paid by SARS to the GEPF. The GEPF has indicated that the penalty amount on my pension benefits that the employer has to pay on my behalf is R1 292 732,68.

RECOMMENDATION

My recommendations are that you please:

- *take note that I intend to take early retirement*
- *consider to approve that I be appointed in a different capacity in SARS on a contract basis; and*

consider to recommend to the Minister that he approves that the penalty on my pension benefits be paid on my behalf to the GEPF by the employer." (own emphasis).

123 What is clear from the above quoted memorandum is the following:

123.1 Pillay's decision to take early retirement was for personal reasons which had absolutely nothing to do with the business of SARS at the time (and even thereafter);

123.2 Pillay asked to be appointed in a "*different capacity*" where the demands of such a job will positively support "*the reasons why I am in the first instance taking early retirement.*"

123.3 Pillay was fully aware that the ordinary consequences of his decision to take early retirement were, amongst others, that he himself would have to pay a penalty to the GEPF for his early retirement and it is for this reason that he then asked SARS "*to pay on behalf*" of himself the amount of R1 292 732,68 as opposed to him paying the penalty himself from his own personal funds by having his pension benefits reduced

124 Also, in 2009 Pillay wrote directly to the Minister where he made a different request to approve his application for early retirement for different reasons ("**the second retirement application**").

125 In his undated memorandum attached hereto as **SA10** motivating the first retirement application, Pillay said the following to the Gordhan:

"Dear Pravin,

PURPOSE

The purpose of this memorandum is to explain the reason why I have decided to take early retirement as well as to request you to consider to approve/recommend certain related matters that will flow from my decision to take early retirement.

DISCUSSION

I have reached the stage in my life where it has become a reality that I had to make some very important decisions about the education of my children. The decisions I have taken will require a considerable capital investment, money that can be raised by means of a bank loan, but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interest are the order of the day and indications are that this situation will prevail for the foreseeable future.

In view of this I have decided to inform you that I intend to retire in 2009 when I reach the age of 56 years. As I have already reached the earliest optional retirement age of 55 years in terms of the SARS retirement provisions, the retirement benefits will provide me with a lump sum benefit (which will financially support the decision I have made in terms of the education of my children) as well as a monthly pension. Whilst this may not be ideal in terms of maximum benefits when finally retiring, I am

of the opinion that this is the best option available to me as far as my children's education is concerned.

This brings me to the second issue at stake, namely how I view my retirement as raised above. Clearly I am doing this on account of a matter that has nothing to do with my work at SARS. I still feel that I am still capable of doing my work, I still have the enthusiasm and will to do it and I am of the opinion that through my work, I can still contribute to the establishment of an even better South Africa for all its citizens. Taking this into account, I will appreciate it if you will consider to approve that immediately after my early retirement, appoint me to my current position but as a contract employee. No legal provision prevents you from making such an appointment.

The third matter is slightly more technical and complicated and it concerns my early retirement benefits payable by the GEPF. Although the Rules of the GEPF provides that a member of the GEPF can elect to retire from the age of 55 years and onwards, there is a penalty payable in terms of the benefits ... As I intend to take early retirement at age 56 years ... my pension benefits will be reduced by 14.4%. It was realized that the provisions of this particular GEPF Rule prevented many employees from an early retirement and in many instances those were employees Departments would have liked to take early retirement. In an effort to address the situation, Section 16(6) of the Public Service Act ... was amended to provide that where early retirement is applied for,

Ministers can approve that employers (Departments/SARS) pay the penalties imposed on early retirees in terms of the GEPF Rules.

In view of this it will be appreciated if you, when I take early retirement, would recommend to the Minister that SARS pay to the GEPF my early retirement GEPF penalties. It is estimated that the penalties will amount to R 1 064 257."

126 In the above quoted memorandum:

126.1 Pillay states correctly that what "*I am doing ... has nothing to do with my work at SARS*";

126.2 Pillay appreciates that "*there is a penalty payable in terms of the benefits*" for the early retirement which he has decided to take and that "*my pension benefits will be reduced by 14.4%*";

126.3 Pillay is wrong in saying that section 16(6) of the Public Service Act was amended to enable government employers to pay penalties on behalf of their early retirees. The correct position is that the penalty is imposed by the Rules of the GEPF and the relevant Rule has never been amended to do that which Pillay asked the then Commissioner at the time, Gordhan, to do;

126.4 Pillay further says that whatever decision he has taken (to take early retirement) is intended to provide him with funds for purposes of paying for the education of his children which funds "*can be raised by means of a bank loan, but which would be*

prohibitively expensive in view of the current financial circumstances where very high rates of interest are the order of the day ..." It is therefore clear from this that Pillay simply wanted the taxpayers to save him from the ordinary financial hardships which he was facing and to which all taxpayers were exposed.

126.5 The first retirement application was not approved. It is not clear why it was not approved.

127 The fact that Pillay was fully aware of the aforesaid financial implications of his decision to take early retirement is also apparent from the contents of the so-called Symington memorandum. In this memorandum, which is dated 17 March 2009 (which is a date long before the date of Pillay's above quoted memorandum dated 27 November 2009) Symington said the following:

"However, the financial soundness of his decision to apply for early retirement is dependent on whether the Minister approves the SARS payment of the benefit penalty to the GEPF as well as whether SARS contracts with him for a period of post-retirement employment. This is so because of the relatively young age at which he will be retiring vis-a-vis his projected life expectancy. If the Minister does not approve his request or if SARS does not contract with him after his retirement, the financial risk of his decision will increase substantially and my advice then would be for him to review his application for early retirement and to possibly withdraw it.

...

... However, if the minister is unable to approve his request relating to the penalty or if SARS is not in a position to contract with him after retirement, then his decision to apply for early retirement should probably all together be withdrawn." (own emphasis).

128 The following is apparent from the Symington memorandum:

128.1 It is dated 17 March 2009 and it is addressed to the Commissioner for SARS.

128.2 Gordhan was the Commissioner for SARS until May 2009 and the Symington memorandum must have been addressed to him. There is nothing to suggest that Gordhan did not receive the Symington memorandum.

128.3 What Symington is saying in his memorandum is simply that Pillay's decision to take early retirement is not financially sound unless:

128.3.1 the Minister of Finance (at the time Trevor Manuel) approved the payment by SARS of the benefit penalty to the GEPF the payment of which would have been triggered by Pillay's early retirement; and

128.3.2 the Minister of Finance also approved that SARS should at the same time enter into a post-retirement contract of employment with Pillay.

128.4 Symington did not say that it was lawful for the Minister and Magashule to burden the taxpayer with Pillay's penalty in excess of R 1.2 million levied upon him as a result of his decision to take early retirement – which decision was clearly a ruse to enable him to access his pension benefits to fund the education of his children. At the end, the SARS ended up financing a big portion of Pillay's children's education as stated in the affidavits to which I refer below.

129 The effect of the above is simply that in order to ensure that Pillay's early retirement did not result in financial prejudice to him, SARS had to pay the benefit penalty to the GEPF. It then entered into a post-retirement employment contract with him, otherwise, according to Symington, Pillay's decision to take early retirement would not have been financially sound.

130 It is for this reason that Symington made it clear in his memorandum that unless the Minister of Finance approved the whole package, i.e. early retirement, payment of the benefit penalty by SARS on behalf of Pillay, and post-retirement employment of Pillay by SARS (without advertising the position), Pillay would have had to forget about taking early retirement and would have had to raise finance for the education of his children differently.

131 At the time when the prosecutors decided to charge GP&M they did not have the Symington memorandum in their possession. The Symington

memorandum was provided to me when the applicants wrote to me on 14 October 2016 and attached it as an annexure.

132 The other document which the prosecutors had in their possession is a letter dated 12 August 2010 from Magashula, (reflecting the third application from Pillay), who at the time was the Commissioner for SARS, addressed to Gordhan. In this letter, Magashula motivated the early retirement of Pillay with full retirement benefits as follows:

> *"1. PURPOSE*
>
> *The purpose of this memorandum is to request approval from the Minister for the early retirement of Deputy Commissioner Ivan Pillay with full retirement benefits from the GEPF as contemplated in Rule 14.3.3(b) of the Government Employees Pension Law, 1996, read with section 19 of the SARS Act and section 16(2A)(a) of the Public Service Act, 1994...*
>
> *In addition, approval is requested to retain Mr. Pillay as Deputy Commissioner of SARS on 3 year contract with effect from 1 September 2010.*
>
> *2. BACKGROUND*
>
> ...
>
> *Ivan has always excelled at his job and made a significant contribution towards the establishment of SARS as the highly respected organisation it is today.*

For personal reasons, he has requested to take early retirement with effect from 1 September 2010. He is currently 56 years old.

Given Ivan's critical skills, experience and leadership, he has agreed to remain in the employ of SARS as Deputy Commissioner after his retirement on a 3 year contract to assist with the on-going leadership transition.

3. *MOTIVATION FOR RETIREMENT WITH FULL BENEFITS*

In the light of Ivan's exemplary service and sacrifice in the service of the people of South Africa, it is requested that he be granted early retirement with full retirement benefits as provided for in section 19 of the SARS Act, 1997, read with section 16(2A)(a) of the Public Service Act, 1994.

Over the past 5 years the GEPF has approved over 3 thousand requests from various government departments for staff members to retire before the age of 60 with full benefits. The statistics are attached to this memorandum as received from the GEPF (Appendix).

In addition, the former and current Minister of Finance have approved at least five such requests over the past 2 years (see Appendix B).

4. *MOTIVATION FOR REAPPOINTMENT ON A 3 YEAR CONTRACT*

Ivan's wealth of knowledge and experience within SARS and his leadership position as Deputy Commissioner is an invaluable asset to the organisation. This is particularly important given the on-going leadership transition within the organisation following the departure of the Minister and the recent restructuring of the top leadership of the organisation as part of the revised Operating Model.

Ivan's continued guidance, leadership knowledge over the next 3 years will provide critical continuity as well as playing an important mentoring role in developing the next generation of SARS leaders.

In addition, it should be noted that there is precedent for the termination of employment and immediate rehiring of the same person under different conditions of employment within the public sector.

In this regard, advice was sought from the Acting Director-General of the Department of Public Service and Administration ... regarding the proposed early retirement of Mr. Pillay and his retention on a 3 year contract. He confirmed that there is no restriction on the appointment to the public service or to the same department of a person who has left on an Employee Initiated Severance Package (EISP) and that he was aware of previous such cases.

5. FINANCIAL IMPLICATIONS

The financial implications of early retirement with downscaled benefits for Ivan will be considerable as his lump sum benefit will decrease by R243605 to R121443 and his monthly pension by R47402 to R48563.

The financial implications for SARS, should approval be granted to allow Ivan to take early retirement with full retirement benefits, will be an amount of R1 258 345.99 which SARS will be liable to pay the GEPF in terms of the provisions of section 17(4) of the GEPF Law, 1996."

133 The above quoted memorandum concludes with a recommendation that the Minister approves Pillay's early retirement without downscaling his retirement benefits and that the Minister also approves the reappointment of Pillay as Deputy Commissioner of SARS on a 3 year contract with effect from 1 August 2010 with the same remuneration that he was earning prior to the so-called early retirement.

134 The recommendations were approved by the Minister on 13 October 2010. It is worth noting that the then Deputy Minister of Finance, Mr. Dhladhla Nene, did not approve the recommendation despite the fact that the memorandum made provision for his approval to be obtained. I understand that it is also part of internal requirements in government that a Minister approve a recommendation only after the Deputy Minister has applied his mind to it. This did not happen in this case.

135 The prosecutors also had in their possession the following documents which they considered when they made the decision to bring the charges in issue:

Affidavit of Nico Johan Coetzee

136 The affidavit deposed to by Nico Johan Coetzee who was previously employed by the South African Revenue Service is attached hereto as **SA11**. There are other documents attached to this affidavit and I refer to them individually below.

137 In his affidavit, Coetzee says that in 2008, he was instructed to prepare a ministerial memorandum to be signed by Gordhan (who was Commissioner of SARS at the time), to recommend to the then Minister of Finance (Trevor Manuel) that he approve Pillay's early retirement.

138 Coetzee further states that:

4

I awaited the approval by the Minister of the request by Mr. Pillay. In October 2009 while waiting for the approval of the memorandum, I received a revised memorandum from the office of the Commissioner, Mr Oupa Magashula. The memorandum contained different reasons from my original memorandum as to why the Minister should approve Mr. Ivan Pillay's early retirement. The reasons on the revised memorandum were that Mr. Pillay wished to go on early retirement in order to enable him

to provide for his children's education and not as I have previously stated that he wished to pursue other interests. I raised concerns to the Commissioner through the e-mails dated the 8th and the 9th October 2009 respectively, that if the Minister should approve Mr. Pillay's application on the grounds of personal interest may create a precedent in terms of which, other employees might come forward with similar request for early retirement."

139 In the e-mails dated 8 and 9 October 2009 referred to in his affidavit, Coetzee said the following to Magashula:

"Hi Oupa

Luckily for me I have dealt with this matter during June this year but I do not know why the matter was not promoted at the time as I have certainly started the process. I have amended the two submissions (attached) to fit in with Mr. Pillay's latest request. It is not unusual that a retired employee is re-appointed after retirement in a contract capacity. <u>What may raise some eyebrows in this particular case is that the employee is appointed in the same position he held before his retirement</u>. Ordinarily such a re-appointment will be to a different and a lower-graded position. It will have to be decided if satisfactory reasons can be given for the re-appointment in the same position. We had two similar applications for early retirement, both which were not

approved by the Minister as the Minister could not find sufficient reason to approve early retirement. In terms of section 16(6) of the Public Service Act, the Minister only has consider if SUFFICIENT REASON exists to approve Mr. Pillay's early retirement ..." (Own emphasis).

In Coetzee's e-mail of 9 October 2009, he said:

"*I am resending this e-mail on account of a slight change I have made to the two attached documents. The changes indicate that the reason why Mr. Pillay is requesting approval for early retirement is to provide for his children's education and not as I have previously stated that he wished to pursue other interests. You will now have to consider to recommend and the Minister consider to approve if this is SUFFICIENT REASON to recommend/approve Mr. Pillay' application for early retirement. If his application is duly recommended/approved, it could technically be construed that SARS is willing to contribute from its budget an amount of + R340 000 towards the education of his children. I admit it is a rather cynical viewpoint, but it can be a viewpoint that may be held by other parties as well and that may put yourself and the Minister in a tight spot, especially because Mr. Pillay was re-appointed in his present position. The argument may be that he was able to continue with his present functions, but his early retirement and reappointment was purely*

to assist him to be able to provide for his children's education, with a R340 000 "contribution" from SARS." (Own emphasis).

Pillay's contract of employment

140 Pursuant to Magashula's recommendation, the Minister approved Pillay's early retirement and re-appointment. The approved re-appointment was to be for a period of three years. The Minister also approved that Pillay's penalty to the GEPF be paid by SARS.

141 Despite the fact that the Minister approved Pillay's re-appointment to be for a period of three years, on 7 February 2011, Magashula and Pillay concluded a five year contract a copy of which is attached hereto as **SA12**. This contract was clearly not approved by the Minister and all the payments made in terms thereof were not lawfully authorised. Magashula and Pillay were fully aware of this illegality. They acted in contravention of the empowering approval given by the Minister to conclude a three year contract (even though that approval itself was unlawful).

142 The aforesaid contract was to have come to an end in 2016. But, on 26 March 2014, the Minister concluded a fresh contract, just weeks before his appointment to a different ministry. In terms of that contract, Pillay was appointed with effect from 1 April 2014 to 31 December 2018. There does not appear to be a lawful reason for concluding another contract before the expiry of the contract concluded in February 2011.

143 Visser's affidavit which is attached hereto as **SA13** largely confirms that there was no business reason for SARS to pay Pillay's penalty.

144 Visser deals with other things in her affidavit, amongst others, the circumstances under which Pillay concluded an employment termination agreement with one Andries Petrus Janse Van Rensburg, referred to in the affidavit as Skollie. Of relevance for purposes of this application, Visser says the following:

> " 8
>
> *Nic Coetzee and I were both uncomfortable with the request as it was for personal reasons and we could find no business reasons to pay the penalty on behalf of Mr. Pillay. We were requested to draft a memorandum to the Minister of Finance for his approval. Nic Coetzee and I both advised Mr. Oupa Magashula in the Commissioner's boardroom that it is not advisable to continue with the early retirement of Mr. Pillay because it was for personal reasons and not business reasons. We were also concerned that it could set a precedent whereby others could come and claim the same benefit. We informed him that no such case was recommended in the past as it was for personal reasons. He instructed us to continue with the memorandum.*
>
> ...
>
> 10

I was presented with the signed approved memorandum by the Minister and I initiated the process of the exit of Mr. Ivan Pillay from the Pension Fund and his re-employment on a contract basis. Part of this process was to sign a contract of employment with Mr. Ivan Pillay. I drafted a three year contract of employment to be signed by Mr. Oupa Magashula as the Commissioner and Mr. Ivan Pillay as the employee. The contract document was however amended to five years ... Mr. Oupa Magashula requested that I sign as a witness. I queried the matter of the contract that was amended to five years. Mr. Oupa Magashula indicated that they decided that it will be five years and not three and continued to sign the contract. I signed as witness as I believed it was merely to indicate that it was Oupa Magashula who signed the contract. I advised but the advice was cast aside and not taken.

11

In 2014 a new contract of employment ... was requested from my Office via Rita Hayes who was employed by Mr. Ivan Pillay. I enquired why a new contract was needed as the previous employment contract was still valid however I was just advised that the Minister Pravin Gordhan and Mr. Ivan Pillay wanted to conclude a new contract. I then continued to e-mail a draft contract to her office. I was presented with a new contract of employment to implement for Mr. Ivan Pillay." (Own emphasis).

145 Pillay's aforesaid contract was concluded in April 2014 – the very last year of the Minister's tenure as Minister of Finance. In view of the fact that Pillay's contract of employment signed in February 2011 was still valid and of full force and effect until February 2016, there was no lawful reason to conclude a new contract other than to unduly benefit Pillay with a further contract of employment for another period of two years after what would have been the end of his contract concluded in February 2011.

Statement of the Minister

146 In his own statement attached hereto **as SA14**, which statement was not made under oath, the Minister says the following about Pillay's early retirement and his approval thereof:

> "*15. Mr. Pillay took early retirement and was re-appointed when I was Minister of Finance. I seem to recall that it happened in early 2010.*
>
> *16. The then Commissioner of SARS, Mr. Oupa Magashula, addressed a memorandum to me on 12 August 2010, seeking my approval for Mr. Pillay's early retirement and re-employment on a fixed term contract. I was told that Mr. Pillay sought in this way to gain access to his pension fund to finance the education of his children. I understand that Mr. Magashula had established from enquiries made with the Department of Public Service and Administration that*

the terms of Mr. Pillay's early retirement and re-appointed were lawful and not unusual. I approved Mr. Magashula's proposal because I believed it to be entirely above board and because I thought it appropriate to recognise the invaluable work Mr. Pillay had done in the transformation of SARS since 1995."

147 The Minister's statement creates an impression that he approved Pillay's early retirement package on the basis that Pillay needed money to finance his children's education. This, however, is not what is stated in Magashula's memorandum to him of August 2010. The issue of raising funds to provide for the education of Pillay's children is referred to in Pillay's memorandum to the Minister in 2008, which is not the one which the Minister approved in 2010.

148 What the Minister does not say in his unsworn statement is the following:

148.1 The legal basis on which he approved the request that Pillay's penalty to the GEPF be paid by SARS;

148.2 The fact that the memorandum which he approved in 2010 does not say anything about Pillay wanting to access his pension benefits in order to provide for the education of his children;

148.3 That he became aware of Pillay's need for money to educate his children when he still worked with him whilst he was still the Commissioner for SARS;

148.4 Why he did not approve the request made to him by Pillay in 2008;

148.5 Why he considered it to be above board to approve the early retirement and re-appointment of Pillay in circumstances where he knew that upon early retirement, the position of Pillay had to be advertised to enable interested parties to apply to be considered for the position – and more so when Magashula resigned from the position of Commissioner for SARS pursuant to allegations that he offered a member of the public employment at the South African Revenue Service without following the prescribed recruitment procedures;

148.6 That he was in fact a party to the "*enquiries made with the Department of Public Service and Administration*" referred to in paragraph 16 of his statement. In this regard, in an e-mail dated 23 July 2010 attached hereto as **SA15** (and which was obtained only in the review process), addressed to the then Acting Director-General of the Department of Public Service And Administration, Magashula said:

"*Dear Kenny,*

Thank you very much for a quick discussion yesterday with my Minister regarding the early retirement of our Deputy Commissioner of SARS. In my discussion this morning with my Minister we agreed that I should ask you for a written

response to our discussion and the questions I posed yesterday ..." (Own emphasis).

149 The reference to "*my Minister*" in the above quoted e-mail is a reference to Gordhan. It is clear from the above quoted e-mail that Gordhan was fully involved in the process leading to Pillay's early retirement. The enquiries referred to in his statement were made at his request, yet he does not say this in his statement.

150 In his aforesaid e-mail, Magashula did not enquire about the payment of Pillay's penalty to the GEPF or the legality of paying it. Of relevance for purposes of the charges in issue, he asked the following questions:

- *"Is there a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment, with a scaled down responsibility, salary and other conditions of employment?*
- ....
- *Related to the first bullet point – do you have any statistics of how many of these early retirement cases without re-engagement have been processed thus far?*"

151 The response from the Acting Director-General of the Department of Public Service and Administration is attached hereto as **SA16** and it is silent on the question whether it was lawful for SARS to pay Pillay's

penalty to the GEPF. This response must necessarily be silent on this issue due to the fact that the issue was not raised. In fact, the response shows that what was asked in the discussion was the so-called Employee Initiated Severance Package, which is completely different from what Pillay wanted to do.

152 The Employee Initiated Severance Package was introduced into the public service in terms of a ministerial determination made by the Minister of Public Service and Administration. A copy of the relevant determination is attached hereto as **SA17** Paragraph 1 of this determination says that it is "*applicable to all employees appointed in terms of the Public Service Act, 1994, as amended.*" Pillay was employed in terms of the South African Revenue Service Act 34 of 1997 and the determination did not apply to him. Furthermore, the determination did not apply to Pillay due to the fact that in terms of paragraph 3 thereof, its purpose is to:

> "*... allow employees affected by transformation and restructuring who wish to exit the public service, to apply for an employee-initiated severance package.*"

153 Pillay's application was in any event not made in terms of the ministerial determination referred to above.

154 What appears from the Minister's statement is that he was not a party to the process which led to Pillay's application for early retirement and re-appointment and that he only became involved in that process when he

was Minister of Finance. As demonstrated by the documents to which I have referred above, this is simply not true.

155 In his memorandum dated 27 November 2009, Pillay requested that his approval be granted in terms of section 16(6)(b) of the Public Service Act, 1994. It provides:

> "*(b) If an employee is allowed to so retire, he or she shall notwithstanding anything to the contrary contained in subsection (4) be deemed to have retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the public service in terms of that subsection.*"

156 Section 16(4) of the Public Service Act, 1994 provides that an officer, other than a member of the services or an educator or a member of the State Security Agency who has reached the age of 60 years may, subject in every case to the approval of the relevant executive authority, be retired from the public service. Pillay had not reached the age of 60 years provided for in this section. This being the case, section 16(4) of the Public Service Act did not apply to him.

157 Section 16(6)(a) of the Public Service Act, 1994 upon which Pillay also relied in his aforesaid memorandum provides that an executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17(2), if sufficient

reason exists for the retirement. This provision simply authorises the executive authority, the Minister in this case, to authorise the early retirement of an employee who has not yet reached the age of 60 years. This provision, however, is silent as far as the retirement or pension benefits are concerned.

158 In his letter to the Minister referred to above, Magashula sought the Minister's approval in terms of section 16(2A)(a) of the Public Service Act 1994. This section provides that:

> "*(2A)(a) Notwithstanding the provisions of subsections (1) and (2)(a), an officer, other than a member of the services or an educator or a member of the State Security Agency shall have the right to retire from the public service on the date on which he or she attains the age of 55 years, or any date after that date.*"

159 This section simply creates a right of a Public Service Employee to retire at the age of 55 years or after attaining that age. The executive authority's approval is not required for that purpose.

160 In his letter to the Minister, Magashula further relied on Rule 14.3.3(b) of the Rules of the GEPF. Rule 14.3.3 deals with members with 10 years and more pensionable service. Rule 14.3.3(b) provides that:

> "*(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 percent for each complete month between the member's actual date of retirement and his or her pension-retirement date."(Own emphasis).

161 It is clear from Rule 14.3.3(b) that it only applies to a person who retires on account of a reason mentioned in Rules 14.3.1(d) or (e).

162 Rule 14.3.1(d) deals with a member who retires before his or her pension-retirement date but not on a date prior to the member attaining the age of 55 years: Provided that such a member has the right to retire on that date in terms of the provisions of any Act which regulates his or her terms and conditions of employment. Pillay had a right to retire in terms of the provisions of the Public Service Act 1994 referred to above. Accordingly, Rule 14.3.1(d) is the one which applied to him.

163 Rule 14.3.3(b) to which reference has already been made above, provides that a person who retires on account of a reason mentioned in Rules 14.3.1(d) or (e) shall be paid "*the benefits referred to in Rule (a) above: Provided, that such benefits shall be reduced by one third of one percent for each complete month between the member's actual date of retirement and his or her pension-retirement date.*" This Rule applied to Pillay because in terms of Rule 14.3.1(b) he was retiring "*before his or her pension-retirement date in terms of the law governing his or her*

terms and conditions of service" being the Public Service Act to which reference has already been made above.

164 There is no provision in the Public Service Act, 1994, in particular in section 16 thereof, in terms of which provision is made for SARS to pay what Pillay himself described in his memorandum as "*the penalty imposed on my pension benefits per Rule 14.3.3(b) of the GEPF Rules.*" Rule 14.3.3(b) of the GEPF Rules simply makes provision for the reduction of the pension benefits of a person who retires before his or her pension-retirement date and does not make provision for the employer of such a person to pay the penalty which is imposed in terms thereof.

165 When the prosecutors decided to bring charges, they clearly took into account that there was no authorisation in law for SARS to pay the penalty, effectively financing Pillay's retirement and education of his children.

166 In addition, the prosecutors were also influenced by the fact that the so-called early retirement was in fact not an early retirement at all. This is so due to the fact that Pillay did not intend to retire and both the Minister and Magashula were fully aware that Pillay did not truly intend to retire. The fact that Pillay did not genuinely truly intend to "retire" is not concealed in his memorandum dated 27 November 2009.

167 In his aforesaid memorandum, a false impression is created that Pillay was to serve SARS in a "*different capacity*" where the demands of such a job will "*positively support the reasons why I am in the first instance*

taking early retirement." The reason given for early retirement is that "*my health condition is slowly deteriorating*" and "*my family responsibilities, for a long time, suffered on account of the dedication required by my job.*" Despite all of this, Pillay was at the very same time reappointed to the very same position from which he so desperately wanted to "*retire*".

168 In the light of the above, the prosecutors were quite correct in bringing the charges against the three individuals.

169 In addition to the above, the fact that Pillay was reappointed at the same time that he went on early retirement clearly meant as far as the prosecutors were concerned, that the position of Deputy Commissioner of SARS, to which he was reappointed immediately was not advertised and other interested parties were not given an opportunity to apply to be appointed to that position. This would have been necessary due to the fact that at the very moment that Pillay took early retirement, his position of Deputy Commissioner became vacant and the position had to be advertised to give all interested parties an opportunity to apply for it. This was not done.

170 The applicants' reliance upon the provisions of section 17(4) of the GEPF Law, 1996; Rule 20 of the Rules of the GEPF; and the contents of the Government Employees Pension Fund Members Guide is not only incorrect, it is also misleading the public because the applicants' papers have been published for all to see.

Section 17(4)

171 Section 17(4) of the GEPF Law, 1996 deals with a situation where the employer or if any legislation adopted by parliament places an additional financial obligation on the GEPF. In that event, the employer or the government shall pay the financial obligation it has placed on the GEPF. This is not what happened in this case. The penalty obligation was imposed upon Pillay by the Rules of the GEPF and not upon the GEPF. The penalty obligation also did not arise from the employer's action or operational requirements – it arose from Pillay's early retirement.

172 Section 17 of the GEPF Law deals with the funding of the GEPF. The section does not deal with penalties which must be paid by employees who are taking early retirement. The section is clearly not concerned with penalties which the Rules of the fund impose upon retiring employees. The GEPF is not funded by penalties levied upon early retirees.

173 Section 17(4) makes it clear that it is concerned with any action taken by the employer or if any legislation adopted by parliament (places any additional financial obligation on the Fund) the person who places such an obligation on the Fund is then made responsible to pay the fund "*an amount which is required to meet such obligation.*"

174 In the case of Pillay, no obligation whatsoever was placed on the GEPF. On the contrary, the obligation was placed on Pillay to pay the penalty. In the premises, section 17(4) of the GEPF Law does not assist the applicants.

Rule 20

175 Rule 20 of the Rules of the GEPF similarly does not assist the applicants. Rule 20 deals with compensation to the GEPF on retirement or discharge of a member prior to attainment of the member's pension retirement date.

176 The Rule applies to a situation where a member "*becomes entitled in terms of Rule 14.8 to the pension benefits in terms of a severance package, referred to in that Rule, or is discharged prior to his or her pension retirement date and at such retirement ... in terms of the Rules becomes entitled to the payment of an annuity or gratuity or both an annuity and a gratuity in terms of the Rules, and any of these actions result in an additional financial liability to the fund.*"

177 In this case, the GEPF did not attract *"an additional financial liability."* On the contrary, it is Pillay who attracted a penalty for himself. He, and not SARS, had to pay the penalty.

The Guide

178 The applicants' reliance on the Government Employees Pension Members Guide is completely wrong. The sentence quoted therefrom, is inconsistent with what is contained in the GEPF Law and the Rules of the GEPF.

179 It cannot be, as the applicants are suggesting that the guide supersedes the GEPF Law and the Rules. In any event, on any proper and rational interpretation of the guide upon which the applicants seek to rely, the

only situation which could be contemplated therein is where "*the employer granted permission for your early retirement*" for the employer's own operational reasons. There can be no basis on which the government should fund the early retirement of its employees in circumstances where that has nothing to do with the government's operational reasons.

180 In any event, the Minister, Pillay and Magashula did not rely for their actions on the provisions upon which the applicants now seek to rely. They did not rely on such provisions simply because they knew that such provisions did not apply. In addition, if these provisions were applicable, it would not have been necessary for Pillay and Magashula to motivate the payment of the penalty to the Minister – they would have told him that he must simply exercise his powers in terms of those provisions.

181 When regard is had to the above background and provisions of the GEPF Law and the GEPF Rules, it cannot be said that there was no rational basis to bring charges against the Minister, Pillay and Magashula. Furthermore, as demonstrated above, the applicants' reliance on Rule 20, section 17(4) and the GEPF Guide referred to above is clearly incorrect and cannot be used to justify the applicants' contentions that there was no rational basis to charge the aforesaid three individuals.

IN FRAUDEM LEGIS

182 When regard is had to the information which the prosecutors had in their possession, there was a rational basis to conclude that the early retirement transaction was *in fraudem legis* or that it was a classical simulated transaction.

183 A simulated transaction is one which is called by a name by which it is not. The parties thereto call it by a name which it is not and they do not implement it according to the terms which are communicated to the outside world – but it is implemented according to some terms that are kept between themselves.

184 In this case:

184.1 The outside world was told that Pillay took early retirement;

184.2 In fact and in truth, Pillay never retired;

184.3 Pillay remained in the very same position of deputy commissioner which, according to his first memorandum, he desperately wanted to retire from;

184.4 The GEPF was made to understand that Pillay was leaving the public service by way of an early retirement, when in fact he was not leaving the public service;

184.5 The transaction was concluded to enable Pillay to have access to his pension benefits to provide for the education of his children;

184.6 The early retirement transaction would not have been concluded if Pillay did not need to provide for the education of his children;

184.7 The Minister approved a three-year contract of employment; however, Pillay and Magashula concluded a five-year term contract commencing in February 2011 with the intended end date being in 2016;

184.8 The transaction was therefore, not a genuine, lawful and proper early retirement transaction because an early retirement transaction results in the retiree actually leaving the employment of the employer. It is common cause that Pillay did not leave the public service, nor was it intend that he would leave the public service.

185 Ordinarily, when a person retires and the position from which he or she retires requires to be filled, the position is advertised for interested parties to apply to be considered for it. When Pillay retired, if he retired at all, his position ought to have been advertised for interested parties to apply for it. The Minister as the custodian of public finances, ought to have satisfied himself that this was done. He did not because he knew that that is not what was intended to happen.

186 It is common practice that the charge of theft is always preferred as an alternative to a charge of fraud. I did not draft the charge sheet and I must admit that the charges could have been drafted more eloquently. The fact that the charges were not a model of clarity does not mean that

they were politically motivated or that there was no basis for them. Charges are in any event amended all the time and this cannot be excluded. Furthermore, the accused persons themselves could have raised this lack of clarity as an issue at the trial – it happens all the time and does not form a basis for the impeachment of the prosecutor, let alone the National Director of Public Prosecutions.

THE DECISION TO PROSECUTE

187 The final decision to prosecute was approved by the third and fourth Respondents.

188 The decision to prosecute was taken pursuant to a consideration of the available evidence at the time, which I have outlined above.

189 The applicants insinuate that I took the decision. I did not.

190 In my briefing to Parliament of 4 November, I made it clear that I was open to reconsidering the charges. In this regard, I said the following:

> *"I am more than willing to review any matter if somebody applies to me to review that matter. The decision to prosecute was made on the recommendation of prosecutors by the Special Director who heads the priority crimes investigation unit in consultation with the director of public prosecution is of North Gauteng."*

191 Oddly, the Applicants have mis-characterised this as *backpedalling*.

192 The argument that the non-availability of an opportunity to make representations prior to the institution of a prosecution indicates bias on the part of the decision-maker does not hold water. It is well within the discretion of a prosecutor to opt to consider representations after the institution of the prosecution. The provisions of s.179(5)(d) of the Constitution are unambiguous in this regard.

193 As we have seen, the Minister's attorney on 24 August demanded that he be informed of any future steps with respect to his client. I responded on 25 August that I would consider his request once the investigation was finalized. In a letter of 29 August (attached hereto as Annexure **SA18)** the Minister's attorney advised that he believed that the matter had now been finalized and stated that he wished to offer representations. To this, Pretorius on 5 September responded that it was he that would be making the decision, but that it was premature to make representations at that stage. However, Pretorius advised if the Minister did wish to interpose any comments, he should resort to a warning statement. This offer was never taken up by the Minister. Against that background, the allegation that anyone *reneged* on an undertaking to the Minister is not well taken.

194 In contending that the Minister was entitled to make representations prior to the institution of charges, the applicants are effectively contending that high government officials must obtain special treatment from the NPA. It is exceedingly rare for such an opportunity to be afforded to those who are subject to NPA investigation. There is no reason to treat the Minister any differently.

195 In a 14 October 2016 letter (a copy of which is attached to the founding affidavit as **SA19**), the Applicants wrote:

> *"Should you not unconditionally withdraw the charges against the Minister or furnish the information sought [by 16:00 on 21 October 2016], our clients will assume that no reasons for the decisions, and no documents other than the documents annexed to this letter, exist in support of the charges".*

196 One of the documents attached to the applicant's letter was the Symington memorandum and this is the first time that this memorandum was brought to my attention and that of the prosecutions team.

197 Once again, the inarticulate premise is that a high office holder is entitled to impose special conditions that would not be available to any ordinary citizen subject to prosecution. As foreshadowed above, this is antithetical to the principle of equality before the law as enshrined in section 9 of the Constitution.

198 The applicants' added:

> *"In respect of both charges, even if it is assumed (contrary to the dispositive analysis above) that the conduct of the minister of finance was not strictly in accordance with the law. There is no basis for imputing a fraudulent or furtive intention to him and none has been suggested."*

199 Anticipating what is set out below, I pause to comment that, upon review, my conclusion was that the available evidence as gathered in the course of the assessment of representations, was indeed not sufficient to create reasonable prospect of a successful prosecution as far as the presence of a criminal intention was concerned. The central fallacy of the Applicants' argument is that this conclusion retrospectively renders the institution of the prosecution irrational, or the product of pressure.

200 While, in light of what is set forth above, the prosecutors believed that there was strong evidence that the 2009/2010 decisions were unlawful, and that there were therefore reasonable prospects of a successful prosecution, it was not clear that the State would be in a position to prove beyond a reasonable doubt the element of intent. As noted elsewhere in this affidavit it is trite that intention as an element of a criminal offence falls to be inferred from an overall conspectus of the alleged facts. Reasonable minds can differ, especially before evidence is heard, as to whether the facts, if true would support an inference of intent.

201 The applicants' attorneys said that:

> *"The main reason for his decision [not to make representations] is that he does not have any confidence in the NDPP's ability or willingness to afford him a fair hearing.*
>
> *First, we repeatedly asked the NPA to afford the Minister an opportunity to make representations to them before they decided whether to prosecute the Minister but they spurned out request.*

Second, the NDPP's conduct at his press conference announcing the decision to charge the Minister made clear his commitment to the prosecution.

Third, having now had an opportunity to study the charges against the Minister, it is also clear to us that they manifest a resolute and not well founded determination to prosecute the Minister at all costs. Any representations to the NDPP would accordingly be pointless."

202 Their conclusion that it would be futile for the Minister to offer representations is ill-founded. No reasons are offered for the Minister's lack of confidence in me. If the basis for his foreboding was that it was I who made the decision to prosecute in the first instance, that was, as shown herein, an erroneous assumption.

203 The suggestion that I could not be swayed by representations, is equally without merit. There is simply no logical connection the institution of charges by experienced senior prosecutors, in whom I had every confidence, and my willingness to be persuaded in light of further information, that the threshold for continued prosecution had not been satisfied.

204 I responded to the applicants' letter on **17 October 2016**, (a copy of which is attached to the founding affidavit as **SA20**), confirming that the decision to prosecute was taken by Pretorius, not by myself; that I considered myself empowered to review the decision; that I had received

representations from Pillay and Magashula; and that the Minister should make representations by 18 October 2016.

205 By way of a letter to me dated **18 October**, (a copy of which is attached hereto as **SA21**) the Applicants reiterated that I had disabled myself from applying an independent and objective mind.

Representations Received

206 On 17 October 2016 Magashula and Pillay, through their legal representatives, made representations to me in which they requested me to review the decision taken by the third respondent.

207 On 18 October 2016 those verbal representations were reduced to writing.

208 Counsel on behalf of Pillay, Advocate Nazeer Cassim SC raised the opinion by Symington dated 17 March 2009 in the following context:

> "*The purpose of this note is to crisply record the grounds whereupon where respectfully submit, Pillay did not have any intention to commit the offences in respect of which he now stands arraigned. In essence, Pillay was guided by the opinion of Vlok Symington ("Symington") a respected legally trained official of SARS at the material time which advised that Pillay's contemplated early retirement from the GEPF, in his application to the Minister of Finance to waive early retirement penalty and is requested to be appointed on contract after his early retirement from the GEPF were technically possible*

under the rules of the GEPF read together with the employment policies of SARS."

209 A copy of these written representations is attached hereto marked **SA22**.

210 On 18 October 2016 Magashula's legal representatives, Advocate PJJ De Jager SC reduced Magashula's representations into writing attached hereto as **SA23** and states the following concerning the Symington memorandum in particular:

"It is true that Mr Magashula promoted and supported Mr Pillay's request for early retirement. He was afforded a memorandum from the Legal and Policy Division (Mr Vlok Symington) and he followed all procedures to the letter. He sent a memorandum on 12 August 2010 to accused NO. 3 who approved. With all due respect, any reasonable employer would under the circumstances have approved. However, even if you doubt the correctness of the Minister's exercise of his discretion, that is still a far cry from any criminal charge, let alone fraud, theft or otherwise."

211 As a result of these representations, I authorized further investigation of the matter, in particular because the import of the Symington memorandum was that Pillay, Magashula and similarly the Minister, lacked the necessary intention to commit an unlawful act. To that end, further statements were taken.

212 The Minister did not make representations, as Pillay and Magashula did. (The Minister, however, subsequently indicated that he aligned himself

with representations that had been included in the letter of the applicants of 14 October.)

Decision to Review the Charges

213 After affording all interested parties including the applicants in this matter, the DPCI, SARS, Pillay, Magashula and the Minister an opportunity to make representations, and considering the representations that were made by those who elected to do so, I then took the decision to review and set aside the charges on 30 October 2016.

214 This decision was taken on the premise that it would be difficult to prove the requisite intention to act unlawfully beyond a reasonable doubt on the strength of the new information that was provided and which was not before the prosecutions team when the third respondent took the decision to prosecute.

215 I announced my decision at a press conference on 31 October; a copy thereof is attached as **SA24**. Once again, the essence of applicants' complaint is not so much that I decided to withdraw the charges, but the manner in which I made that decision known. My assessment was that, in light of the wide publicity the charges had attracted, coupled with the fact that they had been initially announced at a public event it was appropriate that the discontinuation of the prosecution be similarly made known to the public and the media.

216 The applicants disingenuously suggest that the withdrawal of the charges somehow vindicated their position and constituted an admission that the

institution of the charges was a mistake. But the withdrawal of the charges pursuant to the review is an instance of the system working precisely as envisaged by the NPA Act. The initiation of the charges elicited representations, which in turn facilitated further consideration and uncovered material suggesting that for a number of reasons, and in light of the fresh material, the three individuals may not have acted with a criminal intention required for the offences of fraud and theft.

AD SERIATIM

217 Prior to dealing with the allegations *ad seriatim* I wish to address the tone of the founding affidavit. It is somewhat difficult to answer, because so much is framed in language of high emotion and extravagant hyperbole.

218 There is also a great deal of *ad hominem* commentary that has no place in court papers. We are Respondents in this matter by virtue of the offices that we occupy at the NPA. We take our oath of office, our statutory obligations and our ethical requirements very seriously. We prefer not to descend into the arena, but instead to address the factual allegations at issue .

219 I would add that the urgency asserted by the applicants has compelled the Respondents to prepare their answering papers in considerable haste. It has not been possible to address all of the applicants many dubious contentions. Respondents hence reserve the right to seek leave of the court to interpose a further affidavit if necessary.

Ad paragraph 1

220 The content of this paragraph is noted.

221 His gender is irrelevant.

Ad paragraph 2

222 The content of this paragraph is noted.

Ad paragraph 3

223 I dispute that all of the facts alleged by the deponent are within his personal knowledge. The deponent, relies on media accounts for a large portion of his allegations.

Ad paragraph 4

224 The content of this paragraph is noted.

Ad paragraph 5

225 I admit that I announced the charges against Pillay, Magashula and Minister Gordhan at a press conference on 11 October 2016.

Ad paragraph 6

226 The decision to prosecute, which was taken by Pretorius, the third respondent, was guided by there being a *prima facie* case against Pillay, Magashula and Minister Gordhan which a prosecutor could prove beyond reasonable doubt. Pretorius was bound by the above considerations regardless of who the decision to prosecute pertained to. This is because everyone is equal before the law.

227 The emotive description that does not accord with the factual response set out herein, is denied.

Ad paragraph 7

228 The charges were sustainable in law. That is borne out by the contents of the affidavit. I do hold the view that if Magashula, Pillay and Minister Gordhan gave witness statements, the information provided at the review stage may have been provided then, which would have possibly rendered the charges unnecessary. This does not mean that I "*blame the accused*" for anything because they were simply exercising their right to remain silent, which they are at liberty to do.

229 Dr Pretorius' decision to prosecute was taken in consultation with Advocate Mzinyathi, the fourth respondent. It was the correct decision based on the evidence available at the time. I cannot fault the decision to prosecute.

230 My decision to review was similarly taken based on the evidence available at the time, which differed in comparison to the evidence before Pretorius as detailed above.

Ad paragraph 8

231 My decision to review the decision to prosecute may be viewed by some as an about-turn, but that is the very nature of the review process, if successful.

232 There was in fact no "about-turn". I simply exercised the statutorily vested power to provide an accused person with an opportunity to make representations as part of a review process. I submit that the fact that I did so reinforces my independent stance.

233 The remainder of this paragraph is denied.

Ad paragraph 9

234 I deny that I tried to distance myself from Pretorius' decision to prosecute. I maintain that it was the correct decision based on the evidence before him at the time.

235 The process followed has been ventilated at length and to avoid prolixity I reiterate it without repeating it here.

236 I deny that I am incompetent, unfit and improper for my office. To the contrary, I challenge the applicants to set out the exact prescripts of the law that I have allegedly contravened or breached.

237 It is undeniable that Pretorius' decision to prosecute was unpopular, but he was duty bound by the considerations set out above.

238 My decision to review, while met with some relief by the public, is equally an unpopular one or, put differently, makes me unpopular.

239 Fortunately Pretorius and I do not hold our office and exercise our duties in the hope that we become popular, nor do we wish to antagonise the

accused or the public at large. We simply do our jobs in accordance with our duties, regardless of the repercussions.

240 I deny any violation of rights, or that the decision to prosecute and the decision to review has been destructive of the integrity and reputation of the NPA. This affidavit attempts to rectify the record.

Ad paragraph 10

241 I again deny the allegation of incompetence, any ulterior motive, recklessness and that the charges were baseless to begin with.

242 Concerning the "*riots in the streets*" with reference to annexure "**FA1**", the article is dated 1 November 2016, the day after I announced my decision to withdraw the charges. The "*rioters*" were opportunistic looters who damaged property, stole stock, assaulted customers and threatened staff of businesses in the area, among other things. Even the business owners concerned are of the view that *nothing* can justify the looting.

243 To suggest that this relates to me is not in accordance with the practical realities and without merit.

244 In any event, pages 62 and 63 of "**FA1**" deal with what appears to be the real catalyst for the intended *march*, namely the narrative concerning "State Capture".

245 The balance of this paragraph is denied. The stock exchange fluctuates on a daily basis and is influenced by an array of factors. In particular, the applicants are put to the proof that R50 billion was "lost" on the stock

exchange, other than in a notional sense and that the stock exchange has not recovered since.

Ad paragraph 11

246 The content of this paragraph is denied. In particular the applicants are put to the proof concerning who Pretorius and I are *beholden* to and what ulterior purposes are alleged to be promoted or furthered by us.

247 I will be able to respond more fully to these allegations once I have the full details because these allegations, as they stand, are bald, unsupported and speculative.

Ad paragraph 12

248 The need for urgent judicial redress is denied, because at this stage, it is premature as reiterated above. The President should be allowed a reasonable opportunity to make a decision before that decision can be properly be tested by a Court, if need be.

Ad paragraphs 13-15

249 The nature of the relief sought is noted, but it is denied that the applicants are entitled to, or have made out a case for, the relief sought, whether on an urgent basis or at all.

Ad paragraph 16

250 The content of this paragraph is denied insofar as it relates to Pretorius and me.

Ad paragraph 17

251 It is admitted that Pretorius, Advocate Mzinyathi and I occupy high level positions at the NPA which comes with certain *power*, but it must be reiterated that such power is regulated by legislation.

252 I again deny the allegations of incompetence, any ulterior motive, recklessness, unfitness, impropriety and that a clear case concerning the aforementioned has been made out.

253 As stated above, I will respond to the allegations concerning the shattering effects on the economy once the information supporting this allegation has been provided.

Ad paragraph 18

254 The content of this paragraph is admitted. Any negative connotation intended to mean that Pretorius and I are not in keeping with this is denied.

Ad paragraph 19

255 I again deny the allegations of incompetence, any ulterior motive, recklessness, unfitness, impropriety and that a clear case concerning the aforementioned has been made out.

256 The applicant's premature assertion that we have committed misconduct is illustrative of the fact that the Applicants wish to deprive Pretorius,

Advocate Mzinyathi and me of an opportunity to ventilate our version, and have simply decided on this, without having it tested.

257 This accords with the prematurity that is endemic to this application, which presumes to pre-empt the President's decision. I submit that the Court's process is being abused by the Applicants.

Ad paragraph 20

258 Any impropriety, prejudice, damage to public perception, risk, recklessness, damage to the economy and our country's reputation is denied insofar as it relates to Pretorius and myself remaining in office. We do not accept any wrongdoing because we have complied with our obligations in terms of the NPA Act, among other things.

259 As an aside, I would mention that a country's reputation for upholding the rule of law may, if anything, be enhanced in the event that a Minister of State is prosecuted – provided, of course, the charges are good, which Respondents believed they were.

Ad paragraph 21

260 Regarding the allegation that a *failure* to remove Pretorius, Mzinyathi and myself poses an unacceptable risk to the functioning of the NPA, the opposite is true. Our precipitous removal would amount to the decapitation of the institution, and seriously impede ongoing prosecutions.

261 Once again, the import of this paragraph appears to be that my lack of repentance *ipso facto* renders me subject to suspension from office. That is an absurd claim.

262 Applicants effectively seek a permanent stay of prosecution. It is submitted that this is incompetent relief.

263 The fact that the door may have been left open to the prosecution of any of the accused on other charges can never be a legitimate cause of complaint.

Ad paragraph 22

264 The content of this paragraph is denied.

Ad paragraph 23

265 The content of this paragraph is denied, save that I admit that issues of national importance are implicated if this premature application is entertained. The President has neither failed nor refused to institute an enquiry or suspend any of us. He has yet to make a decision, and awaits representations from us by 28 November 2016 which we are in the process of compiling. We were of course also met with this application and have had to place our representations on hold until finalising our answer to this application. The applicants' insistence on rushing the President into precipitous action does not sit well with their insistence that this is a matter of great national importance.

Ad paragraph 24 - 25

266 The applicants correctly emphasise our central and essential roles within the NPA, which is difficult to reconcile with their demand that we should be immediately suspended.

267 Again, I will respond to the applicants' allegation that we are "*a proven severe threat to the economy*" once evidence of this nature has been provided.

268 Concerning my alleged "*threat*" which the applicants say *may* amount to "*misconduct by bringing further ill-conceived charges in the near future*", all interested parties are aware of ongoing investigations so there can be no mischief in what I have said.

269 It is admitted that the NPA and high level officers therein must be, and must be perceived to be, independent of executive and political interference. What the applicants are urging is that the President take precipitous action against high level officers without even affording them the opportunity to respond to the allegations against them. This does indeed threaten to compromise the independence of the NPA.

270 I deny that the offices of the Respondents have been abused or compromised. I deny that the actions of the Respondents indicate their unfitness to hold office.

271 There is no manifest lack of independence. I have pointed out, in fact, that my decision to withdraw the charges came in the face of strong pressure from the Hawks not to do so.

272 The President has not adopted an intransigent and supine attitude. He is obliged to hear the version of the Respondents before taking far-reaching action against them.

273 I would draw the attention of the Court to the decision of the House of Lords in the matter of R (on the application of Corner House Research and others) (Respondents) v Director of the Serious Fraud Office (Appellant) (Criminal Appeal from her Majesty's High Court of Justice) [2008] UKHL 60. Lord Bingham of Cornhill declined to set aside the withdrawal of a prosecution arising out of alleged corruption in an arms transaction with Saudi Arabia notwithstanding that the Attorney-General considered formal representations in a minute of the Prime Minister in which the latter contended that pursuing the prosecuting severally prejudice the public interest. [at paragraphs 17-18]

274 The applicants' contention that whenever the fitness and propriety of a senior office bearer is placed in doubt, the integrity of the entire institution is unsustainable, is without merit. One need only consider the case of the fourth respondent herein, Mzinyathi. He was accused of serious impropriety, only to have an application to strike him from the roll dismissed. The public may be presumed to be aware that serious allegations against senior office holders are not uncommon; they cannot be presumed to lose all faith in an institution of state whenever allegations against its officers, which may or may not be justified, are raised.

Ad paragraph 26

The contents of this paragraph are admitted

Ad paragraph 27

275 It is denied that the President has failed in his constitutional duty. He has not made a decision whether or not to invoke section 12(6) of the NPA against the Respondents. The applicants attempt to railroad the matter by demanding that he make a determination within a matter of days, without consulting those who stand to be most directly affected. It is denied that the President does not exercise a discretion.

Ad paragraph 28

The contents of this paragraph are denied.

Ad paragraph 29

The contents of this paragraph are admitted.

Ad paragraph 30

276 The contents of this paragraph are admitted.

Ad paragraph 31

277 The standing of the applicants is not for present purposes contested.

Ad paragraph 32

278 The standing of the applicants is not for present purposes contested.

Ad paragraph 33-36

279 The first sentence of these paragraphs are admitted. The second sentence is denied. The third sentence is noted.

Ad paragraph 37

The contents of this paragraph are admitted.

Ad paragraph 38

280 The standing of the applicants is not for present purposes contested. The implicit factual claims in this paragraph are denied.

Ad paragraph 39

281 The contents of this paragraph are denied.

Ad paragraph 40

282 The standing of the applicants is not for purposes of this Application denied.

Ad paragraph 41

283 The standing of the applicants is not for purposes of this application denied. The factual and legal claims in this paragraph are denied.

Ad paragraph 42

284 In so far as the quotation accurately reflects the text being quoted, it is noted.

Ad paragraph 43

285 The contents of this paragraph are admitted.

Ad paragraph 44

286 The contents of this paragraph are admitted, save the final sentence which is denied.

Ad paragraph 45

287 The contents of this paragraph are admitted.

Ad paragraph 46

288 The implicit factual claims in this paragraph are denied

Ad paragraph 47

289 The contents of this paragraph are denied

Ad paragraph 48

290 The contents of this paragraph are denied.

Ad paragraph 49-51

291 I can neither admit nor deny the vague and open-ended allegations in these paragraphs. It does not serve the applicants' cause to attach selected media articles, much of which reflect speculation, rumours and "leaks," garnished with political commentary and opinion.

Ad paragraph 52-3

292 My understanding is that the list of questions referred to were compiled by the Hawks regarding the so-called rogue unit. They are hence not relevant to the present proceedings. I would note that the Applicants have elected not to join the Hawks as Respondents. (Neither, indeed, did the Applicants join the Minister of Justice.)

Ad paragraph 54

293 The contents of this paragraph are admitted.

Ad paragraph 55

294 The contents of this paragraph are denied for the reasons set forth above. Although the charges were immediately connected to the Pillay retirement, they came to light in the course of the investigation into the rogue unit.

Ad paragraph 56

295 I know nothing of the so-called "*reference group*".

Ad paragraph 57

296 The contents of this paragraph are denied. The applicants' continuing use of extravagant adjectives is to be deplored.

Ad paragraph 58

297 I stand by what I said at the press conference of 11 October 2016.

Ad paragraph 59

298 It is true that I addressed the matter of the rogue unit at the press conference. Although allegations about the unit form no part of the charges that were laid on that day, the subject matter is not unrelated. I deemed it appropriate to address a subject as to which there has been much speculation. I deny that my intent was to attack the reputations of any person or that I acted with ulterior purpose.

Ad paragraphs 60-61

299 The contents of these paragraphs are denied.

300 The applicants will have their remedies in the event that charges relating to the rogue unit are preferred.

Ad paragraphs 62-66

301 I deny any impropriety or pre-judgment.

302 As head of the National Prosecuting Authority, I deemed to address the issue of the Rogue Unit, about which there had been much public speculation.

303 In the event that a decision is ever taken to prefer charges in connection with the Rogue Unit, anyone subject to such prosecution will have their remedies in law.

304 As to the charges relating to the early retirement of Pillay, I indicated that I had agreed with the decision that had been made by Pretorius to initiate

a prosecution, having been briefed by him in that regard. Nothing I said precluded me from reviewing the charges upon representations having been received.

Ad Paragraph 67

305 I deny then I manifested either incompetence or ulterior motive. The inferences relied upon for these unfounded allegations are based upon wrong facts and are in any event totally unfounded.

306 The start of the reference to 3000 requests of early retirement with full benefits arose from the memorandum sent by Magashula to the Minister (FA, page 100). Magashula stated:

> "Over the past 5 years the GEPF has approved over 3000 requests from various government departments for staff members to retire before the age of 60 with full benefits. The statistics are attached to this memorandum as received from the GEPF (Appendix A)."

307 The third and fourth Respondents endeavoured to obtain the appendix referred to but were informed that the no such document existed. It would be astonishing if the approvals referred to by Magashula were given on the same basis as that sought by Pillay. In fact, based upon the amount paid on behalf of Pillay, it would have cost SARS in the vicinity of R3 billion in unlawful payments on behalf of employees if this ever occurred.

Ad Paragraph 68

308 I deny that the NPA reneged on any undertaking to the Minister. The facts are the following:

308.1 On 24 August 2016 the Minister's attorneys, Gildenhuys Malatji, wrote a letter to me relating to the rogue unit investigation. In paragraph 4 of the letter, the Minister requested that when this matter is presented to me for a decision of whether to initiate a prosecution against him or not, he should be afforded the opportunity to make both written and verbal representations to me regarding my aforesaid decision.

308.2 I responded to this letter on 25 August 2016. I informed Gildenhuys Malatji in regard to paragraph 4 of the letter that "consideration will only be given thereto once the investigation has been concluded and the docket submitted to the National Prosecuting Authority for decision on whether or not to institute you to prosecution against any person(s)."

308.3 It would not be for me to make the decision as to whether or not to initiate a prosecution. Such decision would be made by Pretorius.

308.4 On 29 August 2016, Gildenhuys Malatji again wrote to me requesting the opportunity to make representations. I forwarded this letter to Pretorius,

308.5 On 5 September 2016 Pretorius wrote to Gildenhuys Malatji. Pretorius stated:

> "It would be advisable that your clients' comments, views and version are incorporated in a warning statement to be taken into account before a decision is made and such warning statement being part of the police docket in this instance."

308.6 But when the Minister was invited to make a warning statement, he refused.

308.7 Accordingly, no undertaking was reneged upon.

Ad Paragraph 69

309 My responsibilities do not include making every prosecutorial decision. I have set forth above my responsibilities as head of the NPA. I, however, do have the responsibility to review decisions in appropriate circumstances where representations are made. Notwithstanding that the Minister refused to make representations in this matter, I exercised my discretion to do so, as a consequence of which the charges were withdrawn.

310 I deny the allegations made expressly or implicitly in this paragraph. I prefer not to engage with personal invective.

Ad Paragraph 70

311 As I have noted, to characterise my statement that I was prepared to review the charges as *backpedalling* betrays a fundamental misconception of the statutory scheme.

312 The applicants should be aware that if I took the decision to prosecute, I would not have been able to withdraw the charges - which would ironically entail that they would be reinstated with no review possible.

Ad Paragraphs 71 and 72

313 The contents of this paragraph are noted.

314 It is true that the applicants placed me "on terms" to withdraw the charges. I was reviewing them at that time and they were ultimately withdrawn within the process of review, and not as a result of the demands of the applicants. In fact, before the time limit imposed by the applicants, I informed them that I had prioritized the review and that I was dealing with it urgently. In the same way that they were not satisfied with the President's advice to them that he was dealing with their complaint and required further time, they were uncompromising in their attitude. They precipitously brought the applications to set aside the charges and the present application.

Ad Paragraph 73-74

315 I find it difficult to understand why the applicants would object to efforts to elicit representations and enquire into the background of the charges, as part of the review exercise. Those enquiries ultimately caused me to withdraw the charges – not on the basis that they were improperly instituted in the first instance, but because materials that were not initially to hand raised questions as to whether it would be possible to prove knowledge of wrongfulness beyond a reasonable doubt.

316 Far from negating the decision to institute charges, documents that came to light in the review process, reinforced the assessment that the special arrangement made for Mr Pillay was unlawful.

Ad paragraph 75

317 I deny that there was no evidence warranting either the institution or the continuation of the prosecution. If the suggestion is that I should have withdrawn the charges earlier, before the completion of the investigation, that claims falls to be rejected. Once again, the implication appears to be that the Minister is entitled to special treatment. The refusal of the Minister to make representations did not accelerate the process. The allegation that my mind was closed, was unfair. My subsequent decision to withdraw the charges in fact demonstrates that I was open to being persuaded by what served before me.

Ad Paragraph 76

318 The contents of this paragraph are admitted insofar as they accurately paraphrase the document quoted

Ad Paragraph 77 - 78

319 I have already explained in detail the extensive steps taken before the prosecution was decided upon. Anyone familiar with the prosecution process would know that it would be entirely impractical to require that every possible source of exculpatory evidence be pursued before charges are instituted. The applicants should also know that that the

standard for the institution of prosecution is no higher than reasonable prospects of success in the prosecution. On the applicants' version, the scope of prosecutorial discretion would narrow to vanishing point.

Ad Paragraph 79

320 The contents of this paragraph are admitted.

Ad Paragraph 80

321 It is true that I made it clear that I did not institute the prosecution. The adverse implications in this paragraph are, however, denied.

322 The applicants simply failed to appreciate that a decision to prosecute can only be reviewed if I did not take the decision. They accept the fact that I reviewed the decision and are pleased that the charges were withdrawn. Yet they want to persist in alleging that I took the decision, which I did not.

Ad Paragraph 81

323 The contents of this paragraph are denied. I stand by what I stated at the 31 October press conference. I refer to that which is set forth above in this regard.

Ad Paragraph 82

324 It is naïve of the applicants to believe that I should simply have withdrawn the charges once the Symington memorandum came to light. The

decision to prosecute was not haphazardly taken by Pretorius; nor are decisions to review done in this matter.

325 It was proper that I should make further investigations concerning the Symington memorandum, including obtaining confirmation from Symington himself. Further investigations were also necessary in terms of following proper process.

Ad Paragraph 83

326 I have stated that the charges were fully justified from the outset. I have dealt in detail with the justification for the charges. The applicants' contention that the charges were "unsupportable from the outset" is clearly wrong and I have explained in this affidavit the basis of the charges. It was only the question of intention which caused me to withdraw the charges on review.

327 I did not issue a subpoena.

Ad Paragraph 84

328 The first two sentences of this paragraph are admitted. I deny the second and third sentences of this paragraph.

Ad Paragraph 85.1

329 As set forth above, it is not standard practice for the head of the NPA to evaluate the credibility of charges before the institution thereof.

Ad Paragraph 85.2

330 I have stated that I relied upon the briefing of trusted senior prosecutors.

Ad Paragraph 85.3

331 I have already stated why it was not an error to issue the charges. Once again, the implication appears to be that I should have taken into account the status of the accused, as well as media speculation, in my assessment of the charges. That is denied.

Ad Paragraph 85.4

332 I have addressed this subject matter above.

Ad Paragraph 85.5

333 I have addressed this subject above.

Ad Paragraph 85.6

334 There is no basis or reason to hold anyone to account for charges which, on the information before the prosecutors, met the threshold requirement for the institution of the charges.

Ad Paragraph 86

335 Save for the final sentence, the contents of this paragraph are admitted.

Ad Paragraphs 87 - 88

336 The contents of these paragraphs are denied. I have stated that I reasonably acted on the basis of a briefing I received from trusted senior prosecutors, which I had no reason to disbelieve.

Ad Paragraph 89

337 The adverse implications in this paragraph are denied. It is true that I primarily relied upon a briefing by the prosecutors, in whom I had full confidence. When it came to the review stage, I directed an extensive investigation, which led to the withdrawal of the charges. It is not necessary for me to engage in the contentions of law advanced by the applicants in this paragraph. The fact is, as I have already stated above, the charges were justified based on the information which the prosecutors had.

Ad Paragraph 90

338 I stand by what was stated at the press conference.

Ad Paragraph 91

339 I do not know what is meant by the claim that I *adopted* the decision to prosecute. I did deem, based upon the briefing, that there was sufficient to meet the threshold for the institution of a prosecution. I have never reversed that position. Indeed, some of the material received post-hoc vindicated the initial assessment that the special privilege accorded to Pillay was unlawful. The applicants seem unable to distinguish between unlawfulness on the one hand and the element of intent on the other.

Ad Paragraph 92

340 I deny that the first sentence of this paragraph. As for the second sentence, I declined to enter into a debate with the Applicants as to the

public response to the charges. Suffice to say that the subject matter was, and remains, of great public interest. I would be derelict in my duty if I attached weight to the extent and scope of public opposition to the charges.

Ad Paragraph 93

341 The contents of this paragraph are admitted.

Ad Paragraph 94

342 I am aware that my visit to Luthuli House caused disquiet in some quarters. I deny that it is categorically excluded for me to attend a meeting at such venue. Such attendance may be justified in special circumstances, such as arose in this instance.

343 In this regard I say:-

344.1 During the afternoon of 10 October 2016, I received a telephone call from Minister Masutha, who invited me to attend an emergency meeting around the escalating violence that had erupted at institutions of higher learning as a direct result of the '# *Fees Must Fall*' campaign.

344.2 Minister Masutha is a member of the Justice, Crime Prevention and Security Cluster ('*JCPS*'). The President had requested Ministers of the JCPS Cluster to urgently brief him on the interventions by their respective departments to bring stability to

an already escalating volatile situation. I understood that the President was leaving the country later that day. The President did not invite me to the meeting nor was the President aware that I would be in attendance until my arrival.

344.3 The Minister of State Security, who was in attendance, deputised as the Minister of Police. The Minister of Social Development who was also in attendance, deputised for the Minister of Defence and Military Veterans. Many of the members of the executive were already at the venue, where they had attended earlier engagements. Due to the urgency of the meeting, it was deemed necessary for the meeting to take place at the venue in question.

344.4 Minister Masutha was of the view that I could contribute much more than he could at the meeting and requested my attendance. I was best placed to explain the initiatives undertaken by the NPA in cooperation with its stakeholders in stabilizing a rather volatile situation around the escalating unrest at institutions of higher learning.

344.5 The NPA Prosecution Policy requires the NPA to cooperate effectively with the police and other investigating agencies to enhance efficacy in the criminal justice processes.

344.6 Section 22(4)(a)(iii) empowers me to advise the Minister of Justice on all matters relating to the administration of criminal justice and section 22(4)(i) empowers the NDPP to make recommendations to the Minister of Justice and Correctional Services with regard to the prosecuting authority and the administration of justice as a whole.

344.7 As head of the NPA and by virtue of the provisions of section 22(1) of the NPA Act nothing precluded me from attending an emergency meeting at the invitation of the Minister of Justice and Correctional Services with Ministers of the JCPS Cluster and the President.

344.8 As I recall, in places like Braamfontein, only a kilometre or two from Luthuli House, vehicles were burning, streets were barricaded, shops were being looted and buildings and vehicles were being vandalised.

344.9 At no stage were individual or specific matters implicating any person(s) discussed. Neither the arrest nor the prosecution of any specific person(s).

344.10 In any event, decisions around these matters are ordinarily made under the jurisdiction of the provincial Directors of Public Prosecutions ('*DPPs*') concerned. To this end, section 20(3) of the NPA Act empowers DPPs to (i) institute and conduct criminal

proceedings on behalf of the State; (ii) carry out any necessary functions incidental to instituting and conducting criminal; and (ii) discontinue criminal proceedings in the area of jurisdiction for which he or she has been appointed.

344.11 The issue of the summons against Minister Gordhan was not discussed. I learned that the Minister Masutha had advised the President of the issue around the summons days earlier. There was hence no need to discuss the matter relating to Minister Gordhan. The only issue that was discussed was the violence that had erupted at institutions of higher learning.

345 It may be worth mentioning that, at the committee meeting attended by me on 4 November 2016, the Chairperson noted that the former Public Protector, Adv Thuli Madonsela had called on the offices of the Democratic Alliance ('DA') where she attended meetings. She had also attended official DA events.

Ad Paragraphs 95 and 96

346 I admit the interview with Eyewitness' News Mandy Wiener. I do not intend to respond to the offensive allegations contained in these paragraphs (and their sub-paragraphs), nor to the gratuitous insults and repetitive statements to disparage me.

346.1 I have emphasized that the conduct in making payment of Pillay's penalty was unlawful. I have explained that the charges were withdrawn after I have formed the view that the necessary criminal intention would not be proved.

346.2 The central issue is whether Pretorius was justified in making a decision to charge GP&M. In making the decision, adherence was paid to the rule of law and the Constitution. A detailed explanation has been furnished as to why the conduct was unlawful.

346.3 I have explained in detail the circumstances of my visit to Luthuli House.

346.4 I have explained in detail the reasons for the charges and the reasons for the withdrawal on review in terms of section 179(5)(d) of the Constitution. I submit that my conduct and that of the third and fourth Respondents was absolutely in compliance with the powers vested in us and we at all times paid adherence to the rule of law and the Constitution. It is unfortunate that the applicants describe me as being arrogant, which I certainly believe not to be the case. It is an attitude which I decry and would avoid. I do however mention that the superior attitude adopted by the applicants in calling upon me to explain why I am fit and proper carries its own insolence.

346.5 I have dealt with the effects of the economy above. I have also addressed the question of chargers relating to high officials in relation to the economy and the public interest generally.

Ad Paragraphs 97 and 98

347 I was not "summoned" to attend Parliament. I was "invited" to attend to provide a briefing.

Ad Paragraph 98

348 The applicants again selectively refer to what was stated by the Chairperson. It is significant that they chose not to refer, for example, to the comments by the Chairperson which I have referred to above, relating to the Public Protector having attended the offices of the DA.

Ad Paragraph 99

349 I do not intend to respond once again to the unfounded criticisms and disparaging remarks. It certainly does not behove organisations such as the applicants, supposedly acting in the public interests to make gratuitous insults based on wrong facts, and to draw adverse for making inferences without evidence. They are clearly trying to create media hype but overlook the fact that the court is not a jury. Their motivation is purely political. Hence, a baseless statement, without evidence to support it, that I have "a seeming vendetta... with the perceived political rivals of President Zuma and his allies". On what possible basis is such an allegation made? Furthermore, I have explained the circumstances of my

visit to Luthuli House. Yet the applicants, without compunction, and without any evidence to the contrary, refer to the meeting as being "clandestine".

350 I do not intend to burden this Court with the details of my objection to the presence of Ms Breytenbach presence at the meeting of the Parliamentary Committee.

Ad Paragraph 100

351 My briefing to the Parliamentary Committee is a matter of public record.

Ad Paragraph 101 to 109

352 I dispute that any conduct on behalf of the third, fourth Respondents and myself provides any evidence that we are not fit and proper to continue to hold our positions. In fact, we have at all times fully and properly carried our duties and obligations, both in terms of the Act, the Constitution and prosecutorial policy.

353 The third, fourth Respondents and I were copied on the letter addressed to the President.

354 We assume that the President will respond to the remaining allegations contained in these paragraphs.

355 I nevertheless state that it is extraordinary that the applicants felt entitled to demand on 1 November 2016 that the President make a decision, based purely on their complaint and the voluminous documents furnished

to him, to suspend us and conduct and enquiry. Surely, the President would be entitled to hear from us. I add that the applicants clearly anticipated that the President would not be able to deal with their complaint within the short time prescribed. Once he had not given their desired response by 7 November, they launched this application just more than a day later, on 9 November.

Ad Paragraphs 110 to 116

356 In paragraphs 110 to 116, under the heading "*Other relevant conduct*", Mr Antonie, on behalf of the applicants, deems it relevant to the applicants' case to refer to the matters concerning the Deputy National Director of Public Prosecutions, Nomgcobo Jiba ("Ms Jiba"). His purpose in doing so is to contend that this is "further evidence" that I "cannot be entrusted with the office of NDPP" (para 116, page 47). Not only is this without foundation, but the essential facts he relies upon are untrue.

357 Two points arise out of Mr Antonie having thrown in "the Jiba matter" into the present application:

357.1 Firstly, the applicants cannot truly expect that this Court should engage in a consideration of the facts surrounding the Jiba matter, and then make a determination based on this concerning my suitability to hold the office of NDPP. If the applicants were of the view that I should be suspended and an enquiry held pursuant to the decision – (made by Marshall Mokgatlhe, a Deputy Director of Public Prosecutions and the regional head of

the SCCU) – to withdraw the charges against Ms Jiba, then an application to this end should have been brought by them. It was not brought.

357.2 Secondly, and more importantly, it is disturbing that Mr Antonie, in seeking to malign me, has not disclosed to this Court the sequel to the judgment of Gorven J as dealt with by the Full Bench in this Court in the matter of the **General Council of the Bar v Jiba & Others** [2016] ZAGPPHC 833 (15 September 2016) (referred to in paragraph 113 of Mr Antonie's affidavit).

358 It is inconceivable that Mr Antonie, who is a Director of the first applicant, would not have read the judgment of the Full Court in the matter of the **GCB v Jiba**, to which he refers. It is therefore astonishing, and cause for concern, that Mr Antonie states that Ms Jiba was struck off the roll for, *inter alia*, her "dishonesty" in the Booysen case. He has the temerity to state, after having read the judgment in the GCB v Jiba application, that the Jiba matter "furthers the perception that (I am) incompetent or prone to partiality". His remaining derogatory comments concerning me in these paragraphs are inexplicable. He has not apprised this Court of the actual findings of the Full Court in which that Court disagreed with Gorven J in the Booysen matter. On the basis of the Full Bench judgment it is absolutely clear that there was no basis whatsoever for the charges of perjury and fraud to have been brought against Ms Jiba in the first place. However, it is because I have not reinstated the charges against Ms Jiba,

that the applicants contend that I cannot be entrusted with the office of NDPP. It is puzzling to say the least.

359 With regard to the question of perjury, Legodi J, (writing the judgment for the Full Court) said:

> [61] I am unable to find any conduct on the part of Jiba that justifies an application contemplated in section 7 of the Admission of Advocates Act.

360 In regard to the authorisation of the POCA certificates, Legodi J said at [67]:

> [67] I cannot find any *mala fides* and/or ulterior motives in the authorisation by Jiba as contemplated in POCA
>
> And
>
> [68] It suffices for now to conclude on Booysen matter by stating that no case has been made for removal or suspension from the role of advocates.

361 Clearly, there was no finding by the Full Bench of dishonesty on the part of Ms Jiba. In the light of this judgment, there could be no basis whatsoever to reinstate the criminal charges against her.

362 I do not wish to engage in futile retaliatory allegations. Suffice to say that organisations such as the applicants, claiming to act on the public

interest, should be expected to be objective, fair and impassionate. Unfortunately, the opposite is evident in this matter, especially when regard is had to the plethora of hyperbole and extravagant exaggerated adjectival expressions, many of which have simply been copied and pasted from the Jiba matter.

363 I attach as Annexure **SA25** hereto the relevant portion of the judgment dealing with the Booysen matter. The entire judgment has not been attached to avoid prolixity but will be made available to this Court at the hearing of this matter.

364 Accordingly, the decision to withdraw the charges of fraud against Ms Jiba was totally justified. Yet, in the face of this judgment, which the applicants not only knew of, but in fact referred to, Mr Antonie failed to inform this Court of its contents relating to the Gorven J judgment and in fact misstated the relevant findings. It demonstrates, that the applicants will go to any lengths to have me removed.

365 On 19 September 2016, the first applicant's attorneys wrote to the President, as appears from Annexure FA15 (page 146). Despite the contents of the judgment of the Full Court concerning the Booysen matter, the first applicant's attorneys nevertheless demand that the prosecution against Ms Jiba for fraud and perjury be reinstated.

366 I respectfully submit there is no basis for any of the concerns expressed by the applicants should we continue in office; neither do they truly believe their concerns.

Ad Paragraph 117

367 The contents of this paragraph are denied

Ad Paragraph 118

368 The contents of this paragraph are admitted, save that it is denied that my conduct constituted a blunder. I have given a full account above.

Ad Paragraph 119

369 I deny the first sentence of this paragraph. As to the second sentence, I dispute that an apology is warranted, and even if it were, my failure to afford an apology could in no circumstances warrant the invoking of section 12(6) of the NPA Act.

Ad Paragraph 120

370 The contents of this paragraph are denied. For the Respondents to overnight be barred from exercising their functions would impact very seriously upon the day-to-day functioning of the NPA for the foreseeable future. The suggestion that the former NDPP can readily step into my shoes is absurd.

Ad Paragraph 121-123

371 The allegation that the prosecution of the charges was pursued for an ulterior purpose, is false and without substance. Nothing has been furnished by the applicants to support this allegation. The defamatory allegations of recklessness and incompetence are denied, as well as the

allegation that a proper investigation was not carried out. I refer to the detail furnished above relating to the extensive steps taken before the decision was made by the third respondent to institute the charges.

Ad Paragraphs 124 - 130

372 I refer to the accompanying affidavit of Pretorius and Mzinyathi.

373 I deny that I shifted responsibility to the third and fourth Respondents. The third respondent took the decision to institute the charges, with which I agreed, having been briefed by the third and fourth Respondents.

374 I deny in particular that no rational and conscientious prosecutor of integrity would have preferred the charges. That has been explained in detail above.

375 In terms of section 24(3) of the NPA Act, a Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director: provided any of the powers, duties and functions referred to in section 20(1) they shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned.

376 The powers referred to in section 20(1) relate to the institution and conducting of criminal proceedings on behalf of the state; carrying out any necessary functions incidental to instituting and conducting of such criminal proceedings; and discontinuing of criminal proceedings.

377 In the NPA, the normal practice of the interactions between Special Directors and Directors of Public Prosecutions is that, when the Special Director is seized with an investigation, the management of such an investigation and the engagements between the investigating authorities and the Deputy Directors and prosecutors under the control of the Special Director, happen without the involvement of the Director of Public Prosecutions.

378 It is only when such a Special Director is contemplating making a decision that he or she initiates discussions with the Director of Prosecutions concerned. It is the culmination of these discussions that will determine if the decision of the Special Director was taken in consultation with the Director of Prosecutions or not, in other words whether the Director of Prosecutions agrees with the decision or not.

379 Essentially, the agreement or otherwise of the Director of Public Prosecutions with the decision of the Special Director is on the basis of information provided by the Special Director working in conjunction with the prosecutors resorting under him.

380 In such instances, the Director of Public Prosecutions is not the original decision maker, nor is he accountable for the decision as in instances when decisions are taken by staff in his area of jurisdiction.

381 It is not the function of the Director of Public Prosecutions to review or substitute the role of the Special Director in managing the activities falling under the auspices of the Special Director.

382 Ordinarily, the Special Director would summarise what the decision entails. This is normally done either through personal engagements, or through the submission of memorandums summarising the facts of the decision. If there are aspects that the Director of Public Prosecutions is not clear about, he or she usually asks the relevant aspects to be clarified by the Special Director, and the Special Director would cause such clarifications to be made.

383 The Director of Public Prosecutions does not get involved in the normal day to day activities of the work of the Special Director, and for instance in the case of an investigation, he or she does not usually call for the dockets and to instruct which further investigations should be followed up, etc. This day to day running of the activities remains the responsibility of the Special Director.

384 It is not correct that there was no proper legal analysis. It further disproves the Applicants' assertion that the prosecutors failed in their constitutional and statutory duty to ensure that the charges were properly grounded, and to take an impartial, independent and objective view of all the facts that were presented before them.

Ad Paragraph 131 - 136

385 I admit paragraphs 132, 133 and 134.

386 I admit the remaining contents of these paragraphs insofar as they correctly repeat the terms of the relevant provisions of the Constitution and the Act.

Ad Paragraph 137

387 This is admitted.

Ad Paragraph 138

388 I do not understand in the distinction drawn by the applicants between subjective and on objective determinations in this regard

Ad Paragraph 139

389 This is a matter of legal argument that will be advanced in the heads of argument and at the hearing. I refer to what I have foreshadowed above regarding the standard of rationality.

Ad Paragraph 140

390 The underlining rationale for s.12(6) of the NPA Act will be the subject of argument.

391 I admit the balance of this paragraph.

Ad Paragraph 141-143.

392 The contents of this paragraph are denied.

Ad Paragraph 144

393 The first sentence of this paragraph it is admitted. The second sentence is denied.

Ad Paragraph 145-148

394 The contents of this paragraph are matters for legal argument.

Ad Paragraph 149

395 The contents hereof are denied. Argument will be addressed to this Honourable Court in regard to the unreasonableness of the time periods the applicants sought to unilaterally impose upon the President. The fact is that no decision has been made.

Ad Paragraph 146

396 The contents of this paragraph are denied. If, the applicants wish to anticipate the potential lodgment of charges against the Minister, and to pre-empt same by obtaining a permanent stay, they are free to approach a court of law to seek such a remedy. I again emphasise that no decision has been made regarding the rogue unit and the investigation is at present incomplete.

397 I have already referred to the judgment of the Full Bench concerning the Booysen matter and the withdrawal of the charges against Ms Jiba. It is astounding that the applicants still contend that I should reinstate the charges against her in light of this judgment. I reiterate that the applicants incorrectly informed this Court of the finding of the Full Bench in the Booysen matter concerning Ms Jiba by stating that she was found to be dishonest when this was not the case at all.

398 No doubt the applicants in their replying affidavit would explain the misrepresentation to the Court.

Ad Paragraph 150

399 The politicization of this matter by the applicants is clear from this paragraph.

400 The contents of this paragraph are denied.

Ad Paragraph 151

401 The contents of this paragraph are denied.

Ad Paragraphs 152 - 164

402 The question of urgency has been dealt with above.

Ad Paragraph 165

403 This is disputed.

404 The third respondent and I dispute that the applicants are entitled to any relief. We submit that the application should be dismissed with costs, including the costs consequent upon the employment of three counsel.

COSTS

405 In the event that the application is struck-off the roll for lack of urgency, the costs should follow the event and such costs should include the costs consequent upon the employment of three counsel for the two Respondents. In this regard, the Court should take into account the following factors:

406 The applicants are not impecunious. They litigate just about everything which they do not like and with which they do not agree. The applicants do this because they can afford it. The fact that the applicants are so-called civil organisations does not exempt them from an adverse cost against them.

407 The application is premature, to the extent that it constitutes an abuse of process. The applicants knew that the President had not taken the decision which they have requested the President to take.

408 The applicants also knew that the President had requested them to extend the time frame within which he should take the decision which they requested the President to take. They unreasonably refused to give such an extension.

409 The refusal to give the President an extension to consider their request was unreasonable and calculated to justify the bringing of this application on an urgent basis. The application would clearly not have been brought if the applicants had given the President the extension which he asked for.

410 The refusal to give the President the extension requested was therefore for an ulterior motive, i.e. to bring this application on an urgent basis in circumstances where there was no justification to refuse the extension.

411 When regard is had to the fact that the President still had to give the affected parties an opportunity to make representations, the time frame prescribed for the President to respond was unreasonable and it too was

calculated to justify the bringing of this application as the applicants must have known that the processes which the President would have had to embark upon would not be completed in a matter of three days.

412 In the light of the above, the fact that the applicants may be raising a constitutional matter need not be taken into account in their favour due to the fact that they acted in bad faith in bringing this application and in giving the President an unreasonable time to respond to them. Similarly, I and the other Respondents were not given any time at all to engage with the President as to why the President should not grant the applicants their request.

413 In the premises, the application should be dismissed with costs of four counsel.

SHAUN KEVIN ABRAHAMS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Sandton on the 15th day of November 2016, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES: **JAYSON JUDE REBELO**

BUSINESS ADDRESS: GROUND FLOOR, 33 FRICKER ROAD
ILLOVO, JOHANNESBURG
Commissioner of Oaths
Practising Attorney R.S.A

330
SA1
418

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: ____

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 JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

CONFIRMATORY AFFIDAVIT OF THE THIRD RESPONDENT

I, the undersigned,

JACOBUS PETRUS PRETORIUS

do hereby make oath and state as follows:

INTRODUCTION

1 I am the Third Respondent in this application.

2 I am the Acting Special Director of Public Prosecutions and Head Priority Crimes Litigation Unit. I am the Third Respondent in this matter.

3 The facts contained in this affidavit are to the best of my knowledge true and correct, and within my personal knowledge, unless stated otherwise or indicated by the context.

4 I oppose the application brought against me and deny that the Applicants are entitled to any of the relief claimed.

5 I dispute that the application is urgent and submit that it should be struck from the roll for lack of urgency with costs.

6 I have read the answering affidavit of the Second Respondent, Shaun Abrahams. I oppose this application on the grounds set out in the affidavit of Shaun Abrahams and confirm the allegations in his affidavit insofar as they relate to me.

7 I submit that the application should be dismissed with costs, including the costs consequent on the employment of three counsel.

JACOBUS PETRUS PRETORIUS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Sandton on the 15th day of November 2016, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

JAYSON JUDE REBELO
GROUND FLOOR, 33 FRICKER ROAD
ILLOVO, JOHANNESBURG
Commissioner of Oaths
Practising Attorney R.S.A

14 November 2016

Dear Adv. Abrahams,

NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO.32 OF 1998)

I have been requested by Freedom Under Law and the Helen Suzman Foundation to provisionally suspend you pending an enquiry into your fitness to hold office.

Freedom Under Law and the Helen Suzman Foundation raised concerns with the manner in which you conducted the prosecution of Minister Pravin Gordhan, Mr Visvanathan Pillay and Mr George Magashula. According to them, your conduct in relation to prosecution of the above mentioned people brought the NPA into disrepute, and consequently rendered you unfit to hold office as National Director of Public Prosecutions.

The letter from Freedom Under Law and the Helen Suzman Foundation is attached hereto.

Section 9 (1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 (the Act), provides that "*Any person to be appointed as National Director, Deputy National Director or Director must-*

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and

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

According to section 12(6) of the Act, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold office.

As you are aware, the National Prosecuting Authority is an important constitutional institution in the administration of Justice and maintaining public confidence in the institution is of necessity.

I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Advocate Shaun Abrahams
National Director of the Public Prosecutions
Private Bag X752
Pretoria
0001

cc: Minister TM Masutha: Minister of Justice and Correctional Services

14 November 2016

Dear Dr Pretorius,

NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO.32 OF 1998)

I have been requested by Freedom Under Law and the Helen Suzman Foundation to provisionally suspend you pending an enquiry into your fitness to hold office.

Freedom Under Law and the Helen Suzman Foundation raised concerns with the manner in which you conducted the prosecution of Minister Pravin Gordhan, Mr Visvanathan Pillay and Mr George Magashula. According to them, your conduct in relation to prosecution of the above mentioned people brought the NPA into disrepute, and consequently rendered you unfit to hold office as Director of Public Prosecutions.

The letter from Freedom Under Law and the Helen Suzman Foundation is attached hereto.

Section 9 (1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 (the Act), provides that *"Any person to be appointed as National Director, Deputy National Director or Director must-*

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and

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

According to section 12(6) of the Act, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold office.

The provisions of section 12(6) of the Act are *mutatis mutandis* applicable to suspension of the Director of Public Prosecutions.

As you are aware, the National Prosecuting Authority is an important constitutional institution in the administration of Justice and maintaining public confidence in the institution is of necessity.

I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Dr Torie Pretorius
Acting Special Director of Public Prosecutions
Private Bag X 752
Pretoria
0001

cc: Minister TM Masutha: Minister of Justice and Correctional Services

14 November 2016

Dear Adv. Mzinyathi,

NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO.32 OF 1998)

I have been requested by Freedom Under Law and the Helen Suzman Foundation to provisionally suspend you pending an enquiry into your fitness to hold office.

Freedom Under Law and the Helen Suzman Foundation raised concerns with the manner in which you conducted the prosecution of Minister Pravin Gordhan, Mr Visvanathan Pillay and Mr George Magashula. According to them, your conduct in relation to prosecution of the above mentioned people brought the NPA into disrepute, and consequently rendered you unfit to hold office as Director of Public Prosecutions.

The letter from Freedom Under Law and the Helen Suzman Foundation is attached hereto.

Section 9 (1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 (the Act), provides that *"Any person to be appointed as National Director, Deputy National Director or Director must-*

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and

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

According to section 12(6) of the Act, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold office.

The provisions of section 12(6) of the Act are *mutatis mutandis* applicable to suspension of the Director of Public Prosecutions.

As you are aware, the National Prosecuting Authority is an important constitutional institution in the administration of Justice and maintaining public confidence in the institution is of necessity.

I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Advocate Sibongile Mzinyathi
Director of Public Prosecutions
Gauteng North
Pretoria
0001

cc: Minister TM Masutha: Minister of Justice and Correctional Services

Jse (JSEJF) Add to Watchlists Create an Alert
10.60 -1.37 -11.45% OTC Markets Nov 11, 20:00 Delayed 15m USD

Quote Fundamental Chart Technicals Key Stats Financials Data Estimates News Events Y-Ratings Performance Valu

Jse Market Cap: 920.90M for Nov. 11, 2016

View 4,000+ financial data types

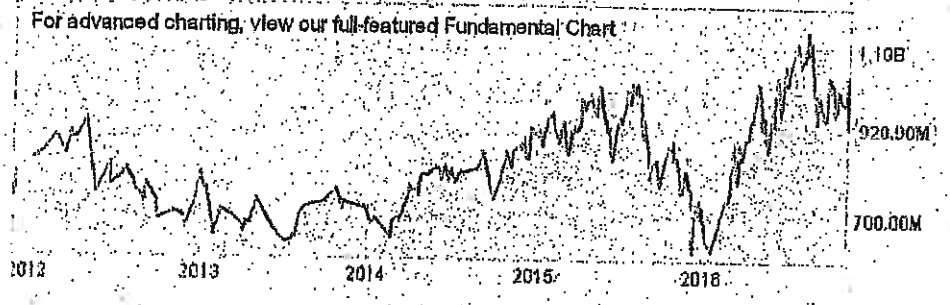
Search Add Browse...

Jse Market Cap Chart

View Full Chart

1d 5d 1m 3m 6m YTD 1y 5y 10y Max Export Data Save Image Print Image

For advanced charting, view our full-featured Fundamental Chart



Jse Historical Market Cap Data

View and export this data going back to 2008. Start your Free Trial

Data for this Date Range			
Nov. 11, 2016	920.90M	Oct. 7, 2016	1.003B
Nov. 10, 2016	1.040B	Oct. 6, 2016	1.025B
Nov. 9, 2016	1.040B	Oct. 5, 2016	1.025B
Nov. 8, 2016	976.50M	Oct. 4, 2016	1.003B
Nov. 7, 2016	976.50M	Oct. 3, 2016	1.011B
Nov. 4, 2016	976.50M	Sept. 30, 2016	1.038B
Nov. 3, 2016	976.50M	Sept. 29, 2016	1.038B
Nov. 2, 2016	976.50M	Sept. 28, 2016	1.038B
Nov. 1, 2016	976.50M	Sept. 27, 2016	1.038B
Oct. 31, 2016	976.50M	Sept. 26, 2016	1.026B
Oct. 28, 2016	976.50M	Sept. 23, 2016	937.41M
Oct. 27, 2016	983.89M	Sept. 22, 2016	937.41M
Oct. 26, 2016	983.89M	Sept. 21, 2016	937.41M
Oct. 25, 2016	986.06M	Sept. 20, 2016	937.41M
Oct. 24, 2016	1.004B	Sept. 19, 2016	937.41M
Oct. 21, 2016	1.004B	Sept. 16, 2016	937.41M
Oct. 20, 2016	1.004B	Sept. 15, 2016	951.31M
Oct. 19, 2016	1.004B	Sept. 14, 2016	960.00M

ADVE

G U

#MI
YEAR I
Spa I
to S
www.gu

JSEJF Market Cap I

Companies

Intercontinental Exchang

CBOE Holdings

Investeo

JSEJF Market Cap I

Minimum

Maximum

Average

JSEJF Market Cap I

Metric Code: market_ca

Latest data point: =YC

Last 5 data points: =Y(
)

To find the codes for any
our Complete Reference

Access our powerful E
Professional Members

JSEJF News

ETF's with exposure to .
Yahoo 10/04 10:03 ET

ETF's with exposure to .
2016
Yahoo 09/20 10:35 ET

Oct. 18, 2016	958.26M	Sept. 13, 2016	949.88M
Oct. 17, 2016	958.26M	Sept. 12, 2016	955.65M
Oct. 14, 2016	958.26M	Sept. 9, 2016	987.97M
Oct. 13, 2016	950.44M	Sept. 8, 2016	987.97M
Oct. 12, 2016	950.44M	Sept. 6, 2016	987.97M
Oct. 11, 2016	952.18M	Sept. 1, 2016	929.59M
Oct. 10, 2016	1.003B	Aug. 31, 2016	930.46M

JSE Ltd. (JSEJY-US: Ea
months ended June 30, 2
Yahoo 08/23 09:54 ET

About Market Capitalization

Market Capitalization (Market Cap) is a measurement of business value based on share price and number of shares outstanding. It generally represents the market's view of a company's stock value and is a determining factor in stock valuation.

For example, if a company has 1.5 million shares outstanding at a share price of $25, its market cap is $37.5 million (1.5 million x $25). Companies can be categorized based upon the size of their market capitalization.

There are five basic groups: mega-cap (market cap over $200B), large-cap ($10B–$200B), mid-cap ($2B–$10B), small-cap ($300M–$2B), and micro-cap ($50M-$300M). Market cap is not always an accurate indication of value because it does not account for debt and other factors.
Learn More

ADVE
$100,00
Demo Tr
1.Videos 2.T
3.Practice G
Trading Tod
avatrade.com

$100,000 Demo Trading
1.Videos 2.Training 3.Practice Get Into Stocks Trading Today! Go to
avatrade.com

341
SA.4

NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
Email: ndpp@npa.gov.za
www.npa.gov.za

429

Your ref: V Movshovich / P Dela / D Cron / D Rafferty / T Dye 3012607
Our ref: Summons No 674/16
CAS Brooklyn 427/05/2015

Webber Wentzel
P O Box 61771
MARSHALLTOWN
2107

Dear Sir

Email: vlad.movshovich@webberwentzel.com

THE STATE VERSUS OUPA MAGASHULA, VISVANATHAN (IVAN) PILLAY AND PRAVIN GORDHAN

1. Your letter dated 14 October 2016, the content of which is noted, refers.

2. As you are aware, the decision to prosecute Minister Pravin Gordhan was made by the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit, Dr Torie Pretorius SC, in consultation with the Director of Public Prosecutions, North Gauteng, Adv Sibongile Mzinyathi in terms of section 24(3) of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act").

3. Section 179(5)(d) of the Constitution, which is replicated in s22(2)(c) of the NPA Act, empowers the National Director, if requested to do so, to review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within a period specified by the National Director, of the accused persons, the complainant and any other person or party whom the National Director considers relevant.

4. Earlier today Messrs Oupa Magashula and Visvanathan (Ivan) Pillay, through their legal representatives, made representations to me in which they

requested me to review the decision by the Acting Special Director of Public Prosecutions.

5. I am presently considering the aforementioned representations.

6. In giving effect to the provisions of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act, I have further invited Minister Gordhan through his lawyers, to make representations to me by no later than 17h00 on 18 October 2016.

7. I will consider all these representations.

Yours sincerely

ADV SK ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 17 – 10 – 2016

343
SAJS
431

HAWKS

Privaatsak/Private Bag X 1600, SILVERTON

Reference	
Enquiries	Lt Gen B M Ntlemeza
Tel / Fax	012 846 4002 012 846 4400
E'mail	dpcihead@saps.gov.za

OFFICE OF THE NATIONAL HEAD
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
HEAD OFFICE
PRETORIA

18 October 2016

2016 -10- 18

National Director of Public Prosecutions
VGM Building
123 Westlake Avenue, Weavind Park
Silverton

ATT: Adv Abrahams

RE: THE STATE vs OUPA MAGASHULA, IVAN PILLAY AND PRAVIN GORDHAN

1. I refer to your letter dated 17 October 2016 for which I thank you for inviting me to make representations to you in terms of section 179(5)9d) of the Constitution, read with section 22(2)(c) of the NPA Act, regarding the representations which you say you have received from the above mentioned persons through their legal representatives.

2. Whilst I am at privy to the representations they have made to you, I am of the view that the DPCI has fulfilled its statutory obligation in terms of Chapter 6A of the SAPS Act by conducting an investigation and submitting the docket to the NPA for a decision. We will as the DPCI be bound by whatever decision that is taken by your office in this matter and will continue to cooperate with the NPA and to carry whatever instructions they give to us in guiding our investigating officers in carrying out their investigations.

3. For the above reasons; the DPCI will not be making any representations on the matter but will await your decision on the matter which will be respected by this office.

Yours sincerely

LIEUTENANT GENERAL
NATIONAL HEAD: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
BM NTLEMEZA
DATE: 2016/10/18

344
SA 6 432

HAWKS

Privaatsak/Private Bag X 1500, SILVERTON

Reference	Cas 427/5/2015
Enquiries	Lt Gen B M Ntlemeza
Tel / Fax	012 846 4002 012 846 4400
E mail	dpcihead@saps.gov.za

OFFICE OF THE NATIONAL HEAD
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
HEAD OFFICE
PRETORIA

30 OCTOBER 2016

OFFICE OF THE DIRECTOR
2016 -10- 31
NATIONAL PROSECUTING AUTHORITY

Adv Shaun Abrahams
National Director of Public Prosecutions
VGM Building
SILVERTON

RE: STATE vs PRAVIN GORDHAN & 2 OTHERS

1. On 17 October 2016 you wrote to us asking if we had any representations to make with regard to this matter.

2. We informed you per our letter dated 18 October 2016 that we had no representations to make.

3. We learn through the media reports that at the time when you wrote this letter you had received representations from some of the accused in this matter, Mr Oupa Magashula and Mr Irvin Pillay.

4. In this regard we would like to enquire whether these media reports are true and if so why you did not:

   4.1 disclose to us that you received those representations;

4.2 request us to make our input as the investigative agency responsible for this matter and clearly a person relevant in terms of section 22 of the NPA Act;

4.3 furnish us with a copy of the representations you received to enable us to properly consider them when we make our input.

5. It is alleged that when Mr Oupa Magashula was called for fingerprint taking, he said it was not necessary to do so as the NDPP intends to withdraw the charges against them.

6. I am aware from the media reports that you intend to withdraw the charges when the accused appear in Court on the 02 November 2016.

7. Furthermore, the media reports of today 30 October 2016, state that you intend to make an announcement pertaining to your decision, which we believe would be to the effect that you will withdraw the charges.

8. It is our considered view that if this is true, your actions are contrary to the imperatives of section 41(1)(h) of the Constitution which you dealt with at length in announcing the decision that the accused are to be charged with fraud and theft some weeks ago. We do not expect the NDPP to do so.

9. Further it is our considered view that your decision is not made in good faith on evidence that we have gathered as an investigative agency in this matter. Rather it seems to us that you make this decision based on the noise made by politicians, civil society lobby groups, and the media sympathetic to the accused.

10. These groups have falsely accused the Hawks and the NPA in the public domain of pursuing the case against the accused persons for political purposes on instructions from the political masters which is utter nonsense. This is the deliberate propaganda machinery that they have unleashed to gain public sympathy and support for the accused persons in their quest to discredit law enforcement agencies in the execution of their mandate.

RE: STATE vs PRAVIN GORDHAN & 2 OTHERS

11. It is our mandate to investigate crime and bring perpetrators to book where there is evidence, irrespective of who the perpetrator is, which office or station in society they occupy and whatever their popularity stake is, in giving effect to the principle of equality before the law.

12. We are extremely concerned about your reported prevaricating stance with regard to the prosecution of the accused persons in this matter and which will bring the administration of justice and the law enforcement agencies into serious disrepute in this country. We note with deep concern the overtures of offers you have made to the accused persons to make representations to you in this matter, after announcing the NPA decision to charge them, which is very much unusual in our experience.

13. We have handled many investigations of fraud and theft as you are aware. It is our considered view that we have a strong case against the accused, despite all contrary the views of the so-called opinion makers and legal experts in the media. If the accused have any defences to the charges or any issues with regard to their prosecution the place to ventilate that is an open court through a criminal trial and be cross examined to expose the truth.

14. We mention all these issues of which you are aware to highlight one issue: that it would be improper for you as a NDPP to stall or withdraw the prosecution of the accused persons in this matter. We do so without being privy to any information at your disposal which you may have received through representations as you opted not to share this with us though we are an investigative agency responsible for this matter.

15. In light of all the issues and considerations highlighted above we humbly request that:

    15.1 you provide us with the representations that you have received from Mr Magashula and Mr Irvan Pillay in order to enable us to make a meaningful input as envisaged in section 22 of the NPA Act;

    15.2 the decision on whether charges should be withdrawn or proceeded with be made once you have considered our views.

RE: STATE vs PRAVIN GORDHAN & 2 OTHERS

16. We trust that you will seriously consider our views and requests before reaching your decision in this matter. We hope to hear from you soon.

Kind regards

LIEUTENANT GENERAL
NATIONAL HEAD: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
B. M. NTLEMEZA

DATE: 2016-10-31

348
S.A.P 436

NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
Email: ndpp@npa.gov.za
www.npa.gov.za

General B Ntlemeza
Directorate for Priority Crime Investigation
Promat Building
1 Cresswell Road
Silverton
0186

Dear General

Email: Ntlemeza.bernie@saps.gov.za
dpcihead@saps.gov.za

THE STATE VERSUS OUPA MAGASHULA, VISVANATHAN (IVAN) PILLAY AND PRAVIN GORDHAN

1. Your letters dated 18 October 2016 and 30 October 2016 refer.

2. For ease of reference, I attach hereto copies of self-explanatory letters between ourselves, dated 17 and 18 October 2016 respectively. Your assertion in paragraph 3 of your letter, dated 30 October 2016 is thus incorrect.

3. I do not intend to respond to each and every averment contained in your letter dated 30 October 2016 and will endeavour to respond thereto more fully at a later stage.

4. In giving effect to the provisions of section 179(5)(d) of the Constitution, I have reviewed the decision to prosecute Messrs Oupa Magashula, Visvanathan (Ivan) Pillay and Pravin Gordhan in respect of the charges listed in the summons.

5. After perusal of the matter I have decided to overrule the decision to prosecute the aforementioned persons and have directed that the summonses be withdrawn immediately. I am of the view that the prosecution will have extreme difficulty in proving the prerequisite knowledge of unlawfulness and intention in respect of all three accused persons. This decision was made yesterday afternoon after much consideration. Your letter dated 30 October 2016 was received after my decision had been made.

8. Under the circumstances it will no longer be necessary for any one of them to appear in court on the charges as listed in the summonses. Their legal representatives have been informed accordingly.

7. Members of the Priority Crimes Litigation Unit will continue to provide guidance to members of the investigating team in respect of the remaining investigations under Brooklyn CAS 427/5/2015.

Yours sincerely

ADV SK ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 31 October 2016

350
S A.8

438

NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
Email: ndpp@npa.gov.za
www.npa.gov.za

8 November 2016

Lt Gen BM Ntlemeza
National Head
Directorate for Priority Crime Investigation
Head Office
Private Bag X1500
SILVERTON

Email: Ntlemeza.berning@saps.org.za
dpcihead@saps.gov.za

Dear General Ntlemeza

S v PRAVIN GORDHAN & 2 OTHERS

1. Your letters dated 18 and 30 October 2016, as well as my letters, dated 17 and 31 October 2016, have reference. Copies thereof are attached hereto for your convenience.

2. In my letter dated 31 October 2016, I communicated my intention to respond more comprehensively to your letter dated 30 October 2016, hence this communique.

3. I find the tone of your aforementioned letter extremely disconcerting and contrary to the spirit espoused in the provision of section 41 of the Constitution.

4. I deem it prudent to record that the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto is constitutionally entrenched and vested in the National Prosecuting Authority.

5. Further, the NPA Act provides that a member of the Prosecuting Authority shall serve impartially and exercise, carry out or perform his/her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

6. At the outset I deem it instructive to record that the powers of review, as enunciated in section 179(5)(d) of the Constitution, and which are replicated in section 22(2)(c) of the NPA Act, are vested in the National Director of Public Prosecutions. As such, I deemed your department to be a relevant party in terms of section 179(5)(d)(iii). To this end I informed you that I had received representations from Mr Pillay and

Mr Magashula's legal representatives in my letter dated 17 October 2016, which was clear and unambiguous. My letter dated 17 October 2016 also served as an invitation to you to make representations to me had you wished to do so. Under no circumstances am I obligated to provide you with a copy of any representations made to me by any party.

7. I take umbrage at the very serious allegations you levelled against me of not having acted in good faith. Speaking of good faith, kindly advise me how did it come about that the memorandum of Mr Symington, by way of example, only surfaced on 14 October 2016, when Freedom under Law and the Helen Suzman Foundation wrote to me?

8. Your view adopted in para 9 of your letter, dated 30 October 2016, is rather regrettable in that you alleged that my decision to withdraw the charges against Messrs Magashula, Pillay and Gordhan was *"based on the noise made by politicians, civil society lobby groups, and the media sympathetic to the accused."* In this regard you are completely incorrect and ill-informed. My decision was based purely on the merits of the matter after having reviewed the matter and having directed further investigations along with the applicable legal provisions.

9. To have proceeded with the matter after receipt of the representations and the additional investigative material would, with the greatest of respect, have been contrary to the rule of law and constitutional prescripts.

10. I am not in a position to respond to the allegations around Mr Magashula. I made the decision to withdraw the charges during the afternoon of 30 October 2016. You were informed of my aforementioned decision the very next day, on 31 October 2016.

11. In conclusion, your legal and constitutional mandate does not permit you to advise me when to withdraw matters and/or when to proceed with prosecutions. I insist that you refrain from any further communications or conduct to this effect, failing which will have serious repercussions.

12. Nevertheless, your recommendations in respect of concluded investigations, submitted to the National Prosecuting Authority, will as usual always be welcome.

13. Any omission not to comment on any other allegation as per your letter, dated 30 October 2016, should not be construed as acquiescence therewith.

Yours sincerely

ADV SK ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 8 - 11 - 2016

CONFIDENTIAL

"A"

Internal Memorandum

Dear Oupa

PURPOSE

The purpose of this memorandum is to explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the Minister certain related matters that will flow from my decision to take early retirement.

DISCUSSION

As you know, I have been working in the Public Sector for the past 16 years, 10 years which have been spent with SARS. For the most part of this period, especially my tenure with SARS, I was expected to perform at a very high level accompanied by the accountabilities that go with the performance of such a high level job. This exacted its toll from me in the sense that my health condition is slowly deteriorating. Added to this, my family responsibilities, for a long time, suffered on account of the dedication required by my job. With the aforementioned in mind, although still not easy, I have decided to take early retirement.

However, I am still enthusiastic about SARS and the tremendous contribution it makes towards the establishment of an even better South Africa for all its citizens. With a view thereto, I am willing to serve in SARS in a different capacity where the demands of such a job will positively support the reasons why I am in the first instance taking early retirement.

Should you favorably consider my proposal to serve SARS in a different capacity, such service will have to be subject to that I be appointed as a contract employee. This will allow me more flexibility in terms of making a decision to finally part ways with SARS, should I come to such a decision. The second condition will be that my early retirement is approved in terms of the provisions of section 16(6)(a) and (b) of the Public Service Act, meaning that the Minister, in terms of the provisions of the aforementioned section approve that the penalty imposed on my pension benefits per Rule 14.3.3 (b) of the GEPF Rules, be paid by SARS to the GEPF. The GEPF has indicated that the penalty amount on my pension benefits that the employer has to pay on my behalf is R1 292 732.68.

CONFIDENTIAL

RECOMMENDATION

My recommendations are that you please:

- Take note that I intend to take early retirement
- Consider to approve that I be reappointed in a different capacity in SARS on a contract basis; and
- Consider to recommend to the Minister that he approves that the penalty on my pension benefits be paid on my behalf to the GEPF by the employer.

Regards

Ivan Pillay

27/11/2009

354
SA-10
442

PLEASE INSERT TOPIC

Internal Memorandum

Dear Pravin

PURPOSE

The purpose of this memorandum is to explain the reason why I have decided to take early retirement as well as to request you to consider to approve / recommend certain related matters that will flow from my decision to take early retirement

DISCUSSION

I have reached the stage in my life where it has become a reality that I had to make some very important decisions about the education of my children. The decisions I have taken will require a considerable capital investment, money that can be raised by means of a bank loan, but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interests are the order of the day and indications are that this situation will prevail for the foreseeable future.

In view of this I have decided to inform you that I intend to retire in 2009 when I reach the age of 56 years. As I have already reached the earliest optional retirement age of 55 years in terms of the SARS retirement provisions, the retirement benefits will provide me with a lump sum benefit (which will financially support the decision I have made in terms of the education of my children) as well as a monthly pension. Whilst this may not be ideal in terms of maximum benefits when finally retiring, I am of the opinion that this is the best option available to me as far as my children's education is concerned.

This brings me to the second issue at stake, namely how I view my retirement as raised above. Clearly I am doing this on account of a matter that has nothing to do with my work at SARS. I still feel that I am still capable of doing my work, I still have the enthusiasm and will to do it and I am of the opinion that through my work, I can still contribute to the establishment of an even better South Africa for all its citizens. Taking this into account, I will appreciate it if you will consider to approve that immediately after my early retirement, appoint me to my current position but as a contract employee. No legal provision prevents you from making such an appointment.

The third matter is slightly more technical and complicated and it concerns my early retirement benefits payable from the GEPF. Although the Rules of the GEPF provides that a member of the GEPF can elect to retire from the age of 55 years and onwards, there is a penalty payable in terms of the benefits. The specific Rules in this regard determines that both the lump sum and monthly pension will be reduced by 0.30% for each month before an early retiree reaches the age of 60 years. As I intend to take early retirement at age 56 years (48 months before reaching the age of 60 years), my pension benefits will be reduced by 14.4%.It was realized that the provisions of this particular GEPF Rule prevented many employees from early retirement and in many instances those were employees Departments would have liked to take early retirement. In an effort to address the situation, Section 16 (6) of the Public Service Act (which still applies to SARS) was amended to provide that where early retirement is applied for, Ministers can approve that employers (Departments/SARS) pay the penalties imposed on early retirees in terms of the GEPF rules.

In view of this it will be appreciated if you, when I take early retirement, would recommend to the Minister that SARS pay to the GEPF my early retirement GEPF penalties. It is estimated that the penalties will amount to R1 064 257.

Oupa Magashula
Commissioner: SARS
Date:

Comments: .....

.....

.....

.....

.....

APPROVED / NOT APPROVED

Pravin Gordhan
Minister: Finance
Date:

BROOKLYN CAS 427/05/2015

Nico Johan Coetzee states under oath in English

1.

I am an adult male, 68 years old with ID number 480428 5047 081 and a pensioner residing at number 23 Manfreya Mansions, 544 de Beer Street, Wonderboom-South, Pretoria, with cellular phone number 0721196823 and home telephone number 012- 3356402.

2.

I am a former South African Revenue Service Human Resource Specialist. I worked for South African Revenue Service for 29years. I retired from the employment of SARS on the 28th of February 2013. My duties entailed dealing with complex HR matters, drafting letters/memorandums to the Minister and the Commissioner. I was a member of SARS Bargaining Council, I was also responsible for drafting News Flashes regarding HR matters. I checked all legislations that may have had an impact on SARS matters. I was reporting to Mrs Susanna Visser .

3.

During December 2008, I was instructed by Susanna Visser to prepare a memorandum for the early retirement of the Deputy Commissioner of SARS, Mr Ivan Pillay to the Minister of Finance in terms of Section 16(6)(a)(b) of the Public Service Act, 1994.

I prepared the memorandum based on the fact that Mr Ivan Pillay wished to pursue other interests. The memorandum was submitted to Susanna Visser for Commissioner Pravin Gordhan to recommend to the Minister that he considers approving the early retirement of Mr Ivan Pillay in terms of the aforementioned provisions of the Public Service Act.

4.

I awaited the approval by the Minister of the request by Mr Pillay. In October 2009 while waiting for the approval of the memorandum, I received a revised memorandum from the office of the Commissioner, Mr Oupa Magashula. The memorandum contained different reasons from my original memorandum as to why the Minister should approve Mr Ivan Pillay's early retirement. The reasons on the revised memorandum were that Mr Pillay wished to go on early retirement in order to enable him to provide for his children's education and not as I have previously stated that he wished to pursue other interests. I raised concerns to the Commissioner through the e-mails dated the 8th and the 9th October 2009 respectively, that if the Minister should approve Mr Pillay's application on the grounds of personal interests may create a

MP

BROOKLYN CAS 427/05/2015

Nico Johan Coetzee continues under oath

4.

precedent in terms of which, other employees might come forward with similar request for early retirement.

5.

I have amended the two submissions I have received from the Commissioner's office to fit in with Pillay's latest request. On my e-mails to Oupa Magashula, I commented that it is not unusual that a retired employee is reappointed after retirement in a contract capacity. I also commented that what may raise some eyebrows in this particular case is that the employee is appointed in the same position he held before his retirement. Ordinarily, such a re-appointment will be to a different and a lower graded position. I further commented that we had two similar applications for early retirement, both which were not approved by the Minister as the Minister could not find sufficient reasons to approve early retirement in terms of Section 16(6)(a) of the Public Service Act. The Minister only had to consider if sufficient reasons existed to approve Mr Pillay's early retirement.

6.

On the e-mail dated 09 October 2009, I stated that if Mr Pillay's application is duly recommended or approved, it could technically be construed that SARS is willing to contribute from its budget an amount of plus/minus R340 000.00 towards the education of his children. I also stated that it is a rather cynical viewpoint, but it can be a viewpoint that may be held by other parties as well and that may put yourself (Oupa Magashula) and the Minister of Finance in a tight spot, especially because Mr Pillay was reappointed in his present position. The argument may be that he was able to continue with his present functions but his early retirement and reappointment were purely to assist him to be able to provide for his children's education. The supporting document (e-mails) to the above effect is attached hereto as **annexure NC1.**

7.

I prepared the revised memorandum regarding this matter and forwarded it to the office of the Commissioner, Mr Oupa Magashula. After the 18th of October 2010, HR received a memorandum in which the Minister approved the early retirement of Mr Ivan Pillay. Human Resources started the process to ensure that Mr Pillay be paid his full retirement benefits as approved by the Minister.

MF

BROOKLYN CAS 427/05/2015

Nico Johan Coetzee continues under oath

8.

On the 6th of July 2012, the SARS Chief Financial Officer received a Revised Claim from the GEPF for the additional liability owing to the FUND. In respect of the liability of Mr Ivan Pillay SARS owed GEPF an amount of R1 141 178.11 in terms of the reduced benefit (penalty) that was due to be paid by SARS after the approval of the early retirement with full benefits. See Annexure A. I prepared a memorandum to Yolande van der Merwe (Finance SARS Own Accounts), see annexure **NC2**, to explain to her why the claim for the payment of R1 141 178.11 should be paid to the GEPF in respect of Mr Ivan Pillay. The payment of R1 141 178.11 was effected on the 06 July 2012. The payment was the amount that represented the penalty due to be paid by SARS in terms of Section 17(4) of the GEPF Act, 1996.

9.

I am unaware from which provision in the SARS budget this payment was made.

10.

During my time at SARS, I also dealt with two other applications for early retirement with full benefits. None of these applications were approved and I assume that insufficient reasons existed for the Minister not to approve those applications. At some stage, I and Susanna Visser had a meeting with Mr Oupa Maghashula to discuss the implications of Mr Ivan Pillay's possible early retirement with full benefits. We advised Mr Magashula that it was not advisable to continue with the early retirement application of Mr Pillay because it was for personal reasons and not business reasons.

This is all I can say

11.

I know and understand the contents of the above statement.

I have no objection to taking the prescribed oath.

I consider the prescribed oath to be binding on my conscience.

Mr J. COETZEE
Deponent's signature

MF

2016-09-14

BROOKLYN CAS 427/05/2015

I certify that the deponent has acknowledged that he knows and understand the content of this statement. This statement was sworn to before me and the deponent's signature was placed thereon during my presence at Pretoria on the 2016-09-14 at about 20:00

Signature of Commissioner of Oaths

COMMISSIONER OF OATHS

MAGEZI FREDDY SEWELE

DIRECTORATE FOR PRIORITY CRIME INVESTIGATION (CATS)

CAPTAIN

218 VISAGIE STREET, PRETORIA

Annexure NC-2

SARS

South African Revenue Service
Suid-Afrikaanse Inkomstediens
Uphiko lwezimali Ezingenayo eNingizimu Afrika
Tirelomatlotlo ya Afrika-Borwa

Memorandum

Human Resources

TO ◦ Yolande van der Merwe

FROM ◦ Nic Coetzee TEL ◦ (012) 422-

DATE ◦ 05 July 2012

SUBJECT ◦ Revised claim: ADDITIONAL LIABILITY OWING TO THE GOVERNMENT EMPLOYEES PENSION FUND (GEPF).

Yolande

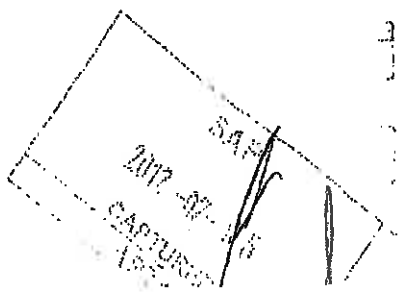
The attached revised claim (Annexure A) for the additional liability owing to the GEPF refers

As to the background of this claim by the GEPF, your attention is invited to Section 17 (4) of the GEPF Law which reads as follows:
"17 (4) If any action taken by the employer or if any legislation adopted by Parliament places any additional obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be shall pay to the Fund an amount which is required to meet such obligation."
The aforementioned section of the Law thus places an obligation on SARS to pay to the GEPF an amount that is equal to the amount of the additional costs that accrued to the GEPF on account of a discretionary decision made by SARS in terms of the retirement of employees who were members of the GEPF.
In terms of the amount of R1,333,460.91 as indicated on the revised claim by the GEPF (Annexure A), SARS approved that only one employee between the ages of 55 and 60 years retire with SARS paying the penalty as provided for in Rule 14.3.3(b) of the GEPF Rules for early retirement on their behalf to the GEPF. This discretionary approval by SARS is provided for in terms of the provision of Section 16(6)(b) of the Public Service Act, 1994. In this regard you are referred to the attached Annexure B and in particular to Annexure B9. You are requested to pay only the original claim amount of R1,141,178.11 in respect of Mr Pillay SARS has never approved the retirement of Ms G van den Heever in terms of the aforementioned provision of the Public Service Act and the interest amount is currently also in dispute.
With reference to the second claim amount of R4, 020,631.37 on the revised GEPF claim (Annexure A) the President of the Republic of South Africa approved that Mr S Soni, a former SARS employee, be appointed as the South African Ambassador to Kazakhstan. Rules 14.1.1(e) and14.1.2 read with Rule 14.2.4(b)(AA) of the GEPF Rules determine that where the President granted approval for this appointment the pensionable service of the employee/member of the GEPF be increased by 1/3 of his/her contributory service limited to a maximum of 5 years. The increase of the pensionable service of the former employee by 5 years lead to the additional liability by SARS to the GEPF of R 4 020 631.37. Particulars as how this figure has been arrived at is indicated in Annexure C 3 - 7.

SAP
2012

In view of the aforementioned it will be appreciated if the attached EFT Application Form for the amount of R5,161,809.48 can be processed as soon as possible according to the attached EFT instructions by the GEPF. Please also ensure that proof of payment is forwarded to the GEPF as per the EFT instructions. SARS's employer code to be used as a reference number of the deposit slip is 000146.

Nic Coetzee.
Operational Specialist
Human Resources.



SARS

NEW TRADE CREDITOR REQUEST FORM

Request by	NIC COETZEE	Checked by	
Tel	012 422 4185	Tel	
Date	2012-06-28	Date	

REASON FOR REQUEST:

CREATE VENDOR		VENDOR ON HOLD		OTHER REASON	X

Note; ADDITIONAL LIABILITY OWING TO THE GEPF
FOR THE PERIOD 01/04/2011-30/06/2011 (FIRST QUARTER CLAIM)
FOR THE PERIOD 01/01/2012-31/03/2012 (FOURTH QUARTER CLAIM)

Creditor ID (Head Office use only)	
Creditor Name	GOVERNMENT EMPLOYEES PENSION FUND
Trading as ...	GEPF
Class ID	
VAT Registration number	

	Current information	New information (Change)
Address (Postal and Physical)	PRIVATE BAG X63	34 HAMILTON STREET
City	PRETORIA	ARCADIA, PRETORIA
Postal code	0001	0007

Contact Person	MR MS MASANGO	
Phone number(s)	(012) 319 1237	( )
Additional contact number(s)	( )	( )
Fax number	(012) 325 0220	( )
E-mail address	simon.masango@gepf.co.za	

BANKING DETAILS

Account name	GOVERNMENT EMPLOYEES PENSION FUND (GEPF)
Bank	ABSA BANK
Account number	405 419 7798
Type of account (savings or cheque)	CURRENT/CHEQUE
Branch code	632005

NB: Please attached a cancelled cheque, if applicable.

SAP
Bank stamp
2012 -07- 06
CAPTURED
SAP

Authorised by	

363

451

GOVERNMENT EMPLOYEES PENSION FUND

Contact: Mr MS Masango, Tel no.: (012) 319-1237, Fax no.: (012) 325-0220, Ref.: Bank Details (96)

Date: June 20, 2012

BANKING DETAILS FOR THE GOVERNMENT EMPLOYEES PENSION FUND (96 FUND)

All deposits and electronic transfers in respect of the Government Employees Pension Fund (GEPF) should be deposited into the following bank account:

Bank:	ABSA
Account Name:	Government Employees Pension Fund (GEPF)
Account Number:	40-5419-7798
Account Type:	Current
Branch:	Voortrekker Road
Branch Code:	63-20-05

Proof of deposit must be sent to the Government Employees Pension Fund by fax to Mr MS Masango (012) 325-0220 or e-mail to simon.masango@gepf.co.za. Please ensure that you quote your Departments' employer code as a reference number (~~eg NWP103~~) on your deposit slip [redacted]
SARS 000146

Thank you for your co-operation.

MS Masango
ASSITANT MANAGER: CONTRIBUTION MANAGEMENT
GOVERNMENT EMPLOYEES PENSION FUND

SAP
2012 -07-

ANNEXURE A7

REPUBLIC OF SOUTH AFRICA
GOVERNMENT EMPLOYEES PENSION
ADMINISTRATION AGENCY

Private Bag X63, Pretoria, 0001, 34 Hamilton Street, Arcadia, Pretoria

Ref: 000146

Chief Financial Officer
NAT: SA REVENUE SERVICES
LEHALE LA SARS BUILDING
299 BRONKHORST STREET
NEW MUCKLENEUCK
PRETORIA
0001

21 June 2012

ATTENTION:

Revised claim: ADDITIONAL LIABILITY OWING TO THE GOVERNMENT EMPLOYEES PENSION FUND

URGENT

Reference is hereby made to the letter dated **19 June 2012** with regard to Additional Liability Claim(s) for the period **01 April 2011 to 30 June 2011 and 01 January 2012 to 31 March 2012** for which an amount of **R 5,431,718.19** is still outstanding and payable to GEPF on or before 7th of July 2012. *(Refer to Annexure B)*

Should an employer fail to pay the additional liability as it becomes due, interest will be charged at the prescribed rate (repo rate plus 3%) and the employer will also be obliged to pay the capital amount plus interest raised.

Also note that the GEPF debt collection Policy requires the following escalation procedures to be adhered in the event of nonpayment. Escalating to your **Chief financial Officer (CFO), Accounting Officer** and **Executive Authority;** should this not have the desired effect the issue will then be escalated to the office of the **Accounting General** within **the National Treasury** for the necessary intervention(s).

If the amount has already been paid, please forward proof of payment or queries in this regard to theresa.neethling@gpaa.gov.za or by fax to the following number (086) 690-0068.

SAP
2012 -07- 0

You are reminded that actuarial interest will accrue on the outstanding balance; therefore contact must be made with our department to make payment arrangements.

Annexure B

Description	Issue Date	Claim Amount	Receipts	Total
First Quarter Claim: 2011/04/01-2011/06/30	23-Aug-11	1,333,460.91	-	1,333,460.91
Payment Received:		-	-	-
Balance		1,333,460.91		1,333,460.91
Fourth Quarter Claim: 2012/01/01 to 2012/03/31	15-June-12	4,020,631.37	-	5,354,092.28
Payment Received:		-	-	-
Late payment interest:		77,625.91		77,625.91
Amount Outstanding		4,098,257.28	-	5,431,718.19

Your co-operation is urgently required with regard to this matter

I trust that you will find this in order

MR. MS MASANGO
Assistant Manager: Contribution Management: EB - Finance Section
Enquiries: T.Neethling
Tel: (012) 319 1101
Fax: (086) 690-0068
E-mail: theresa.neethling@gpaa.gov.za

GPA
2012 -07- 06
CAPTURED

Annexure N-1

Nic Coetzee

From: Nic Coetzee
Sent: 09 October 2009 05:57 AM
To: Oupa G. Magashula
Subject: FW: HIGHLY CONFIDENTIAL

Early retirement application l... Early retirement Ivan Pillay m...

Hi Oupa

I am resending this e-mail on account of a slight change I have made to the two attached documents. The changes indicate that the reason why Mr Pillay is requesting approval for early retirement is to provide for his children's education and not as I have previously stated that he wished to pursue other interests. You will now have to consider to recommend and the Minister consider to approve if this is SUFFICIENT REASON to recommend/approve Mr Pillay's application for early retirement. If his application is duly recommended/approved, it could technically be construed that SARS is willing to contribute from its budget an amount of + R340 000 towards the education of his children. I admit it is a rather cynical viewpoint, but it can be a viewpoint that may be held by other parties as well and that may put yourself and the Minister in a tight spot, especially because Mr Pillay was re-appointed in his present position. The argument may be that he was able to continue with his present functions, but his early retirement and reappointment was purely to assist him to be able to provide for his children's education, with a R340 000 "contribution" from SARS.

Thanks

Nic.

-----Original Message-----
From: Nic Coetzee
Sent: 08 October 2009 03:24 PM
To: Oupa G. Magashula
Subject: RE: HIGHLY CONFIDENTIAL

Hi Oupa

Luckily for me I have dealt with this matter during June this year but I do not know why the matter was not promoted at the time as I have certainly started the process. I have amended the two submissions (attached) to fit in with Mr Pillay's latest request. It is not unusual that a retired employee is re-appointed after retirement in a contract capacity. What may raise some eyebrows in this particular case is that the employee is appointed in the same position he held before his retirement. Ordinarily such a re-appointment will be to a different and a lower-graded position. It will have to be decided if satisfactory reasons can be given for the re-appointment in the same position. We had two similar applications for early retirement, both which were not approved by the Minister as the Minister could not find sufficient reason to approve early retirement. In terms of section 16(6) of the Public Service Act, the Minister only has consider if SUFFICIENT REASON exists to approve Mr Pillay's early retirement. I trust that the above comments plus the two submissions contain enough information for you to engage the Minister on this matter.

Thanks

Nic.

-----Original Message-----
From: Tania Kirby On Behalf Of Oupa G. Magashula
Sent: 08 October 2009 01:12 PM
To: Nic Coetzee
Cc: Tania Kirby
Subject: HIGHLY CONFIDENTIAL

Dear Nic,

[redacted]

Employment Contract between SARS and Mr Visvanathan Pillay

EMPLOYMENT CONTRACT

entered into between:

THE SOUTH AFRICAN REVENUE SERVICE
("the Employer")

and

Visvanathan Pillay
Identity number: 630416 5734 085
("the Employee")

1. APPOINTMENT

1.1 The Employer employs the Employee and the Employee accepts the appointment and shall render services to the Employer in the capacity set out in Annexure A to this contract, or any other similar capacity required by the Employer from time to time. Any change in capacity will be set out in a letter, which letter will then form an Addendum to this agreement and will replace Annexure A.

1.2 The Employee shall commence employment on 1 January 2011 (the "Commencement Date") for a period of Five (5) years and shall terminate on 31 December 2015. Notwithstanding the date on which this contract of employment is signed, the Commencement Date is as stated.

1.3 The Employee will perform his functions and duties in terms of this agreement at SARS Head Office in Pretoria or such other place as the Employee may reasonably be required by the Employer from time to time for the effective performance of the Employee's functions and duties in terms of this agreement.

2. FUNCTIONS AND DUTIES OF EMPLOYEE

2.1 The Employee will perform functions and duties in a professional manner and to the best of his ability as referred to in the role profile/ job description. Any change in role profile /job description will communicated as may be necessary.

2.2 In addition to the functions and duties contained in the job description, the Employee will:

2.2.1 perform such duties as the Employer or its duly authorised representative may from time to time assign to him;

2.2.2 perform his duties in a timely, professional and responsible manner as the Employer or other authorised representative of the Employer may direct from time to time;

2.2.3 in the discharge of his duties, observe and comply with all resolutions, directives, rules, orders, polices and procedures as the Employer may give from time to time;

2.2.4 devote all his time and attention to his duties under this agreement during normal working hours;

2.2.5 not communicate, publish or distribute to any person outside the Employer's employ, either during the continuance of his employment under this agreement or thereafter, any official documents, reviews, research results, articles and/or publications whether produced by the Employee or not, without the prior written permission of the Employer or other duly authorised representative of the Employer;

2.2.6 at such intervals as the Employer may direct, report fully on the results obtained and knowledge acquired by him in any research work done by him both during and outside working hours;

2.2.7 use his best endeavours to properly conduct, improve, extend, promote and protect and preserve the interests and reputation of the Employer; and

2.2.8 not engage in activities that would detract from the proper performance of his functions and duties.

2.3 The Employer may, after consulting with the Employee, change or amend the Employee's duties and responsibilities from time to time in accordance with the Employer's operational requirements.

3. REMUNERATION

3.1 The Employee will be paid an all inclusive remuneration package as set out in Annexure A to this contract of employment.

3.2 The Employee agrees that his remuneration package will be reviewed annually in line with the Employer's guaranteed pay policy and procedures, as applicable from time to time, copies of which are available to the Employee from the HR department. The Employee agrees to access the Employer's Pay Policy and Procedures and to familiarise himself as to the content thereof. A key element of this annual review will be the measurement of the Employee's performance against the standards of performance agreed to with the Employer represented by the Employee's line manager. The Employee will be advised of any increase to his remuneration package by means of a letter, which letter will then form an Addendum to this agreement and will replace Annexure A.

3.3 The Employer shall provide the Employee during his employment with the benefit of membership of a Medical Aid Scheme selected from time to time, unless the Employee furnishes proof that he is a dependant on his spouse's or partner's scheme. The Employee shall be subject to such Medical Aid Scheme's rules as amended from time to time.

3.4 The Employee is excluded from membership of the Government Employees Pension Fund in accordance with section 5 (d) of the Government Employees' Pension Law, 1996 (Proclamation 21 of 1996).

3.5 The Employer shall make contributions to the Employee's medical aid on behalf of the Employee and at the Employee's request, monthly in arrears, the cost of which shall form part of the Employer's remuneration package reflected in Annexure A to this contract of employment.

3.6 The Employee will receive his remuneration in twelve equal monthly payments on the 15th of every month. Should the 15th fall on a weekend or public holiday the Employee will be paid on the day immediately preceding such weekend or public holiday.

3.7 The Employer does not provide any post retirement medical aid benefits.

4. PERFORMANCE BONUS

4.1 The Employee will report to the Commissioner; SARS or a delegate who will discuss and conclude a performance contract with the Employee within the first six weeks of employment.

4.2 By concluding and signing such a performance contract, the Employee will be eligible to participate in the Employer's Performance Bonus/Incentive Scheme. In the event that the Employee refuses or is unwilling to participate in the Employer's Bonus/Incentive Scheme, then in such an event the Employee agrees that he will not be entitled to any additional remuneration save that as detailed in the agreed Employee's remuneration.

4.3 The terms and conditions of the Employee's participation on the above scheme are set out in more detail on the Employer's Performance Management and/or Incentive Scheme Policies, as applicable from time to time and available to the Employee, who agrees to access such policies, from the HR department.

5. WORKING HOURS AND OVERTIME

5.1 The Employee's ordinary hours of work are 8am to 5pm Mondays to Fridays, both days inclusive, with an entitlement to a 60 minute meal interval. However the Employee will be required to work such additional time as is necessary to properly perform all the functions of the job.

5.2 Overtime is paid only to those employees who are entitled to overtime in terms of the Overtime Policy.

6. LEAVE

6.1 Annual leave, sick leave, family responsibility leave and study leave is regulated by the Employer's Leave Policy, applicable from time to time, a copy of which is available from the HR department.

7. ALLOWANCE

7.1 Allowances payable to the Employee are regulated by the Employer's Allowances policy, applicable from time to time, a copy of which is available from the HR department.

8. CONFIDENTIALITY

8.1 The Employee agrees not to divulge or discuss his remuneration package with colleagues, as the Employer regards such matter as confidential.

8.2 The Employee shall not, either during the continuance of his employment under this agreement or thereafter, use for his own benefit or otherwise to the detriment or prejudice of the Employer, except in the proper course of his duties, divulge to any person any trade secret or any other confidential information concerning the business or affairs of the Employer which may come to the Employee's knowledge during his employment.

8.3 In particular, the Employee shall not at any time during or after termination of his employment, reveal to any person, firm or corporation, any of the trade secrets, technical know-how and data, drawings, systems, methods, software, processes, lists, programs, marketing and/or financial information, confidential information, or any information concerning the organisation, functions, transactions or affairs of the Employer, and shall not use or attempt to use any such information in any manner which may injure or cause loss either directly or indirectly to the Employer or may be liable to do so.

8.4 The Employee agrees that it is a condition of this contract that he signs the SARS Oath of Secrecy on or before the Commencement Date.

9. EMPLOYER RESOURCES

9.1 The Employee acknowledges and accepts that the Employee's resources, including but not limited to servers, computers, printers, telefax machines, telephones, postal services, e-mail facilities and internet facilities ("the resources") are for conducting the Employer's business.

9.2 The Employee shall have no expectation of privacy in relation to the use of the resources provided by the Employer.

9.3 The Employee understands and accepts that the Employer may, subject to relevant legislation, at its discretion, monitor the Employee's use of the resources and intercept, acquire, read, view, inspect, record and/or review any and all communications created, stored, transmitted, spoken, sent, received or communicated by the Employee on, over or in the resources or otherwise. The Employee hereby consents to the Employer doing so.

10. SECURITY

10.1 The Employee agrees to submit his person, personal belongings and office or workstation to a search by any person designated by the Employer whenever the Employer deems it necessary and reasonable.

11. EMPLOYER PROPERTY

11.1 All catalogues, correspondence, letters, memoranda, note books, order books, documents, papers, goods, samples, equipment and any other articles of any kind whatsoever that may be made available to or come into the possession of the Employee during the period of his employment under this agreement, shall belong to and remain the property of the Employer, both during the Employee's employment and after termination of his employment, at which time the Employee shall deliver to the Employer all such items in his possession with the assurance that no such articles remain in his possession.

11.2 Upon the termination of the Employee's employment, he must return to the Employer all property, of whatsoever nature, in his possession which belongs to the Employer.

11.3 In addition, the Employee must return to the Employer all other material containing information relating to the affairs of the Employer, regardless of whether or not such material was originally supplied by the Employer to the Employee, including but not limited to: records, discs, accounts, letters, notes or memoranda.

12. INTELLECTUAL PROPERTY

12.1 Intellectual property rights include, but are not limited to, trade marks, service marks, trade names, domain names, designs, patents, petty patents, utility models and like rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing, copyright (including, without limitation, rights in computer software and data bases, and moral rights), rights in inventions, designs, know-how, confidential information, trade secrets, other intellectual property rights and all rights or forms of protection having equivalent or similar effect to any of the foregoing which may subsist in any country in the world.

12.2 Any intellectual property rights of whatsoever nature arising out of the performance by the Employee of his obligations in terms hereof are, to the extent that they do not vest automatically in the Employer, hereby irrevocably ceded and assigned in perpetuity to the Employer, it being further recorded that the Employer shall be entitled to cede and assign all such rights to any other person without limitation.

12.3 The Employer and/or such other person, as the case may be, shall be entitled to dispose of any and all intellectual property rights in their sole discretion, anywhere in the world, without the payment of any additional consideration to the Employee.

12.4 The Employee undertakes to sign all documents and to do all things necessary, at the cost of the Employer, to obtain or to record such intellectual property rights at any intellectual property rights registry in the world.

13. TERMINATION OF EMPLOYMENT

13.1 The Employee's employment shall automatically terminate as indicated in paragraph 1.2.

13.2 Notwithstanding 13.1 above either party may terminate this contract by giving the other party one (1) month's written notice of termination or such longer period for disengagement as agreed to in good faith with due regard to operational continuity of the Employer's business and the period it would take to replace the Employee.

13.3 The Employer may also terminate this contract by paying the Employee the amount of salary he would have received during the required period of notice in lieu of giving him that period of notice.

13.4 If the Employee is incapable of performing his duties under this contract because of mental or physical illness or injury, the Employer may terminate his employment for incapacity. To assist the Employer in deciding whether to terminate employment on these grounds the Employer may require the Employee to undergo (at the Employer's expense) a medical examination by a registered medical practitioner. The Employer may rely on any report or recommendations made available to the Employer as a result of that examination, along with any other relevant medical reports or recommendations received.

13.5 Nothing in this contract prevents the Employer from exercising its right to dismiss the Employee without notice at any stage for misconduct, incapacity, poor performance or the operational requirements of the Employer, or for any other reason justified in law and in accordance with the Employer's Disciplinary Code and Procedure.

13.6 On termination of employment, the Employee must return all the equipment and property of the Employer in a satisfactory condition before his final remuneration shall be paid.

14. CONFLICT OF INTEREST

14.1 Employees are required to ensure at all times that they do not put themselves in a situation where their own personal interests conflict or may potentially conflict with the interest of the Employer.

14.2 Conflicts of interest are regulated by the Employer's Declaration of Private Interests Policy applicable from time to time, a copy of which is available from the HR department.

15. COMPANY POLICIES AND PROCEDURES

15.1 All the Employer's policies and procedures as applicable from time to time form part of the terms and conditions of employment. The Employee undertakes and agrees that on signing this agreement, he will abide by such policies.

15.2 The Employee further agrees and undertakes to comply with all other Employer's policies, rules, regulations and procedures applicable from time to time. Copies of the Employer's policies and procedures are available from the HR department. It is the Employee's responsibility to familiarise himself therewith.

15.3 Transgression or non-compliance with any of the provisions of any of the Employer's policies and procedures may result in disciplinary action being taken against the Employee which may result in termination of the Employee's employment relationship with the Employer.

15.4 The Employer reserves the right to amend its policies at its discretion, from time to time.

SIGNED BY THE EMPLOYER AT Brooklyn ON THIS 7th THE DAY OF February 2011.

AS WITNESSES:

1. _____

2. _____

For and on behalf of:
The South African Revenue Service, duly authorised

SIGNED BY THE EMPLOYEE AT PRETORIA ON THIS 7th THE DAY OF February 2011.

AS WITNESSES:

1. _____

2. _____

The Employee

ANNEXURE A

1. CAPACITY

1.1 The Employee is employed in the capacity of Deputy Commissioner, SARS in terms of this agreement.

2. JOB DESCRIPTION OF EMPLOYEE

2.1 The Employee will perform the set functions and duties in a professional manner and to the best of his ability.

BROOKLYN CAS 427/05/2015

CHRISNA SUSANNA VISSER states under oath in English

1.

I am an adult white female 53 years of age id number 6210020074083 residing at 53 Ninow Road Valhalla Pretoria and employed by the South African Revenue Service as an Executive Remuneration and Employee Services with our offices situated at no.570 Fehrsen Brooklyn Linton house with cellphone no.0824602493 officeno.012-4224182.

2.

I am employed in SARS since January 1992 in the HR Division. My current duties include centralised HR and payroll administration for all employees in SARS.

3.

During March 2008 I was invited to a meeting at a Guest House in Brooklyn together with Ms Rita Hayes. During this meeting I was introduced to a group of employees who I knew worked for SARS as a group of employees whose duties it was to investigate the illicit economy. I was told to accompany Mr Pillay and Rita Hayes to the meeting as they wanted to regularise the appointment of these employees. During this meeting mentioned was made to "surface" these employees. Discussions was also taking place about who they will report as Andries Janse van Rensburg referred as "Skollie" was no longer going to be in charge as he was becoming a problem. I did not know who "Skollie" was.

4.

As per my recollection, a couple of days later, I was requested by Mr Pillay and Rita Hayes to meet them at the SARS Offices at Hatfield Gardens to assist them in trying to reach an agreement with "Skollie". It was the first time that I met "Skollie". We met in a separate room from where Mr Pillay was sitting. "Skollie was a threatening character and made threatening remarks to me. He said things like "hijackings can be arranged". I was very scared of him and knew that I was out of my depth. I went to Mr Pillay and informed him that I was not prepared to deal with this matter on my own. I requested that we inform Mr George Nkadimeng, the head of the SARS Employment Relations Division in HR, to assist with the process of obtaining a settlement agreement with "Skollie". He agreed and we briefed George Nkadimeng. From that point forward I met with "Skollie" only in the presence of Mr George Nkadimeng.

5.

During these talks George Nkadimeng and I would go back and forth between Mr Pillay in the other office and "Skollie" who we sat with in the other office. At some point during these talks, "Skollie" informed us that he had information that he is prepared to take to the

BROOKLYN CAS 427/05/2015

CHRISNA SUSANNA VISSER states further that:-

5.

media if we do not agree to pay him the balance of his employment contract. We informed Mr Pillay that he is threatening with information that he would leak to the media, however Mr Pillay told us that "he just thinks he still has it".

6.

At some point during these negotiations we were informed to pay Skollie the full balance of his employment contract. I then insisted that we draft a memorandum to obtain a mandate from SARS to enter into the separation agreement. See annexure CSV 01. Once this memorandum was signed by Mr Oupa Magashula (the then Head of Human Resources) in SARS and Mr Ivan Pillay, George Nkadimeng and I continued to draft the separation agreement.

7.

The separation agreement is a standard template that was used in the Employment Relations section. I then inserted "Skollie's" details into the agreement. This agreement was then signed by Mr Oupa Magashula on behalf of SARS. I signed as the witness for Mr Magashula. Skollie signed the agreement See annexure 02. I then continued to make payment to "Skollie" based on the signed separation agreement and memorandum approved by SARS officials. The payment was made up of a settlement of 36 month's remuneration that amounted to R3 063 937.68 and his leave pay due to him to the amount of R86 957.13. I never met or spoke to "Skollie" since.

8.

I was informed in 2010 via the Office of the Commissioner that Mr Ivan Pillay wanted to retire prior to the normal retirement age of 60, however he wanted to invoke a clause in the Government Employment Pension Fund Law that allows the Executive Authority (Minister of Finance in this case) that allows the Employer to pay the penalty in terms of the rules on behalf of him. I was presented with a document that he signed and addressed to Mr Oupa Magashula in his capacity as the Commissioner. See annexure CSV 03. Mr Nic Coetzee who reported to me dealt with all the difficult pension cases in my Unit and he discussed this request with me.

BROOKLYN CAS 427/05/2015

CHRISNA SUSANNA VISSER states further that:-

8.

Nic Coetzee and I were both uncomfortable with the request as it was for personal reasons and we could find no business reasons to pay the penalty on behalf of Mr Pillay. We were requested to draft a memorandum to the Minister of Finance for his approval. Nic Coetzee and I both advised Mr Oupa Magashula in the Commissioner's boardroom that it is not advisable to continue with the early retirement of Mr Pillay because it was for personal reasons and not business reasons. We were also concerned that it could set a precedent whereby others could come and claim the same benefit. We informed him that no such case was recommended in the past as it was for personal reasons. He instructed us to continue with the memorandum.

9.

The memorandum stating the clauses that SARS will invoke to pay the penalty and to re-employ Mr Ivan Pillay, was forwarded to the Office of the Commissioner. At some point during the process, Mr Magashula requested to have a list of such cases approved in Government. I informed him that I do not have access to such a list. According to my knowledge, Mr Magashula obtained such a list from the head of the Government Employmee Pension Fund. The memorandum marked annexure CSV 04 was then amended by Mr Marco Granelli who reported into Mr Oupa Magashula as the Commissioner.

10.

I was presented with the signed approved memorandum by the Minister and I initiated the process of the exit of Mr Ivan Pillay from the Pension Fund and his re-employment on a contract basis. Part of this process was to sign a contract of employment with Mr Ivan Pillay. I drafted a three year contract of employment to be signed by Mr Oupa Magashula as the Commissioner and Mr Ivan Pillay as the employee. The contract document was however amended to five years. See annexure (CSV 05). Mr Oupa Magashula requested that I sign as a witness for him. I queried the matter of the contract that was amended to five years. Mr Oupa Magashula indicated that they decided that it will be five years and not three and continued to sign the contract. I signed as witness as I believed it was merely to indicate that it was Oupa Magashula who signed the contract. I advised but the advice was cast aside and not taken.

BROOKLYN CAS 427/05/2015

CHRISNA SUSANNA VISSER states further that:-

11.

In 2014 a new contract of employment annexure (CSV 06) was requested from my Office via Rita Hayes who was employed by Mr Ivan Pillay. I enquired why a new contract was needed as the previous employment contract was still valid however I was just advised that the Minister Mr Pravin Gordhan and Mr Ivan Pillay wanted to conclude a new contract. I then continued to e-mail a draft contract to her office. I was presented with a new contract of employment to implement for Mr Ivan Pillay.

12.

I know and understand the contents of the above statement.

I have no objection to taking the prescribed oath.

I consider the prescribed oath to be binding on my conscience.

CS Visser

(Signature of the deponent)

Date: 2016-08-10

I certify that the deponent has acknowledged that she knows and understand the content of this statement. This statement was sworn to before me and the deponent's signature was placed thereon in my presence at Pretoria on the 2016-08-10 at about 13:31.

Capt.

Signature of Commissioner of oath

COMMISSIONER OF OATH

MAGEZI FREDDY SEWELE

DIRECTORATE FOR PRIORITY CRIME INVESTIGATIONS

CAPTAIN,

218 GENERAL PIET JOUBERT BUILDING, PRETORIA

CONFIDENTIAL

Internal Memorandum

Dear Oupa

PURPOSE

The purpose of this memorandum is to explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the Minister certain related matters that will flow from my decision to take early retirement.

DISCUSSION

As you know, I have been working in the Public Sector for the past 15 years, 10 years which have been spent with SARS. For the most part of this period, especially my tenure with SARS, I was expected to perform at a very high level accompanied by the accountabilities that go with the performance of such a high level job. This exacted its toll from me in the sense that my health condition is slowly deteriorating. Added to this, my family responsibilities, for a long time, suffered on account of the dedication required by my job. With the aforementioned in mind, although still not easy, I have decided to take early retirement.

However, I am still enthusiastic about SARS and the tremendous contribution it makes towards the establishment of an even better South Africa for all its citizens. With a view thereto, I am willing to serve in SARS in a different capacity where the demands of such a job will positively support the reasons why I am in the first instance taking early retirement.

Should you favorably consider my proposal to serve SARS in a different capacity, such service will have to be subject to that I be appointed as a contract employee. This will allow me more flexibility in terms of making a decision to finally part ways with SARS, should I come to such a decision. The second condition will be that my early retirement is approved in terms of the provisions of section 16(6)(d) of the Public Service Act, meaning that the Minister, in terms of the provisions of the aforementioned section approve that the penalty imposed on my pension benefits per Rule 14.3.3 (b) of the GEPF Rules, be paid by SARS to the GEPF. Indications are that the penalty will amount to about R1 064 257.

RECOMMENDATION

My recommendations are that you please:

- Take note that I intend to take early retirement
- Consider to approve that I be reappointed in a different capacity in SARS on a contract basis; and
- Consider to recommend to the Minister that he approves that the penalty on my pension benefits be paid on my behalf to the GEPF by the employer.

Regards

Ivan Pillay

DRAFT STATEMENT OF MINISTER PRAVIN GORDHAN

INTRODUCTION

1. I make this statement in response to the request for a *"warning statement"* made by Major General Ledwaba of the Directorate for Priority Crime Investigation in her letter of 21 August 2016. As I understand the letter, I am required to deal with two issues. The first is my role as the Commissioner of SARS in the establishment of an investigation unit in 2007. The second is my approval, as Minister of Finance, of Mr Ivan Pillay's early retirement and re-appointment to SARS in early 2010.

2. I shall deal with both these matters. I am advised that my conduct was at all times entirely lawful. I will however not address matters of law because I have requested my attorneys to do so.

THE SARS INVESTIGATION UNIT

3. I was the Commissioner of SARS from November 1999 until May 2009. I was Minister of Finance from May 2009 to May 2014, Minister of Co-operative Governance and Traditional Affairs from May 2014 to December 2015 and again Minister of Finance from December 2015.

4. Your questions relate to an investigation unit in SARS. This unit was part of the broader enforcement division of SARS – similar to the enforcement capabilities required in any tax and customs administration in the world. In the South African societal and economic context, SARS had developed a compliance approach which consisted of good service to the compliant taxpayers, increased education about the importance of paying tax to those entering the economy, and different types of

enforcement being utilised on the non-compliant taxpayers depending on the level of non-compliance. Non-compliance could include non-submission of a tax return, incorrect information on a tax return, different types of debt collection, aggressive tax avoidance, abuse of trusts, tax evasion, smuggling across borders, cigarette and other forms of illicit trade, trafficking of drugs, round-tripping to avoid excise duties and VAT etc.

5. A few thousand staff could be engaged in these forms of enforcement activity. Enforcement actions are more effective when they are guided by good risk assessments and information from various stakeholders. Relatively few staff are engaged with risk assessments – some twenty-odd in the instance of the unit in question.

6. The unit did not initially have a name but was later successively known as the Special Projects Unit, the National Research Group and the High-Risk Investigations Unit. I participated in the decision to establish the Unit in February 2007. The manager of the Unit reported to Mr Ivan Pillay in his capacity as General Manager: Enforcement and Risk. Mr Pillay in turn reported to me for as long as I was Commissioner of SARS until May 2009.

7. I believed that the Unit was lawfully established to perform very important functions for and on behalf of SARS. As far as I was aware, the Unit lawfully performed its functions. If it or any of its members engaged in unlawful activities then they did so without my knowledge or consent.

8. SARS was established by the South African Revenue Service Act 34 of 1997. Section 3 provides that its objectives are *"the efficient and effective (a) collection of revenue; and (b) control over the import, expert, manufacture, movement, storage or use of certain goods"* including those subject to customs and excise duty.

9. Section 4(1)(a) of the SARS Act provides that SARS must *"secure the efficient and effective, and widest possible, enforcement"* of the tax laws listed in Schedule 1. Those tax laws have always vested SARS with wide powers for the investigation of tax matters including the investigation of crimes with tax implications. The wide scope of these powers is apparent from:

- sections 4 and 4A to 4D of the Customs and Excise Act 91 of 1964;
- sections 74 and 74A to 74D of the Income Tax Act 58 of 1962 (before its amendment by the Tax Administration Act);
- sections 57 and 57A to 57D of the Value-Added Tax Act 89 of 1991 (before its amendment by the Tax Administration Act); and
- sections 40 to 66 of the Tax Administration Act 89 of 1991.

10. SARS has thus always had its own investigation and enforcement units engaged in a wide range of investigations including criminal investigations with tax implications.

11. The Unit was established against the background of government's commitment to crack down on crime generally and organised crime in particular. President Mbeki mentioned this commitment in his state of the nation address on 9 February 2007 when he said that government would, amongst other things,

> "... *start the process of further modernising the systems of the South African Revenue Services, especially in respect of border control, and*

improve the work of the inter-departmental co-ordinating structures in this regard;

- *intensify intelligence work with regard to organised crime, building on the successes that have been achieved in the last few months in dealing with cash-in-transit heists, drug trafficking and poaching of game and abalone".*

12. It became apparent to SARS that it had to enhance its capacity to gather intelligence of and investigate organised crime. It decided in about February 2007 to set up the Unit to penetrate and intercept the activities of tax and customs related crime syndicates. Its initial intention was to employ and train the members of the Unit and then to transfer them to the NIA where they would continue to function as a unit dedicated to SARS. The NIA, however, lost appetite for the project as a result of which SARS decided to retain the Unit within its Enforcement Division.

13. I was, in my capacity as Commissioner, the chief executive officer of SARS. Its staff complement at the time was about 15 000. The Unit with a staff complement of only 26 odd, was a miniscule part of SARS. My knowledge of its establishment, functions and operations was consequently very limited. Your questions moreover enquire about events of many years ago. My recollection of the detail of those events is inevitably patchy.

14. I firmly believed at all times that the establishment of the Unit was an entirely lawful extension of SARS's long-standing capacity to investigate tax-related crime. I still hold that belief and am advised that those who contend otherwise are mistaken.

MR PILLAY'S EARLY RETIREMENT AND RE-APPOINTMENT

15. Mr Pillay took early retirement and was re-appointed when I was Minister of Finance. I seem to recall that it happened in early 2010.

16. The then Commissioner of SARS, Mr Oupa Magashula, addressed a memorandum to me on 12 August 2010, seeking my approval for Mr Pillay's early retirement and re-employment on a fixed term contract. I was told that Mr Pillay sought in this way to gain access to his pension fund to finance the education of his children. I understood that Mr Magashula had established from enquiries made with the Department of Public Service and Administration that the terms of Mr Pillay's early retirement and re-employment were lawful and not unusual. I approved Mr Magashula's proposal because I believed it to be entirely above board and because I thought it appropriate to recognise the invaluable work Mr Pillay had done in the transformation of SARS since 1995.

CONCLUSION

17. I have nothing further to say in relation to these matters. If the Hawks however require any further assistance in good faith, I would be happy to assist.

Pravin J Gordhan
Minister of Finance
23 August 2016

SA.15

Thembani Mokhari

From: Oupa G. Magashula
Sent: 23 July 2010 09:03 AM
To: kenny@dpsa.gov.za
Subject: Early retirment

Dear Kenny

Thank you very much for a quick discussion yesterday with my Minister regarding the early retirement of our Deputy Commissioner of SARS. In my discussion this morning with my Minister we agreed that I should ask you for a written response to our discussion and the questions I posed yesterday. For the sake of refreshing both our memories the questions were:

- Is there a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment, with a scaled down responsibility, salary and other conditions of employment?
- If authorised, what is the impact of Cabinet's decision to recognise NSF service at a 100% on the retirement benefits of the Deputy Commissioner (assuming the approval is granted immediately). ? You mentioned the only outstanding decision to give effect to the cabinet's decision, is to develop/find a funding model for the 100% recognition of NSF service? If you could kindly give me an indication of how long you expect the process to take and who can do the estimates to assess the impact of this decision on the Deputy Commissioners retirement which is anticipated to happen in a month's time.
- Related to the first bullet point- do you have any statistics of how many of these early retirement cases without re-engagement have been processed thus far?

Thank you again for your assistance and I will await your soonest response in the above matter.

Kind regards,

Oupa Magashula
Commissioner: South African Revenue Service

Lehae la SARS, 299 Bronkhorst Street, Nieuw Muckleneuk, PRETORIA 0181
Private Bag X923, PRETORIA, 0001
Tel: +27 12 422 5017 | Fax +27 12 422 5189
E-mail for official correspondence: omagashula@sars.gov.za

Thembani Mokhari

From: Kenny Govender <Kenny@dpsa.gov.za>
Sent: 03 August 2010 06:14 PM
To: Oupa G. Magashula
Subject: RE: Early retirment

Dear Oupa

1. Employee initiated severances packages (EISP) are granted to employees that are generally in excess of the organization as a result of a restructuring exercise. It includes changing the content of the job or the abolishment of the post.
2. There is no restriction in the appointment to the public service or to the same department on a person who has left on a EISP. Any new appoint will be to a new post with a new set of conditions.
3. I do not have figures on how many were re-employed, but I aware of a few that were.
4. Cab Memo 8 of 2009 recognised full NSF service as pensionable service ito the GEPF rules for department of defence personnel. Dpsa together with dod and the gepf are currently preparing a cab memo to extend this decision to cover all public service employees and secondly to approve the funding associated with the recognition of this period has pensionable service. In light of this matter from SARS, we need to include other employers, outside the public service, that are contributing employers to the gepf – I will make sure it is included. The intention is to get this memo to cabinet before the end of this month. Once a decision is taken, the gepf will need to put in place systems to give effect. Its difficuly to give a clear indication of timeframes.
5. Finally, if the DC is granted an EISP his package will be calculated ito his current contribution to the gepf and amended once the NSF decision is obtained and implemented.

I hope the above assists and my apologies for the delay in responding. Please feel free to follow-up if necessary.

Kenny

From: Oupa G. Magashula [mailto:OMagashula@sars.gov.za]
Sent: 23 July 2010 09:11 AM
To: Kenny Govender
Subject: Early retirment

Dear Kenny

Thank you very much for a quick discussion yesterday with my Minister regarding the early retirement of our Deputy Commissioner of SARS. In my discussion this morning with my Minister we agreed that I should ask you for a written response to our discussion and the questions I posed yesterday. For the sake of refreshing both our memories the questions were:

- Is there a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment, with a scaled down responsibility, salary and other conditions of employment?
- If authorised, what is the impact of Cabinet's decision to recognise NSF service at a 100% on the retirement benefits of the Deputy Commissioner (assuming the approval is granted immediately). ? You mentioned the only outstanding decision to give effect to the cabinet's decision, is to develop/find a funding model for the 100% recognition of NSF service? If you could kindly give me an indication of how long you expect the process to take and who can do the estimates to assess the impact of this decision on the Deputy Commissioners retirement which is anticipated to happen in a month's time.
- Related to the first bullet point- do you have any statistics of how many of these early retirement cases without re-engagement have been processed thus far?

Thank you again for your assistance and I will await your soonest response in the above matter.

Kind regards,

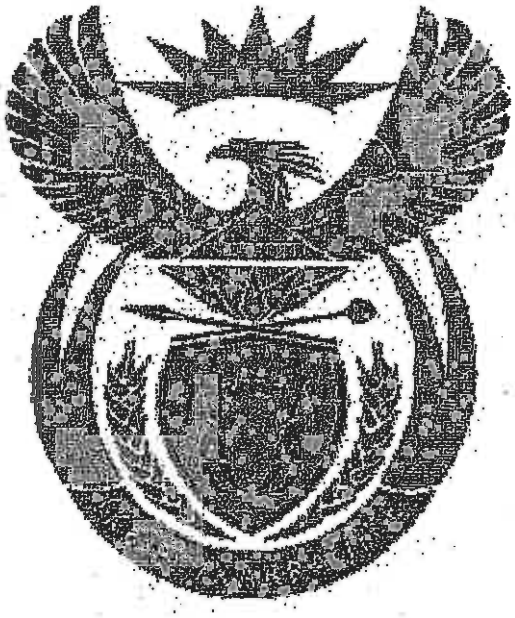
Oupa Magashula
Commissioner: South African Revenue Service

Lobby in SARS, 299 Bronkhorst Street, New Muckleneuk, PRETORIA 0181
Private Bag X923, PRETORIA, 0001
Tel: +27 12 422 9017 | Fax: +27 12 422 5189
E-mail for official correspondence: omagashula@sars.gov.za

Please Note: This email and its contents are subject to our email legal notice which can be viewed at http://www.sars.gov.za/Email_Disclaimer.pdf

393
5A17
481

DETERMINATION ON THE INTRODUCTION OF AN EMPLOYEE-INITIATED SEVERANCE PACKAGE FOR THE PUBLIC SERVICE (REVISED)



1 JANUARY 2006

MADE BY THE MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION

DETERMINATION ON THE INTRODUCTION OF AN EMPLOYEE-INITIATED SEVERANCE PACKAGE FOR THE PUBLIC SERVICE

1. SCOPE

1.1 This Determination is applicable to all employees appointed in terms of the *Public Service Act*, 1994, as amended.

1.2 For purposes of this Determination, the term "employees" means persons who are appointed permanently, but excludes persons who are appointed temporarily or on a fixed term contract.

2. AUTHORISATION AND DATE OF EFFECT

This Determination has been made by the Minister for the Public Service and Administration in terms of section 3(3)(c) of the Public Service Act, 1994, as amended and is effective from 1 January 2006.

3. PURPOSE

To allow employees affected by transformation and restructuring who wish to exit the public service, to apply for an employee-initiated severance package.

4. APPLICATION

4.1 Only employees who are affected by transformation and restructuring may voluntarily apply to his/her executing authority (or delegate) to be discharged from the public service in terms of section 17(2)(c) of the Public Service Act, 1994, as amended on the basis of the employee-initiated severance package set out in paragraph 6 or 7 of this Determination, as the case may be.

4.2 The application is subject to the approval of the relevant executing authority (or delegate).

4.3 The application must be made on the application form attached as Annexure A. An electronic copy of the application form is available on the DPSA website (http://www.dpsa.gov.za).

5. PROCEDURE FOR CONSIDERING THE APPLICATION

5.1 When an application is received by the executing authority (or delegate), he/she must decide whether or not to support the application.

5.2 In considering the application, the following must, as a minimum, be taken into account:

(a) The impact of the employee's exit from the department on its service delivery capabilities.

(b) The employee's competence and suitability for continued employment.

(c) The manner in which the employee's exit will support the transformation and restructuring of the department.

(d) The specific reasons for the employee's request.

(e) The ability of the department to finance the costs related to the payment of the severance package (e.g. refunding the Pension Fund, severance pay, leave pay, etc.).

(f) The impact of the granting of the severance package on the morale of other employees.

(g) Whether the employee occupies a post on the department's establishment or whether the employee is held additional to the establishment.

5.3 If misconduct or incapacity (due to poor performance) proceedings are underway against an employee, the decision regarding his/her application must be postponed until such proceedings have been finalised.

5.4 If the executing authority (or delegate) does not support the application, the employee must, in writing, be informed that the application is not approved. The employee must also be provided with adequate reasons for the decision and be informed of any right of review.

5.5 If the executing authority (or delegate) supports the application, the application form, with section B completed, must be submitted to the Minister for the Public Service and Administration (MPSA) for comment.

5.6 The MPSA's comments will be provided (in section C of the application form) to the relevant executing authority (or delegate) for a final decision.

5.7 Taking into account the MPSA's comments, the relevant executing authority (or delegate) must finally decide whether or not to approve the application.

5.8 If the application is approved, the employee must be notified in writing of the decision and his/her exit from the public service, must take effect not later than two months after the date of such notice.

5.9 If the application is not approved, the employee must be notified in writing of the decision, must be provided with reasons for the decisions and informed of any right of review.

5.10 Due care must be taken to ensure compliance with the provisions of the *Promotion of Administrative Justice Act*, 2000, with regard to decisions not to approve applications made in terms of Determination.

6. SEVERANCE PACKAGE PAYABLE: EMPLOYEES ON SALARY LEVELS 1-10

If the executing authority or delegate approves the employee-initiated severance package application, the following measures shall apply:

6.1 Pension benefits (in accordance with rules 14.8 and 20 of the Rules made in terms of the *Government Employees Pension Law*, 1996 (as amended) and Part B of the Annexure to the said Rules, as amended, with effect from 1 July 2005)

The following pension benefits are payable:

(a) Members of the Government Employees Pension Fund who have attained the age of 55 years and who have completed at least 10 years' pensionable service, on written choice of the member:

(i) A gratuity equal to his or her actuarial interest payable to the member in own right or into an approved retirement fund of the member's choice; OR

(ii) A gratuity and annuity determined in terms of the formula that applies to the member;

without scaling down of pension benefits in terms of Rule 14.3.3(b) and without an addition of pensionable service in terms of Rule 14.2.4(b).

(b) Members of the Government Employees Pension Fund who have not yet attained the age of 55 years, and members who have attained age 55 but have less than 10 years pensionable service:

A gratuity equal to his or her actuarial interest payable to the member in own right or into an approved retirement fund of the member's choice,

without scaling down of pension benefits in terms of Rule14.3.3(b) and without an addition of pensionable service in terms of Rule 14.2.4(b).

6.2 **Severance pay**

Two weeks basic salary for every full year of the qualifying period of service will be paid with a minimum payment of R15 000. The following formula will be used:

Step 1:
Calculate the following:

$$\frac{\text{Basic annual salary} \times \text{qualifying period of service.}}{26}$$

Step 2:
If the result of the calculation is less than R15 000, an amount of R15 000 must be paid. If the result of the above calculation exceeds R15 000, the calculated amount must be paid.

Service that may be recognised for severance pay purposes include the following service periods:

(a) Service in statutory bodies provided the affected employees were transferred to the Public Service in terms of section 15 of the *Public Service Act*, 1994 or a similar legislative provision.

(b) Service in former Development Boards provided the affected employees were transferred to the Public Service in terms of the *Abolition of Development Bodies Act*, 1986, or similar legislation.

(c) Service under a former provincial ordinance provided that the affected employees were transferred to the Public Service in terms of the *Provincial Government Act*, 1986, as amended.

(d) By virtue of section 2(5)(b) of the *Public Service Act*, 1994, as amended, service in institutions referred to in section 236(1) of the Interim Constitution must be recognised for severance pay purposes.

In determining the qualifying period of service, the provisions of section 84 of the *Basic Conditions of Employment Act*, 1997, apply. For this purpose, previous employment with the State as employer must be taken into account if the break between the periods of employment is less than one year and occurred after 1 December 1998, i.e. the date of implementation of section 41 (severance pay) of the *Basic Conditions of Employment Act*, 1997, in respect of the public service.

Example:

Mr A was in service from 1 January 1997 until 31 December 1999 (a full three years) when he resigned. He was re-appointed on 1 July 2000 (a break in service of 6 months) and will leave the service with a severance package on 30 September 2005. Since the break in service was less than 12 months, the three year period until 31 December 1999 must be added to the period of service that commenced on 1 July 2000 to calculate his severance pay. Note that only full years may be used and the severance pay due to Mr A will be calculated on eight years.

6.3 Leave pay

All unused days accumulated until 30 June 2000 (capped leave) as well as all unused days in respect of leave due to employees under the leave dispensation that became effective on 1 July 2000 must be paid according to the formulas contained in paragraphs 7.4 and 8.4 of the Directive on Leave of Absence in the Public Service issued by the Minister for the Public Service and Administration.

Leave must be audited before any leave payments may be made to an employee. In respect of capped leave, the Head of Department shall determine whether there are periods that cannot be audited due to a lack of records. In

such instances, an affected employee's leave payout shall be on the basis of 6 working days per completed year of service up to a maximum of 100 days in respect of unaudited periods.

6.4 Compensation for medical and housing benefits

(a) Employees aged 55 and older on the date of service termination who have been members of registered medical schemes for the year ending with service termination, will qualify for post retirement medical assistance as follows:

(i) Employees with less than 10 years of actual service: An amount equal to 12 times the employer's monthly contribution as at the date of service termination will be paid to the employee directly by Pensions Administration.

(ii) Employees with at least 10 but less than 15 years of actual service: An amount equal to 36 times the employer's monthly contribution as at the date of service termination will be paid to the employee directly by Pensions Administration.

(iii) Employees with at least 15 years of actual service: Employees who continue to be members of registered medical schemes will qualify for a continued employer contribution. The employer contribution will be two-thirds of membership fees limited to a maximum employer contribution of R1 014 per month. The employer contribution will be paid directly to the medical scheme by Pensions Administration.

(b) All other employees, namely-

- all employees who are younger than 55 at the date of service termination; and
- employees who are 55 and older who do not qualify for the above post retirement medical assistance benefits, e.g. they are not members of registered medical schemes,

must be paid a once-off all-inclusive amount of R9 000 by departments directly. This amount is in lieu of medical and housing benefits regardless of an employee's participation in the benefits before service termination. These employees do not qualify for post retirement medical assistance in future.

6.5 Service bonus

A pro rata service bonus calculated according to the formula in paragraph 1.2 of the Financial Manual for Purposes of the Calculation and Application of Remunerative Allowances and Benefits will be paid.

6.6 Contractual obligations

Employees are to be released from contractual obligations that require from them to remain in service.

Payments to third parties under the State Guarantee Scheme as well as other departmental debt will be recovered from pension benefits in terms of section 21(3) of the *Government Employees Pension Law*, 1996, if employees do not make suitable arrangements to settle their debt.

6.7 Official housing

Employees must be given one month's notification to vacate official housing, unless a different period is specified in an individual contract of employment.

6.8 Notice of termination of service

The employee's termination of service by the department must take effect within two months after the date of the notice of the approval of his/her application.

6.9 Subsidised car scheme

Subsidised motor vehicles must be dealt with in terms of the policy of the Department of Transport on subsidised motor vehicles.

6.10 Resettlement benefits

Employees who are 55 years and older on the date of service termination must be compensated according to provisions as set out in PSCBC Resolution 3 of 1999 and existing departmental policies.

7. SEVERANCE PACKAGE: EMPLOYEES IN THE MIDDLE MANAGEMENT SERVICE (LEVELS 11–12) AND SENIOR MANAGEMENT SERVICE (LEVEL 13 -16)

If a department grants a severance package on application to an employee remunerated according to the provisions for the Senior Management Service or Middle Management Service, the following measures shall apply:

7.1 Pension benefits (in accordance with rules 14.8 and 20 of the Rules made in terms of the *Government Employees Pension Law*, 1996 (as amended) and Part B of the Annexure to the said Rules, as amended, with effect from 1 July 2005)

The following pension benefits are payable to employees who are members of the Government Employees Pension Fund:

(a) Members who have attained the age of 55 years and who have completed at least 10 years' pensionable service, on written choice of the member:

(i) A gratuity equal to his or her actuarial interest payable to the member in own right or into an approved retirement fund of the member's choice; OR

(ii) A gratuity and annuity determined in terms of the formula that applies to the member;

without scaling down of pension benefits in terms of Rule 14.3.3(b) and without an addition to pensionable service in terms of Rule 14.2.4(b).

(b) Members of the Government Employees Pension Fund who have not yet attained the age of 55 years, as well as those who have attained age 55 but have less than 10 years pensionable service:

A gratuity equal to his or her actuarial interest payable to the member in own right or into an approved retirement fund of the member's choice.

without scaling down of pension benefits in terms of Rule 14.3.3(b) and without an addition of pensionable service in terms of Rule 14.2.4(b).

7.2 Severance pay

The salary to be used for purposes of calculating severance pay is 100% of the inclusive remuneration package. Two week's salary for every full year of the qualifying period of service will be paid according to the following formula:

$$\frac{\text{Inclusive package} \times \text{qualifying period of service}}{26}$$

Service that may be recognised for severance pay purposes include the following service periods:

(a) Service in statutory bodies provided the affected employees were transferred to the Public Service in terms of section 15 of the *Public Service Act*, 1994 or a similar legislative provision.

(b) Service in former Development Boards provided the affected employees were transferred to the Public Service in terms of the *Abolition of Development Bodies Act*, 1986, or similar legislation.

(c) Service under a former provincial ordinance provided that the affected employees were transferred to the Public Service in terms of the *Provincial Government Act*, 1986, as amended.

(d) By virtue of section 2(5)(b) of the *Public Service Act*, 1994, as amended, service in institutions referred to in section 236(1) of the Interim Constitution must be recognised for severance pay purposes.

In determining the qualifying period of service, the provisions of section 84 of the *Basic Conditions of Employment Act*, 1997, apply. For this purpose, previous employment with the State as employer must be taken into account if the break between the periods of employment is less than one year and occurred after 1 December 1998, i.e. the date of implementation of section 41 (severance pay) of the *Basic Conditions of Employment Act*, 1997, in respect of the public service. (Note the example in paragraph 6.2).

7.3 Leave pay

All unused days accumulated until 30 June 2000 (capped leave) as well as all unused days in respect of leave due to employees under the leave dispensation that became effective on 1 July 2000 must be paid according to the formulas contained in paragraphs 4(d) and 5(d) of Chapter 3 of the SMS Handbook (SMS) and paragraph 7.4 and 8.4 of the Directive on Leave of Absence (MMS) as issued by the Minister for the Public Service and Administration.

Leave must be audited before any leave payments may be made to an employee. In respect of capped leave, the Head of Department shall determine whether there are periods that cannot be audited due to a lack of records. In such instances, an affected employee's leave payout shall be on the basis of 6 working days per completed year of service up to a maximum of 100 days in respect of unaudited periods.

7.4 Compensation for medical benefits

Employees aged 55 and older on the date of service termination who have been members of registered medical schemes for the year ending with service termination, will qualify for post retirement medical assistance as follows:

(a) Employees with less than 10 years of actual service: An amount equal to 12 times the employer's monthly contribution as at the date of service termination will be paid to the employee directly by Pensions Administration.

(b) Employees with at least 10 but less than 15 years of actual service: An amount equal to 36 times the employer's monthly contribution as at the date of service termination will be paid to the employee directly by Pensions Administration.

(c) Employees with at least 15 years of actual service: Employees who continue to be members of registered medical schemes will qualify for a continued employer contribution. The employer's monthly contribution will be two-thirds of membership fees limited to a maximum employer contribution of R 1 014 per month. The employer contribution will be paid directly to the relevant medical scheme by Pensions Administration.

7.5 Service bonus

(a) Employees who have structured a service bonus: A pro rata service bonus calculated according to the formula in paragraph 1.2 of the Financial Manual for Purposes of the Calculation and Application of Remunerative Allowances and Benefits will be paid.

(b) Employees who have not structured a service bonus: No payment will be made.

7.6 Contractual obligations

Employees are to be released from contractual obligations that require from them to remain in service.

Payments to third parties under the State Guarantee Scheme as well as other departmental debt will be recovered from pension benefits in terms of section 21(3) of the *Government Employees Pension Law*, 1996, if employees do not make suitable arrangements to settle their debt.

7.7 Official housing

Employees must be given one month's notification to vacate official housing, unless a different period is specified in an individual contract of employment.

7.8 Notice of termination of service

The employee's termination of service by the department must take effect within two months after the date of the notice of the approval of his/her application.

7.9 Resettlement benefits

Employees who are 55 years and older on the date of service termination must be compensated according to the provisions as set out in PSCBC Resolution 3 of 1999 and existing departmental policies.

ANNEXURE A

PROCESS FORM: APPLICATION FOR EMPLOYEE-INITIATED SEVERANCE PACKAGE

SECTION A *(TO BE COMPLETED BY THE EMPLOYEE)*

I, _____ (full first names and surname), herewith apply to be discharged (in terms of section 17(2)(c) of the Public Service Act,1994) from the public service on the basis of the employee-initiated severance package as determined by the Minister for the Public Service and Administration, in a dpsa circular 1/16/21 dated 16 January 2006. I declare that this request is made voluntarily and that I accept the conditions and severance benefits set out in the aforementioned determination by the Minister. I acknowledge that my application is subject to approval by the executing authority (or delegate).

The reasons for my request are the following (Please make use of a separate sheet if the allocated space is inadequate):

_____
_____
_____
_____
_____

SIGNATURE

DATE:

SECTION B *(TO BE COMPLETED BY THE RELEVANT DEPARTMENT)*

Department: _____

Rank of Employee: _____

Occupational classification code _____

Salary notch: R_____

Salary scale: R_____

Age: _____

Race: _____

Prescribed retirement age: _____

Amount of severance package (excluding pension benefits): _____

Reasons for supporting/not supporting the application (Please use a separate sheet if the allocated space is inadequate):

_____

_____

_____

_____

_____

EXECUTING AUTHORITY (OR DELEGATE)

DATE:

(NOTE: *If the application is supported, submit the process form to the Minister for the Public Service and Administration for comment.*

If the application is not supported (and therefore not approved), do not submit to the Minister for the Public Service and Administration, but inform the employee in writing of the decision, provide him/her with adequate reasons for the decision and inform him/her of any right of review.)

SECTION C *(TO BE COMPLETED BY THE MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION OR DELEGATE)*

Comment: _____

_____

_____

_____

_____

_____

MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION (OR DELEGATE)

DATE:

SECTION D *(TO BE COMPLETED BY EXECUTING AUTHORITY OR DELEGATE)*

The application is approved/not approved

EXECUTING AUTHORITY (OR DELEGATE)

DATE:

(NOTE: *If the application is approved, the employee must submit a completed pension withdrawal form (Z102).*

*If the application is **not** approved, the employee must be informed in writing of the decision, be provided with adequate reasons for the decision and be informed of any right of review.)*

406

5A.18

494

GILDENHUYS MALATJI
INCORPORATED
REG NO 1987/002114/21
VAT NO 4400100851

GILDENHUYS MALATJI
ATTORNEYS

OUR REF
T MALATJI/BC
01744844

DIRECT TEL NO
(012) 428 8687

DIRECT E-MAIL
tmalatji@gminc.co.za

DIRECT FAX
(012) 428 8787

YOUR REF

29 August 2016

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
THE NATIONAL PROSECUTING AUTHORITY OF SA
VGM BUILDING (CNR WEST LAKE & HARTLEY)
123 WEST LAKE AVENUE
WIEVIND PARK
SILVERTON
PRETORIA

ATTENTION: ADV S ABRAHAMS

Dear Adv Abrahams,

BROOKLYN CAS 427/05/2015 – THE HON. MINISTER PRAVIN GORDHAN

1. We refer to the above matter and to our letters exchanged on 24 and 25 August 2016.
2. Our client has come to learn through Media reports that the Hawks had completed their investigations and have also handed the docket pertaining to the above matter to your office. We again reiterate our request and in light of your letter of 25 August 2016 request that you urgently confirm whether our client will be afforded the opportunity to make both written and verbal representations to you regarding a decision whether he should be prosecuted or not.
3. We look forward to your response as soon as circumstances permit.

Yours faithfully

GILDENHUYS MALATJI INC

Per: *Tebogo Malatji*

(Transmitted electronically and thus not signed)

GM HOUSE
HARLEQUINS OFFICE PARK
154 TOTIUS STREET
GROENKLOOF 0027
P O BOX 818
PRETORIA 0001
DOCEX 4 PRETORIA
E-MAIL gminc@gminc.co.za
WEB ADDRESS www.gminc.co.za
TEL +27 12 428 8600
FAX +27 12 428 8601

DIRECTORS
TEBOGO MALATJI LLB
KOBUS MARKGRAAFF BCOMM LLM
DERIK DE BEER LLM
JOSÉ DA SILVA BPROC
WIM CILLIERS LLM
ANEESA MAHOMED LLB
SUNELLE ELOFF BCOMM LLM
MOETI KANYANE LLB
NICOLETTE DE WITT LLB
RAKGADI PHOSA BPROC
ANËL GRAY BPROC
HOPE CHAANE LLB
THEKLUWE VILAKAZI LLB
BONANG MASIA LLB
RIAAN VENTER LLB
LUISE VON DÜRCKHEIM-BOTES LLM
GREYLING ERASMUS LLM
THEKISO MAGOI LLM
STEFANI SMITH LLB
ZELMAINE SHAW BPROC
JONES OTSELA LLB

SENIOR ASSOCIATES
NEETU DAWLAL LLM
JOHAN SMALBERGER LLM
MINE VAN ZYL LLB
TIM VLOK LLB
REHAM SHAMOUT LLB
MASHUDU RAMBAU LLB

ASSOCIATES
ANITA DU TOIT BCOMM LLB
SIMON MAELANE LLB
WANDILE MOEKETSANE LLB
BOIKETLO MPHAHLELE LLB
KANABC SIKHOSANA BCOMM LLB

CONSULTANT
OIV LESSING LLB

MANAGERS
GERHARD J V RENSBURG (FINANCIAL)
CHRISTELLE DOMAN (INFORMATION TECHNOLOGY)
UMITHA RAMNATH (HUMAN RESOURCES)
INNO THIPE (OFFICE)
JENNIFER KLAASTE (MARKETING)

A LEVEL TWO (AAA) BBBEE AND VALUE ADDING SUPPLIER VERIFIED BY EMPOWERDEX

407

5-A-19

495

WEBBER WENTZEL

in alliance with > Linklaters

90 Rivonia Road, Sandton
Johannesburg, 2196

PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 11 530 5000
F +27 11 530 5111

www.webberwentzel.com

Shaun Abrahams
National Director of Public Prosecutions
National Prosecuting Authority
Victoria and Griffiths Mxenge Building (Corner Westlake & Hartley)
123 Westlake Avenue
Weavind Park, Silverton
Pretoria
0184

JP Pretorius SC
Acting Special Director of Public Prosecutions
Priority Crimes Litigation Unit
National Prosecuting Authority
Victoria and Griffiths Mxenge Building (Corner Westlake & Hartley)
123 Westlake Avenue
Weavind Park, Silverton
Pretoria
0184

By hand
By email: skabrahams@npa.gov.za; kbenjamin@npa.gov.za
By fax: 012 843 2220

URGENT

OFFICE OF THE NATIONAL DIRECTOR
2016 -10- 14
NATIONAL PROSECUTING AUTHORITY

Your reference	Our reference	Date
Summons No 574/16 CAS: Brooklyn 427/05/2015	V Movshovich / P Dela / D Cron / D Rafferty / T Dye 3012607	14 October 2016

Dear Sirs

Summons in criminal case against, *inter alios*, the Honourable Minister of Finance Mr Pravin Gordhan: Summons 574/16; CAS: Brooklyn 427/05/2015

1. We act for Freedom Under Law NPC and the Helen Suzman Foundation, non-governmental organisations concerned with, amongst other things, the promotion of the rule of law and the protection of our constitutional project ("**our clients**").

Senior Partners: JC Els Managing Partners: SJ Hutton Partners: RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley PG Bradshaw EG Brandt JL Brink S Browne MS Burger RI Carrim T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Feleki GA Fichardt JB Forman KL Gawith MM Gibson SJ Gilmour H Goolam CJ Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston CJ Kok MD Kota J Lamb L Marais S McCafferty V McFarlane MC McIntosh SJ McKenzie M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu J Moolman VM Movshovich M Mtshali SF Naicker RA Nelson BP Ngoepe A Ngubo ZN Nishona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold

2. We address this letter on behalf of our clients acting in their own and in the public interest.

3. On 11 October 2016, summons no. 574/16 was served on, *inter alios*, the Honourable Minister of Finance, Mr Pravin Gordhan, MP. In terms of annexures A, B and E thereto ("**the charge sheet**"), the Honourable Minister is charged with:

3.1 fraud, alternatively theft, in relation to the alleged payment by the South African Revenue Service ("**SARS**") to the Government Employees' Pension Fund ("**the Fund**") of R1,141,178.11 on behalf of Mr Visvanathan Pillay, where such sum was allegedly a penalty payable by Mr Pillay to the Fund (count 1 and the alternative to count 1 of the charge sheet); and

3.2 fraud in relation to the re-hiring of Mr Pillay in or around April 2014 (count 4 of the charge sheet);

(collectively, "**the charges**").

4. As prefaced in our previous correspondence, your conduct in pressing baseless charges against the Minister of Finance has, and continues to have, devastating consequences for the Republic and its economy. This is a matter of paramount public interest and our clients intend to review and set aside your decisions to institute the charges against the Minister of Finance, under the constitutional principle of legality and otherwise, unless you withdraw the decisions or furnish a cogent basis for the actions taken. It has been held in a long line of cases that our clients have standing and an interest to bring such proceedings.

5. The charges, such as they are, are unsustainable in law and fact, and may be actuated by conscious recklessness or ulterior purposes on the part of the National Prosecuting Authority ("**NPA**").

6. In respect of charge 1 (fraud, alternatively theft), we note the following:

6.1 Mr Pillay was clearly entitled under the relevant legislation governing public servants' retirement to retire from the age of 55. This was an integral part of his employment relationship with the South African Revenue Service ("**SARS**").

6.2 In terms of the Rules of the Government Employees Pension Fund ("**GEPF**"), however, a retirement before 60 years of age constitutes retirement prior to the

pension retirement date and a penalty (by way of a deduction) would normally be applicable to the payout on such early retirement.

6.3 All the relevant legislation, however, provides for that penalty or deduction to be paid by SARS or the Government of the Republic of South Africa:

6.3.1 Rule 20 of the Rules to the Government Employees Pension Fund Law, 1996, ("GEPF") states that *"**Compensation to the fund on retirement or discharge of a member prior to attainment of the member's pension retirement date.** Without detracting from the generality of section 17(4) of the Law, the Government or the employer or the Government and the employer shall, if a member, except for a reason in rule 14.1.1(a), retires, becomes entitled in terms of Rule 14.8 to the pension benefits in terms of a severance package, referred to in that Rule, or is discharged prior to his or her pension retirement date and at such retirement, entitlement or discharge in terms of the rules becomes entitled to the payment of an annuity or gratuity or both an annuity and a gratuity in terms of the rules, and any of these actions result in an additional financial liability to the Fund, **pay to the Fund the additional financial obligations as decided by the Board acting on the advice of the actuary.** Such payment to the Fund, with interest to account for any delay in payment, shall be in accordance with a schedule approved by the Board."*

6.3.2 Section 17(4) of the Government Employees' Pension Fund Law, 1996, which states that: *"If any action taken by the employer or if any legislation adopted by Parliament places any additional financial obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be **shall pay to the Fund an amount which is required to meet such obligation**";*

6.3.3 Government Employees Pension Fund Members' Guide, page 34, which reads *"Where the employer granted permission for your early retirement, your benefits will not be scaled down. However, **your employer will pay an additional liability.**"*

6.4 In light of the above alone, the charges are unsustainable.

6.5 The position is simply reinforced by the following contemporaneous documentation related to the retirement of Mr Pillay:

6.5.1 The interoffice memorandum dated 27 November 2009 from Mr Pillay to the then Commissioner of SARS (annexed marked "A");

6.5.2 The Legal and Policy Division memorandum dated 17 March 2009 (annexed marked "B");

6.5.3 The memorandum dated 12 August 2010, and approved by the Minister on 18 October 2010 referred to in count 1 (annexed marked "C").

6.6 The above correspondence not only references the relevant legislation, but also:

6.6.1 sets out cogent reasons for Mr Pillay's circumstances; and

6.6.2 cites the fact that over 3000 government employees have taken early retirement with full benefits.

6.7 It is plain from the legislation that the retirement of Mr Pillay did not require the Minister's approval at all: SARS and the government would be liable to pay any early retirement penalty. But to the extent that the Minister gave his approval, it was clearly in line not only with a raft of legislation but also ample precedent.

6.8 The allegation that the NPA could ever prove fraud or theft in those circumstances in relation to the payment of the penalty is preposterous.

7. In respect of charge 4 (fraud), we note the following:

7.1 The charge is inchoate and incomprehensible.

7.2 It is initially alleged that SARS was not authorised to employ Mr Pillay as Deputy Commissioner for a period of four years from 1 April 2014 to 31 December 2018. The alleged issue is thus authority. There is nothing in law or fact, however, which states that SARS was not empowered to hire Mr Pillay as Deputy Commissioner for this period.

7.3 Under the relevant legislation, SARS is, in fact, empowered to employ its Deputy Commissioner. Section 5(1)(a) of the SARS Act empowers SARS to "*determine its*

own staff establishment, appoint employees and determine their terms and conditions of employment in accordance with section 16".

7.4 In respect of senior management SARS employees, the Minister of Finance is statutorily charged with approving the terms and conditions of their employment (under section 18(3) of the SARS Act).

7.5 That is precisely what happened in this case. SARS appointed Mr Pillay and the Minister of Finance approved his terms and conditions. The employment agreement is attached marked "D".

7.6 Thus the alleged representation (if it occurred at all) is correct in law and is in no way unlawful.

7.7 There is also no basis for the alleged prejudice. Mr Pillay, with a proven track record and years of exemplary service to SARS, would be rendering services as the Deputy Commissioner for the amounts which would be paid to him under the employment agreement. In any event, Mr Pillay's employment with SARS could be cancelled on one month's written notice - accordingly, if SARS ever felt aggrieved or prejudiced by Mr Pillay's employment, this could have been remedied on one month's notice.

7.8 The fraudulent intention is allegedly grounded in the fact that the Minister of Finance knew that SARS was under no obligation to enter into a new employment agreement. But the alleged misrepresentation is that the Minister of Finance stated that SARS was empowered (not obliged) to hire Mr Pillay, and so this intention is irrelevant to the alleged fraudulent conduct.

7.9 Ultimately, the charge of fraud is nonsensical, is bad in fact and law, and cannot be sustained.

8. In respect of both charges, even if it is assumed (contrary to the dispositive analysis above) that the conduct of the Minister of Finance was not strictly in accordance with the law, there is no basis for imputing a fraudulent or furtive intention to him and none has been suggested.

9. Indeed, in previous correspondence from the Directorate for Priority Crime Investigation, it has never been alleged that Minister Gordhan

allegations were breaches of the Prevention and Combating of Corrupt Activities Act, 2004, Public Finance Management Act, 1999 and National Strategic Intelligence Act, 1994.

10. In light of the above, please confirm, in writing and by no later than 16:00, 21 October 2016, that the charges against Minister Gordhan will be withdrawn.

11. Should you refuse or fail to withdraw the charges as set forth above, then, for the purposes of assessing their position and the breaches of your constitutional and statutory obligations, our clients require you to furnish the following information and reasons, by no later than 16:00, 21 October 2016:

11.1 the record of decision in respect of the decision to issue the summons and prefer the charges against Minister Gordhan ("**the Decisions**");

11.2 full written reasons, and substantiating documents, which support the Decisions;

11.3 without derogating from the above, all reasons explaining why, despite the factual matrix in relation to the charges being known (and being in the public realm) for many years, the Decisions were taken now;

11.4 without derogating from the above, the evidence (alternatively a summary thereof) proving:

11.4.1 the unlawful intention required successfully to prosecute the charges;

11.4.2 that Minister Gordhan made any misrepresentation as required for the purposes of establishing fraud and that such misrepresentation induced the persons cited in counts 1 and 4 of the charge sheet to act to their prejudice;

11.4.3 the act of appropriation (or *contrectatio*) attributed to Minister Gordhan in respect of the alternative charge of theft.

11.5 whether any other instances of State employees taking early retirement with full pension (without any penalty payment being paid by the employee) are / have been investigated and are being considered for criminal prosecution on the basis of fraud or theft;

WEBBER WENTZEL
In alliance with > Linklaters

11.6 whether any other instances of State employees being hired after taking early retirement are / have been investigated and are being considered for criminal prosecution on the basis of fraud;

11.7 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement with full pension (and no penalty payment by such employee); and

11.8 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement and being rehired.

12. Should you not unconditionally withdraw the charges against the Minister or furnish the information sought within the time periods set forth above, our clients will assume that no reasons for the Decisions, and no documents other than the documents annexed to this letter, exist in support of the charges.

13. Our clients may then, without further notice, seek to exercise their rights in law on an urgent basis.

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
Email: ndpp@npa.gov.za
www.npa.gov.za

Your ref: V Movshovich / P Dela / D Cron / D Rafferty / T Dye 3012807
Our ref: Summons No 574/16
CAS Brooklyn 427/05/2015

Webber Wentzel
P O Box 61771
MARSHALLTOWN
2107

Dear Sir

Email: vlad.movshovich@webberwentzel.com

THE STATE VERSUS OUPA MAGASHULA, VISVANATHAN (IVAN) PILLAY AND PRAVIN GORDHAN

1. Your letter dated 14 October 2016, the content of which is noted, refers.

2. As you are aware, the decision to prosecute Minister Pravin Gordhan was made by the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit, Dr Torie Pretorius SC, in consultation with the Director of Public Prosecutions, North Gauteng, Adv Sibongile Mzinyathi in terms of section 24(3) of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act").

3. Section 179(5)(d) of the Constitution, which is replicated in s22(2)(c) of the NPA Act, empowers the National Director, if requested to do so, to review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within a period specified by the National Director, of the accused persons, the complainant and any other person or party whom the National Director considers relevant.

4. Earlier today Messrs Oupa Magashula and Visvanathan (Ivan) Pillay, through their legal representatives, made representations to me in which they

requested me to review the decision by the Acting Special Director of Public Prosecutions.

5. I am presently considering the aforementioned representations.

6. In giving effect to the provisions of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act, I have further invited Minister Gordhan through his lawyers, to make representations to me by no later than 17h00 on 18 October 2016.

7. I will consider all these representations.

Yours sincerely

ADV SK ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 17 – 10 – 2016

DIRECTOR
2016 -10- 18
THORITY

WEBBER WENTZEL
in alliance with > Linklaters

Shaun Abrahams
National Director of Public Prosecutions
National Prosecuting Authority
Victoria and Griffiths Mxenge Building (Corner Westlake & Hartley)
123 Westlake Avenue
Weavind Park, Silverton,
Pretoria
0184

By email: skabrahams@npa.gov.za; hzwart@npa.gov.za

90 Rivonia Road, Sandton
Johannesburg, 2196

PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 11 530 5000
F +27 11 530 5111

www.webberwentzel.com

URGENT

Your reference	Our reference	Date
Summons No 574/16 CAS: Brooklyn 427/05/2015	V Movshovich / P Dela / D Cron / D Rafferty / W Timm / T Dye 3012807	18 October 2016

Dear Sirs

Summons in criminal case against, *inter alios*, the Honourable Minister of Finance Mr Pravin Gordhan, MP ("Min. Gordhan"): Summons 574/16; CAS: Brooklyn 427/05/2015 ("the Summons")

1. We refer to your letter dated 17 October 2016 ("your letter").

2. We note that Min. Gordhan has publicised his intention not to make representations on the basis that he believes you are capable neither of being independent nor of objectively considering his representations concerning the charges put to him in the Summons ("the Charges").

3. There is much to be said for Min. Gordhan's position. The conduct of the National Prosecuting Authority, including yours, has not been characterised by anything approximating the necessary objectivity or due care. From the circumstances, it appears that you may well have been the person who took the decision to institute the Summons. In any event, it was you who announced and specifically justified, with much fanfare, the Charges being brought against Min. Gordhan last week. There is no basis to suppose that you are capable of exercising, or may be entrusted to exercise, an independent discretion in this matter.

Senior Partners: JC Els Managing Partners: SJ Hutton Partners: RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley EG Brandt JL Brink S Browne MS Burger RJ Carrim T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies PM Daya L de Bruyn JHB de Lange LW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman CP Gaul KL Gawith MM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Holborn JS Henning KR Hillis XNC Hlatshwayo S Hockey CH Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston CJ Kok J Lamb L Marais S McCafferty MC McIntosh SJ McKenzie N McLaren SJ Meltzer SM Nethula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu S Mogale J Mooiman VM Movshovich M Mushali SP Naicker RA Nelson BP Ngoepe A Ngubo ZN Nkhoma NB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips S Rajah D Ramjettan GI Rapson NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DNJ Simaa AJ Simpson N Singh P Singh MP Spalding L Stein PS Stein MW Streull LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen A van Niekerk JE Veeran D Venter B Versfeld MC Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken Chief Operating Officer: SA Boyd

4. We point out that section 179 of the Constitution and section 22(2)(c) of the National Prosecuting Authority Act, 1998 ("the Act") contemplate representations by "*any other person or party whom the National Director considers to be relevant.*" Without in any way acknowledging that you have not disabled yourself from making an unbiased and legitimate decision and without prejudice to any review grounds to be pursued by our clients, our clients have made submissions to you in our letter dated 14 October 2016 as to why the Charges are insupportable and must be withdrawn ("**our 14 October letter**"). We accordingly assume that they will be considered by you alongside the other representations, which in paragraph 7 of your letter you indicate you will be considering.

5. Should we not receive your decision to withdraw the Charges by 16h00 on Friday, 21 October 2016, our clients may, without further notice, seek to exercise their rights in law on an urgent basis. We also remind you of the need to furnish our clients with the information set forth in our 14 October letter, should the Charges not be withdrawn. For ease of reference, we reiterate that the information sought is the following:

5.1 the record of decision in respect of the decision to issue the summons and prefer the charges against Minister Gordhan ("**the Decisions**");

5.2 full written reasons, and substantiating documents, which support the Decisions;

5.3 without derogating from the above, all reasons explaining why, despite the factual matrix in relation to the charges being known (and being in the public realm) for many years, the Decisions were taken now;

5.4 without derogating from the above, the evidence (alternatively a summary thereof) proving:

5.4.1 the unlawful intention required successfully to prosecute the charges;

5.4.2 that Minister Gordhan made any misrepresentation as required for the purposes of establishing fraud and that such misrepresentation induced the persons cited in counts 1 and 4 of the charge sheet to act to their prejudice;

5.4.3 the act of appropriation (or *contrectatio*) attributed to Minister Gordhan in respect of the alternative charge of theft.

5.5 whether any other instances of State employees taking early retirement with full pension (without any penalty payment being paid by the employee) are / have been

investigated and are being considered for criminal prosecution on the basis of fraud or theft;

5.6 whether any other instances of State employees being hired after taking early retirement are / have been investigated and are being considered for criminal prosecution on the basis of fraud;

5.7 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement with full pension (and no penalty payment by such employee); and

5.8 a list of all cases which have been or are being criminally prosecuted, or are being considered for criminal prosecution, which relate to State employees taking early retirement and being rehired.

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

OFFICE OF THE NATIONAL DIRECTOR
2016 -10- 18
NATIONAL PROSECUTING AUTHORITY

ADV NAZEER CASSIM SC
MEMBER OF THE JOHANNESBURG BAR

MAISELS CHAMBERS 3

MEMORANDUM

DATE: **18 OCTOBER 2016**

TO: **MR S ABRAHAMS**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

RE: **STATE v OUPA MAGASHULA, IVAN PILLAY, PRAVIN GORDHAN**

1. We appreciate the opportunity afforded to us to make representations on behalf of Accused No. 2, Mr Ivan Pillay ("Pillay"), in accordance with the provisions of section 179 of the Constitution of the Republic of South Africa.

2. The purpose of this note is to crisply record the grounds whereupon we respectfully submit, Pillay did not have any intention to commit the offences in respect of which he now stands arraigned. In essence, Pillay was guided by the opinion of Vlok Symington ("Symington"), a respected legally trained official of SARS at the material time which advised that Pillay's contemplated early retirement from the GEPF, his application to the Minister of Finance to waive early retirement penalty and his request to be appointed on contract after his early retirement from the GEPF were technically possible under the rules of the GEPF read together with the employment policies of SARS.

3. A copy of Symington's opinion dated 17 March 2009 was furnished to you.

4. We also drew your attention to the provisions of section 16(4) read together with 16(6)(a) and (b) of the Public Service Act which contemplated that under the appropriate circumstances, Pillay would not be penalised in terms of pension fund benefits should he take early retirement. We accept that the

4 Protea Place, Sandton | [T] 011 535 1800 | [F] 011 535 1920 | [C] 0833083094 | ncassim@law.co.za

circumstances itself is a value judgment, but hardly, with respect, a matter, on the facts of this case, where it can be suggested that the Accused would not satisfy the test of a reasonably possibly true version (**Rex v Difford** 1937 AD 370).

5. We also addressed you on some length on public policy considerations as to why, in the exercise of the discretion vested in you in law, that you take a decision not to prosecute this case.

Regards

NAZEER CASSIM SC

AFZAL MOSAM
Electronic transmission and therefore unsigned

Instructed by: **Mr A Patel**
Cliffe Dekker Hofmeyr Inc

ADV PJJ DE JAGER SC

Advokaat van die Hooggeregshof van Suid-Afrika / Advocate of the High Court of South-Africa
Lid van die Pretoria Vereniging van Advokate / Member of the Pretoria Society of Advocates

Hooggeregshof Kamers, Kamer 920
Vermeulenstraat 220
Pretoria, 0002

Pretoria Vereniging van Advokate
Privaatsak X480, Pretoria, 0001

Tel: (012) 303-7701
Faks: (012) 303-7940
Sel: 083 264 5373
Epos: chambers937@asamail.co.za

High Court Chambers, Room 920
220 Vermeulen Street
Pretoria, 0002

Pretoria Society of Advocates
Private Bag X480, Pretoria, 0001

Tel: (012) 303 -7701
Fax: (012) 303-7940
Cell: 083 264 5373
Email: chambers937@absamail.co.za

Datum/Date:	18 October 2016
U verw/Your ref:	

Adv Shaun Abrahams
The National Director of Public Prosecutions

IN RE THE STATE v GEORGE (OUPA) MAGASHULA & 2 OTHERS

Our consultation at your chambers on 17 October 2016 refers. My learned attorney, Mr Michael Tilney, instructed me to afford you, as we had undertaken yesterday, with a short résumé of our views on the facts and the law in respect of the charges laid against our client, Mr Oupa Magashula (Accused No 1).

It is obvious that we cannot speak on behalf of the other accused, however, the actions taken by the three accused which forms the basis of the charges proffered against them are interwoven and/or all the charges are based on the actions taken by the three accused in securing Mr Ivan Pillay's early retirement and reappointment on contract as Deputy Commissioner of SARS.

As was indicated to you by Mr Tilney and myself we foresee almost no factual dispute. It is a question of law whether the facts on which your good offices rely can ever sustain any criminal charge of whatsoever nature. The legal basis on which we rely can thus be shortly summarised as follows:

1. Not a single act performed by either of the accused can ever be defined as unlawful. When functionaries and/or a Minister acts strictly within their empowering statute(s) and merely execute a discretion which they are empowered to do in terms of the laws of the Republic of South Africa it is unthinkable that unlawfulness can ever come into play. Not even to mention any inference of criminal intent.

2. At all material times and specifically in terms of Section 16(2A)(a) an officer such as Mr Pillay had the right to retire from the public service on the date on which he attained the age of 55 years or at any date after that date.

3. This should, however, be read with Section 16(6)(a) which specifically provides that retirement before the age of 60 years, i.e. older than 55 but younger than 60 requires the permission of the Executive Authority. In terms of the definitions set out in Section 1, that is the Minister of his or her department, i.e *in casu* Accused No 3 and permission may be given if sufficient reasons exist for retirement. This is purely a discretional function which the Minister has and which falls clearly within his sole discretion. You mentioned that you doubted whether personal circumstances of an official constitutes sufficient reason for granting such permission. There is absolutely no provision in the act or in any other act that creates a *numerus clausus* of reasons or that restricts the Minister's discretion in this regard.

4. Section 16(6)(b) creates a deeming provision with reference to subsection 16(4). In terms of this deeming provision the moment that the Minister accedes to the request in terms of subsection 16(6)(a), the employee shall be entitled to such pension as he or she would have been entitled to if he or she retired from the public service in terms of subsection 4. That means at the age of 60. The provision is couched in peremptory terms and the Minister's discretion actually does not go beyond the permission that he gives for early retirement. It thus follows that any shortfall or "penalty" should of necessity be paid by the State. This happens every day and

according to our information thousands of employees of various departments went on early retirement in terms of this section.

5. Our submissions set out *supra* are further strengthened by the provisions of Section 17(4) of the Government Employees' Pension Fund Law 1996, as well as Rule 20 of the Rules promulgated in terms of that Act. Furthermore, the Government Employee's Pension Fund Members' Guide states clearly that:

> *"Where the employer granted permission for your early retirement your benefits will not be scaled down. However, your employer will pay an additional liability."*

As for the facts, you have access to all the documentation pertaining to same and it clearly appears that the written and transparent procedure that was followed is not tainted by any illegality and cannot warrant the slightest inference of criminal intent.

It is true that Mr Magashula promoted and supported Mr Pillay's request for early retirement. He was afforded a memorandum from the Legal and Policy Division (Mr Vlok Symington) and he followed all procedures to the letter. He sent a memorandum on 12 August 2010 to Accused No 3 who approved. With all due respect, any reasonable employer would under the circumstances have approved. However, even if you doubt the correctness of the Minister's exercise of his discretion, that is still a far cry from any criminal charge, let alone fraud, theft or otherwise.

We are not going to deal with the separate charges. If all the actions referred to *supra* were lawful and untainted with any criminal intent it is unnecessary to analyse any further.

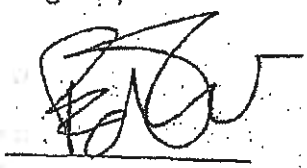
In the light of the foregoing, we humbly submit that neither Mr Magashula, Mr Pillay nor Minister Gordhan did anything untoward, let alone committing a crime.

It is unnecessary to deal with the reappointment of Mr Pillay. This happens daily in various different government departments. No new pension benefits were afforded in

the contract eventually concluded. Mr Pillay had a track record, did not get his new appointment for free, and had to render services for it. His contract could have been terminated with one month's notice, if ever it was required by SARS.

We hope that the foregoing may assist you in taking your final decision in this regard.

Regards,



PJJ DE JAGER SC

Instructed by: Michael Tlney
Tlney Incorporated Attorneys
JOHANNESBURG

"B"

SARS

Memorandum	South African Revenue Service Suid-Afrikaanse Inkomstediens Uphiko lwezimali Ezingenayo eMingizimu Afrika Tirelomatlotlo ya Afrika-Borwa
Legal and Policy Division	Pretoria Head Office 299 Bronkhorst Street, Nieuw Muckleneuk, 0181 P O Box 402, Pretoria, 0001 Telephone (012) 422-4000 E-mail: vsymington@sars.gov.za

TO	COMMISSIONER		
FROM	Vlok Symington	TEL	(012) 422-4929
2009 march 17	2009 March 17	FAX	(012) 422-4952
SUBJECT	EARLY RETIREMENT: MR IVAN PILLAY		

Dear Commissioner,

Background

Mr Ivan Pillay requested me to consider certain elements that form part of his decision to apply for early retirement from the Government Employees Pension Fund (the GEPF). These elements are:

1. His application for early retirement from the GEPF;
2. His application to the Minister of Finance to waive the early retirement penalty; and
3. His request to be appointed on contract after his early retirement from the GEPF.

The technical position

Approached individually, all three elements are technically possible under the rules of the GEPF read together with the employment policies of SARS. Mr Pillay has reached the required age for early retirement, he is entitled to request the Minister to "waive" the early retirement penalty, and no technicality prevents SARS from appointing him on a contract after his retirement from the GEPF.

Financial risk

I am not a registered financial advisor and my views in this document is therefore not intended to be financial advice and should not be construed as such.

Mr Pillay opted for the early retirement package to be paid in the form of a monthly pension and a once-off gratuity. Because of the current global financial turmoil and his personal adversity to risk his choice in favour of a pension and gratuity split is prudent.

However, the financial soundness of his decision to apply for early retirement is dependent on whether the Minister approves the SARS payment of the benefit penalty to the GEPF as well as whether SARS contracts with him for a period of post-retirement employment. This is so because of the relatively young age at which he will be retiring vis-à-vis his projected life expectancy. If the Minister does not approve his request or if SARS does not contract with him after his retirement, the financial risk of his decision will increase substantially and my advice then would be for him to review his application for early retirement and to possibly withdraw it.

Summary

Mr Pillay's application for early retirement should be considered together with his application for the Minister to approve the benefit penalty payment by SARS as well as his request for post retirement contract employment at SARS. If his application is approved as a package the financial risks in the context of his circumstances are probably minimal. However, if the Minister is unable to approve his request relating to the penalty or if SARS is not in a position to contract with him after retirement, then his decision to apply for early retirement should probably altogether be withdrawn.

Kind regards

Vlok Symington

MEDIA ANNOUNCEMENT

By

ADV SHAUN K ABRAHAMS

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

11h00, 31 October 2016: VICTORIA AND GRIFFITHS MXENGE BUILDING, PRETORIA

Good morning!

I would like to acknowledge the presence of:

Dr Silas Ramaite SC, a Deputy National Director of Public Prosecutions;

Adv Thoko Majokweni, an Acting Deputy National Director of Public Prosecutions;

Adv Sibongile Mzinyathi, the Director of Public Prosecutions, North Gauteng;

Dr Torie Pretorius SC, the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit;

Ms Bulelwa Makeke, the Head of Communications;

Adv Luvuyo Mfaku, my Spokesperson;

Members of the media;

Ladies and Gentlemen;

This morning's announcement relates to the review of the decision to prosecute Mr Oupa Magashula, Mr Ivan Pillay and Minister Pravin Gordhan

A: INTRODUCTION

1. On 11 October 2016 I announced the decision of the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit ('PCLU') made in consultation with the Director of Public Prosecutions:

North Gauteng, that Mr Pillay, Mr Magashula and Minister Gordhan must be prosecuted and arraigned on various charges.

2. At the outset of that briefing I alluded to the provisions of section 179(5)(d) of the Constitution, which empowers me as the National Director, when requested, to review a decision to prosecute or not to prosecute:

   (i) after consulting the relevant Director; and,

   (ii) after taking representations, within a period as specified by me, from the accused persons, the complainant and any other person or party whom I consider relevant.

3. When I made the announcement I extended an invitation to Mr Magashula, Mr Pillay and Minister Gordhan to make representations to me as the National Director.

4. This is in line with the provisions of section 179(5)(d) of the Constitution, read with section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 ('the NPA Act'), to review a decision to prosecute and to decide whether to continue or discontinue a prosecution.

5. The receipt of representations and requests to review decisions is a daily occurrence. The NPA receives representations from accused persons and/or their legal representatives in respect of matters in both the lower and High Courts, which are submitted to the Control Prosecutors, Senior Public Prosecutors, Chief Prosecutors, The DPP Offices and/or to Special DPPs. This serves as checks and balances in the criminal justice system. So too do my constitutionally enshrined powers of review.

6. Since my appointment in June 2015 I have reviewed numerous cases. In giving effect to my constitutionally entrenched review powers I have overruled the original decisions of Directors of Public Prosecutions and/or Special Directors to prosecute or to discontinue prosecutions in numerous instances. I have also agreed with the original decisions of Directors of Public Prosecutions and/or Special Directors in many instances.

7. I believe that there is a general public misconception as to my role as the National Director and not a full appreciation of the structure of the National Prosecuting Authority.

8. Whilst I have the power to institute a prosecution, I would only do so in very rare instances. This matter was certainly not one of those rare instances.

9. Thus, if I made a decision to prosecute, it would not be competent for me to review my own decision in terms of the Constitution or the NPA Act.

10. I am vested with and retain the power to review a decision to prosecute after complying with the provisions of the Constitution and the NPA Act as already mentioned.

11. Hence my invitation to make representations if they wished to do so.

12. I have always been mindful of the constitutionally entrenched rights that everyone is equal before the law and everyone has the right to equal protection and benefit of the law.

B. <u>THE DECISION TO PROSECUTE</u>

13. Before I speak on the Review and prior to informing you of my decision, I deem it relevant to first speak of the initial decision to prosecute.

14. The decision by the Head of the PCLU to prosecute Mr Magashula, Mr Pillay and Minister Gordhan on, *inter alia*, charges of fraud are premised on the following brief set of facts:

14.1 Mr Magashula was employed at SARS from 2006 to 2009 as the Head of Human Resources and Corporate Services and as the Commissioner from 2009 to 12 July 2013.

14.2 Mr Pillay joined SARS in 1999. He was the General Manager of the Enforcement & Risk Unit until his appointment as Deputy Commissioner in 2009, in which capacity he served until his resignation with effect from 31 December 2010. He continued to serve as the Deputy Commissioner of SARS on contract until the termination thereof in 2015. He also served as the Acting Commissioner of SARS from 12 July 2013 until the appointment of Mr Tom Moyane in 2015.

14.3 Minister Gordhan served as the Commissioner of SARS from November 1999 to May 2009 and as the Minister of Finance from May 2009 to May 2014 and again from 15 December 2015 to date. From May 2014 to December 2015 Minister Gordhan served as the Cabinet Minister responsible for Co-operative Governance and Traditional Affairs.

December 2008 Memorandum

14.4 Mr Pillay first applied to go on early retirement in December 2008, when a vastly experienced Human Resource Specialist in the employ of SARS was requested to prepare a memorandum for the early retirement of Mr Pillay.

14.5 The memorandum was for the attention of the Commissioner, (who was Mr Gordhan at the time), to recommend to the then Minister to consider approving the early retirement of Mr Pillay in terms of the provisions of Section 16(6)(a) and (b) of the Public Service Act.

14.6 At that stage, the reasons advanced by Mr Pillay to retire early were to the effect that he wished to pursue other interests.

14.7 This memorandum was never approved. Instead, the self-same Specialist received a revised version of the memorandum in October 2009 from the office of the Commissioner, (who was now Mr Magashula), which contained different reasons as to those advanced by Mr Pillay in the original memorandum for the Minister to approve his early retirement.

14.8 The revised memorandum now advanced that Mr Pillay wished to retire early to enable him to provide for his children's education.

14.9 The self-same Specialist raised concerns to Mr Magashula via e-mails dated 8 and 9 October 2009 to the effect that:

(i) In the event the Minister approves Mr Pillay's application on the grounds of personal interests it may create a precedent in terms of which other employees may submit similar requests for early retirement;

(ii) Further, that should Mr Pillay's application be approved, it could technically be construed that SARS contributed approximately R340 000 towards the education of Mr Pillay's children;

(iii) That approving Mr Pillay's request may put both he and the Minister of Finance in a tight spot, especially if Mr Pillay is reappointed in the very same position; and

(iv) That the argument could be advanced that Mr Pillay was able to continue with his present functions as his retirement and reappointment was purely to assist him to provide for his children's education.

14.10 He further confirmed that whilst at SARS, he dealt with two other applications for early retirement with full benefits. Neither of the two were approved as insufficient reasons existed for the Minister to have approved those applications.

14.11 He is largely corroborated by his supervisor, a Remuneration and Employee Services Executive. He along with his supervisor further advised Mr Magashula against continuing with Mr Pillay's early retirement as it was for personal reasons and did not advance SARS' business interests.

14.12 Another SARS official, a Remuneration and Benefits Executive made a statement to the Hawks in which he, *inter alia*, states that after diligently perusing SARS policies he expressed the view that there is no framework that governs SARS' payment of penalties imposed by the GEPF in respect of SARS officials and that issues relating to the retirement of SARS officials' retiring early and the penalty imposed by the GEPF Law are governed by that law.

14.13 During 2009 Mr Pillay successfully purchased pensionable service for the period 28 February 1980 to 27 April 1994, to enhance his

retirement benefits, through the Government Employees Pension Fund ('GEPF').

August 2010 Memorandum

14.14 In August 2010, Mr Pillay, who was 56 years old at the time, submitted separate internal memoranda to Mr Magashula, and to Minister Gordhan, in which he, *inter alia*:

(i) Informed them of his decision to retire early;

(ii) Explained that the decision to retire early is largely informed by his deteriorating medical condition and family responsibilities, which he had suffered as a result of his dedication to his job at SARS;

(iii) Requested to be reappointed in SARS in a different capacity on contract after having taken early retirement;

(iv) Further requested Mr Magashula to recommend to the Minister Gordhan, to approve his early retirement '*subject to the provisions of section 16(6)(d) of the Public Service Act, in terms of which the Minister approves that the penalty imposed*' on his pension benefits as envisaged by Rule 14.3.3(b) of the Government Employment Pension Fund (GEPF) Rules, '*be paid by SARS to the GEPF*' on his behalf.

14.15 It is clear that regard was had to sections 16(6)(a) and (b) of the said Act, which read as follows:

"*(6)(a) An executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years,*

notwithstanding the absence of any reason for dismissal in terms of section 17(2), if sufficient reason exists for the retirement.

(b) If an employee is allowed to so retire, he or she shall, notwithstanding anything to the contrary contained in subsection (4), be deemed to have retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the public service in terms of that subsection."

14.16 It is evident from the aforementioned subsections:

(i) That an executive authority is vested with the discretion to allow an employee to retire early subject to, *inter alia*, the request from the employee and where sufficient reasons exist for such a retirement;

(ii) That should the above criteria be met, an employee will be entitled to such pension as he or she would have been entitled to where the retirement is in terms of the relevant subsection, and in reference to the early retirement age.

14.17 The aforementioned subsection does not waive the requirements of the Government Employees Pension Law of 1996 ('*the GEPL*') and its Rules, nor does it vest the executive with the discretion to wave the requirements of the Government Employees Pension Law and its Rules.

14.18 The Government Employees Pension Law provides for the payment of pensions and other benefits to persons in the

employment of Government, certain bodies and institutions, and to the dependents and nominees of such persons.

14.19 The Government Employees Pension Law further provides for Rules which are binding on Government, The Government Employment Pension Fund ('*GEPF*'), its members, pensioners and their beneficiaries or any person who has a claim against the GEPF.

14.20 Section 2 of the South African Revenue Services Act 34 of 1997 ('*the SARS Act*') establishes SARS as an organ of state within the public administration, but as an institution outside of the public service.

14.21 Section 19 of the SARS Act however reads as follows:

"(1) Subject to the Government Employees' Pension Law, 1996) Proclamation No. 21 of 1996), a person appointed by SARS as an employee –

becomes a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees' Pension Law, 1996; and
is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service..." [My emphasis]

14.22 Hence, the GEPL and its Rules are applicable to persons appointed as SARS employees.

14.23 Mr Pillay was a SARS employee during the period in question, hence the GEPL and its Rules were applicable to his application for retirement.

14.24 Rule 14.3.1 reads as follows:

> *"If a member retires –*
> *(a) ...*
> *(b) before his or her pension-retirement date in terms of the law governing his or her terms and conditions of service;*
> *(c) ...*
> *(d) before his or her pension-retirement date, but not a date prior to the member attaining the age of 55 years: Provided that such a member has the right to retire on that date in terms of the provisions of any act which regulates his or her terms and conditions of employment;*
> *(e) ...*
>
> *Such member shall be entitled to the benefits indicated in rule 14.3.2 or 14.3.3, as the case may be."*

14.25 Rule 14.3.2 is only applicable to members with less than 10 years' pensionable service and finds no application to Mr Pillay's matter as Mr Pillay had in excess of 10 years pensionable service.

14.26 Rule 14.3.3 applies to members with 10 years or more pensionable service, as in Mr Pillay's instance and, *inter alia*, reads that:

> *"(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]

14.27 The reading of Rule 14.3.3(b) is unambiguously clear and concise in that a person in Mr Pillay's position would be subjected to a reduction of pensionable benefits by one third of one percent for each completed month between his or her actual date of retirement and the date of his or her pensionable-date of retirement. In effect, this Rule creates what is commonly referred to as a penalty payable by the employee.

12 AUGUST 2010 MEMORANDUM

14.28 In a memorandum dated 12 August 2010, titled *EARLY RETIREMENT OF DEPUTY COMMISSIONER IVAN PILLAY WITH FULL RETIREMENT BENEFITS*, Mr Magashula requested Minister Gordhan's approval for:

(i) The early retirement of Mr Pillay with full benefits with effect from 1 September 2010, i.e. whereby SARS pays the penalty to the GEPF *'as contemplated in Rule 14.3.3(b) of the Government Employees Pension Law Act 69 of 1996, read with section 19 of the SARS Act and section 16(2A)(a) of the Public Service Act 103 of 1994'*;

(ii) To retain Mr Pillay as Deputy Commissioner of SARS on a three year contract with effect from 1 September 2010;

(iii) Informs Minister Gordhan that Mr Pillay has decided to take early retirement *'for personal reasons'*;

(iv) Motivates that the GEPF had approved in excess of 3000 requests for early retirement from various government departments for staff members to retire before the age of 60 with full benefits and that the former Minister of Finance, (in reference to Mr Trevor Manuel), and Minister Gordhan himself had approved at least five (5) such requests over the past two years; (v) Informs Minister Gordhan that advice was sought from the Acting Director-General of the Department of Public Service and Administration ('DPSA'), who confirmed that there is no restriction on the appointment to the public service or the same department of a person who has retired on an Employee Initiated Severence Package ('EISP'); (vi) Advises Minister Gordhan that the financial implications to SARS would be *'an amount of R1 141 178.11, which SARS will be liable to pay to the GEPF in terms of the provisions of section 17(4) of the GEPF Law, 1996.'*

14.29 Section 16(2A)(a) of the Public Service Act 103 of 1994 (*'the PS Act'*) provides that:

"... an officer, other than a member of the service or an educator or a member of the State Security Agency, shall have the right to retire from the public service on the date on which he or she attains the age of 55 years, or on any date after that." [My emphasis]

14.30 In terms of Section 17(4) of the GEPF Law, 1996:

> *"If any action taken by the employer or if any legislation adopted by Parliament places any additional financial obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be shall pay to the Fund an amount which is required to meet such obligation."* [My emphasis]

14.31 It is evident that Section 17(4) only places a financial encumbrance on the employer or Government in circumstances **where the employer has taken action or where legislation**, as adopted by Parliament, **places any further financial obligations on the GEPF**. [My emphasis]

14.32 It would with respect amount to an absurdity where an employee applies to be released from his her responsibilities to enjoy early retirement where an executive authority exercises his or her discretion to permit such an employee to be released prior to his/her actual date of retirement and the employer or government has to carry the bill (without any criteria having been applied).

14.33 In practice this would mean that all officials who retire early, at their request, would benefit financially in the absence of the employer taking any action.

14.34 The words *'where the employer has taken action'*, it is submitted required some act which would be to the benefit of the department concerned either by way of transformation initiatives or restructuring. It certainly cannot be the mere

authorization by an executive authority of a request by an employee to take early retirement.

14.35 The Minister of the Department of Public Service and Administration ('*DPSA*') issued a '*Determination on the Introduction of an Employee-Initiated Severance Package for the Public Service*' in terms of the provisions of section 3(3)(c) of the Public Service Act, with effect from 1 January 2006 as per DPSA circular 1/16/21 dated 16 January 2006.

14.36 In terms of its scope, the Determination is applicable to all employees appointed in terms of the Public Service Act.

14.37 The purpose of the Determination is to allow employees affected by transformation and restructuring who wish to exit the public service, to apply for an Employee-Initiated Severance Package ('*EISP*').

14.38 In terms of the Determination:

(i) It is only applicable to employees who are affected by transformation and restructuring who may apply voluntarily to the executive authority (or delegate) of his or her department to be discharged from the Public Service;

(ii) The application is subject to the approval of the executive authority;

(iii) The application must be made on an application form marked Annexure A, titled: '*Process Form: Application for Employee-Initiated Severance Package*' which is available from the DPSA website.

14.39 In consideration of the application the executive must as a minimum take the following into account:

(i) The impact of the employee's exit from the department on its service delivery capabilities;

(ii) The employee's competence and suitability for continued employment;

(iii) The manner in which the employee's exit will support the transformation and restructuring of the department;

(iv) The specific reasons for the employee's request;

(v) The ability of the department to finance the costs related to the payment of the severance package (e.g. refunding the GEPF, severance pay, leave pay, etc);

(vi) The impact of the granting of the severance package on the morale of other employees;

(vii) Whether the employee occupies a post on the department's establishment or whether the employee is held additional to the establishment;

(viii) (viii) That the following benefits are payable to employees who are members of the GEPF who have attained the age of 55 years and who have in access of 10 years' service: A gratuity and annuity determined in terms of the formula that applies to the member; Without scaling down of pension benefits in terms of Rile 14.3.3(b) and without an addition to pensionable service in terms of Rule 14.2.4(b).

14.40 In an affidavit by the then Acting Director General ('*DG*') of the Department of Public Service and Administration ('*DPSA*'), he, *inter alia*, states the following:

i) He advised Mr Magashula in relation to the Employee Initiated Severance Package ('*EISP*')and the applicable criteria as previously outlined;

ii) That in respect of Mr Magashula's enquiry whether employees exiting the public service on an EISP can be re-employed into the public service, he advised, generally, *inter alia*, that there was no restriction on the re-employment of such employees;

iii) That he further explained that in the event that the employee concerned left on a Voluntary Severance Package ('VSP'), the employee concerned would only be permitted to be reappointed if the relevant department was unable to recruit suitable candidates, and that the reappointment of such former employee would only be on a fixed term contract limited to a maximum period of three years;

iv) That he, in addition, advised that such fixed term could be further extended for a period of not more than three years.

14.41 It is clear from the above that the reasons advanced by Mr Pillay do not fall within the qualifying criteria of EISP.

14.42 Whilst the memorandum dated 12 August 2010 is not signed by the erstwhile Deputy Minister of Finance, Mr Nhlanhla Nene

('Mr Nene'), Minister Gordhan's approval is only obtained on 18 October 2010.

14.43 As a result, Mr Pillay's early retirement, with full benefits, as approved by Mr Gordhan, was only implemented with effect from 31 December 2010.

14.44 In this regard, Mr Pillay also entered into a five (5) year employment contract with SARS as the Deputy Commissioner of SARS, with effect from 1 January 2011 to 31 December 2015, instead of a three (3) year contract as approved by Minister Gordhan, and instead of in a different capacity.

14.45 In addition, a new employment contract was entered into between Mr Pillay and Mr Gordhan, with effect from 1 April 2014 to 31 December 2018, whereby Mr Pillay would serve as a Deputy Commissioner for SARS for a further period of four (4) years. This is 9 months prior to the initial contract being due to expire and a month before Minister Gordhan was appointed as the Minister of Cooperative Governance and Traditional Affairs. There was no supporting documentation submitted in the ordinary course for Minister Gordhan to apply his mind to the approval of the renewal of the contract.

14.46 This was done contrary to advice from a Remuneration and Employee Services Executive, which was disregarded, including advice on the issue of the renewal of a contract between Minister Gordhan and Mr Pillay in 2014 when there was still a valid contract still in existence.

14.47 In their Warning Statements to the Hawks, both Mr Pillay and Mr Magashula elected to remain silent.

14.48 Minister Gordhan did not subject himself to the taking of a warning statement but did provide his version to the Hawks, through his lawyers, and in which Minister Gordhan stated that he approved Mr Pillay's early retirement with full benefits on the strength of the recommendation by Mr Magashula.

14.49 Minister Gordhan is further recorded to have approved Mr Pillay's early retirement with full benefits, being mindful that Mr Pillay wanted to gain access to his pension fund to finance the education of his children; and that he believed it to be entirely above board; and because he thought it appropriate to recognise the invaluable work Mr Pillay had done in the transformation of SARS since 1995.

REVIEW

15. I now would like to address the review in terms of section 179(5)(d) of the Constitution.

16. On Friday, 14 October 2016, Freedom Under Law ('*FUL*') and the Helen Suzman Foundation ('the *HSF*'), submitted a communication to me through their lawyers in which they requested me to withdraw the charges against Minister Gordhan unconditionally on or before a specified date, failing which they would exercise their right to seek urgent recourse to review and set aside the decision to prosecute Minister Gordhan.

17. On Monday 17 October and Tuesday 18 October 2016, both Mr Magashula and Mr Pillay requested me to review the decision to prosecute them by way of representations to me in terms of section 179(5) of the Constitution through their legal representatives.

18. The gist of Mr Magashula's representation was the following:

(i) He supported the application of Mr Pillay and placed much reliance on the advice of Mr Symington.

(ii) That he had regard to the provisions of sections 16(2A)(a), 16(6)(a) and (b) and 16(4) of the Public Service Act, Section 17(4) of the GEPF Law and Rule 20 of the Rules to the GEPF law.

(iii) That he lacked the requisite criminal intent as he genuinely believed that the aforementioned empowering provisions permitted the authorising of the application by Mr Pillay.

(iv) That Minister Gordhan acted within the scope of the executive discretion extended to him by virtue of the position he holds and the law.

(v) That in the event Minister had exercised his discretion wrongly, it does not amount to criminal intent.

(vi) That there was an e-mail communication between Mr Magashula and the DG, which confirms the engagement between them in relation to Mr Pillay.

19. The gist of Mr Pillay's representations is much the same as that advanced by Mr Magashula. Mr Pillay also produced a memorandum from a Mr Vlok Symington.

20. Minister Gordhan chose not to make representations to me. In a communication dated 18 October 2016, through his lawyers, he aligned himself with the submissions made to me by FUL and the HSF.

21. I am aware of media reports which attribute to Minister Gordhan as his reasons for not making representations, his belief that he could not expect to receive a fair hearing. If these media statements are true, then it is indeed distressing that Minister Gordhan had this perception, which was unfounded. In a letter dated 5 September 2016 from the Head: PCLU, addressed to the legal representative of Minister Gordhan, the latter was, *inter alia*, informed:

(i) That the decision will be made by the Head: PCLU in consultation with the DPP: Pretoria.

(ii) Of the provisions of section 179(5)(d) of the Constitution.

(iii) That it will be premature to invoke reviewing provisions of section 179(5)(d) of the Constitution prior to a decision having been made to prosecute or not.

(iv) That it would be advisable for him to incorporate his further comments, views and version in a warning statement.

22. Mr Pillay and Mr Magashula were accorded a fair and dignified hearing and there is no reason why Minister Gordhan would not have received the same.

23. I also extended an invitation to the Commissioner of SARS, as the complainant, and to the Head of the Hawks as the investigating authority to submit representations to me. Both parties elected not to make any further submissions.

24. I further obtained the views of the prosecuting team and the Acting Special Director.

25. Section 17(4) of the GEPF Rules and the relevant legal prescripts has been addressed above. I have however noted the omission of FUL and the HSF to comment on Rule 14.3.3.(b) of the Rules to the GEPF Law.

26. Rule 20 of the Rules to the GEPF, in so far as it is relevant, obligates the employer and/or Government to pay an annuity and/or a gratuity and/or both. It does not waive the penalty to be paid by the employee or the scaling down of benefits requirement provided for in Rule 14.3.3.b. of the Rules to the GEPF Law.

27. FUL and the HSF also, *inter alia*, place reliance on a memorandum from a SARS Legal and Policy Division employee, Mr Vlok Symington, dated 17 March 2009.

28. This document only came to the attention of the prosecutors for the first time by way of the submissions by FUL and the HSF and is advice to the Commissioner of SARS as a result of Mr Pillay having requested him to consider: (i) His application for early retirement from the GEPF;(ii) His application to the Minister of Finance to waive early retirement penalty; and (iii) His request to be reappointed on contract after his early retirement from the GEPF.

29. Mr Symington, *inter alia*, advised as follows:

(i) Approached individually, all three requests are technically possible under the Rules of the GEPF, read with SARS' employment policies;

(ii) Pillay is entitled to request the Minister to waive the early retirement penalty;

(iii) No technicality prevents SARS from appointing Mr Pillay on contract after his retirement;

(iv) That Mr Pillay's decision to apply for early retirement is dependent on whether the Minister approves that SARS pays the early retirement penalty to the GEPF and that SARS re-employs him on a contract basis after his retirement;

(v) Should the Minister decide not to approve Mr Pillay's request and SARS does not contract Mr Pillay after his retirement that his decision to apply for early retirement be withdrawn altogether.

30. It is clear from the above that if Mr Pillay's requests could not be met, he would withdraw his application to retire early altogether.

31. As a result of the representations by Mr Magashula and Mr Pillay and the submissions by FUL and the HSF I directed further

investigations to be conducted, which I deemed necessary and relevant to assist me in reaching a decision in the matter.

31.1 I, *inter alia*, required the following:

31.1.1 Confirmation from Mr Symington that he is the author of the document submitted by FUL, the HSF and Mr Pillay.

31.1.2 [Mr Symington, who is now employed in the Legal Counsel Division at SARS, submitted an affidavit dated 20 October 2016 in which he amplified his views when he advised the Commissioner in 2009].

31.1.3 An affidavit from SARS clarifying why Mr Pillay's early retirement was processed differently to that of others where early retirement had been refused by the Minister. [a SARS Remuneration and Employee Services Executive submitted a further affidavit dated 25 October 2016 in which she expressed the view that SARS had suffered actual prejudice by the early retirement of Mr Pillay as a result of SARS paying the GEPF penalty which should have been paid by Mr Pillay and Mr Pillay's salary, albeit on contract, from the date of his retirement until he reached the age of sixty (60)].

31.1.4 An affidavit from the GEPF in which it, *inter alia*, explains the anomaly between what is contained on page 34 of its Member's Manual and the provisions of Rule 14.3.3(b) of the GEPF Law Rules; clarification around the circumstances under which an employer and/or executive authority may exercise a discretion to waive the penalty imposed on the employee by Rule 14.3.3(b); and the information around the alleged 3000 approvals for early retirement with full benefits from various government departments. [Two affidavits were obtained from the Chief Executive Officer of the Government Pensions Administration Agency ('*GEPFAA*'), The affidavits were unhelpful to say the least. In this regard, The information around

the 3000 approvals with full benefits could not be supplied. He did however confirm that action taken by an employer places an additional financial obligation on the Fund, which needs to be made good by the employer; The GEPAA processes various exits from the Fund with full benefits, where the employer is liable for the additional liability; There is no contradiction between on page 34 of the Members Guide where approval has been granted by an Executive Authority for early retirement with full benefits]. The affidavits failed to explain Rule 14.3.3(b).

31.1.5 E-mail communications between the Acting DDG of the DPSA and Mr Magashula as alleged by Mr Magashula: [In an email communication dated 23 July 2010, Mr Magashula refers to a discussion the previous day between Mr Gordhan, Mr Govender and himself regarding the early retirement of the Deputy Commissioner of SARS, in reference to Mr Pillay. Mr Magashula asks the following questions in the mail which were raised during their discussion:

(i) Whether there is a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment, with a scaled down responsibility, salary and other conditions of employment?

(ii) Should same be authorised, what would the impact of Cabinet's decision to recognise NSF service at 100% on the retirement benefits of the Deputy Commissioner?

(iii) To indicate how long he expects the process to take and who can do the estimates to assess the impact of the decision on the Deputy Commissioner's retirement which is anticipated to happen in a month's time?

(iv) Whether he has any statistics of how many of early retirement cases without re-engagement have been processed to date?

The Acting DDG responded to the aforementioned e-mail on 3 August 2010 in the following terms:

(i) Employee Initiated Severance Packages ('EISP') are granted to employees that are generally in excess of the organization as a result of a restructuring exercise. It includes changing the content of the job or the abolishment of the post.

(ii) There is no restriction in the appointment to the public service or to the same department on a person who has left on an EISP. Any new appointment will be to a new post with a new set of conditions.

(iii) That he did not have figures on how many persons were reemployed but is aware of a few that were.

(iv) That Cabinet memo 8/2009 recognised full NSF service as pensionable service in terms of the GEPF rules for the Department of Defence personnel.

(v) That DPSA, in conjunction with the Department of Defence and the GEPF, were presently preparing a Cabinet memorandum to extend this decision to cover all public service employees and to approve the funding associated with the recognition of this period as pensionable service.

(vi) That in light of this matter from SARS, there is a need to include other employers outside the public service that are contributing to the GEPF, that the intention is to get this memorandum to Cabinet before the end of August 2010 and that once a decision had been taken, it will be incumbent upon the GEPF to put systems in place to give effect thereto.

(vii) That in the event that the Deputy Commissioner is granted an EISP, his package will be calculated into his current contribution into the GEPF and amended

once the NSF decision has been obtained and implemented.

32. It is evident that Minister Gordhan and Mr Magashula were both uncertain as to whether Mr Pillay requested early retirement with full benefits and his immediate reemployment into SARS could be approved. This much is clear from the engagement with both Mr Symington and the DDG DPSA. In this regard Minister Gordhan in hindsight should have consulted his Deputy Minister of Finance, Mr Nhlanhla Nene who could have provided crucial guidance and clarity.

33. The advice of Symington appears to have largely influenced Mr Pillay and Mr Magashula.

34. I foresee great difficulty in proving the requisite animus.

35. In order to sustain a conviction, it is necessary to prove what is known as *animus*, namely, knowledge of unlawfulness and intention to act unlawfully.

36. In **S v Barketts Transport (Pty) Ltd and Another 1986 (1) 706 (C)**, the Second Appellant had acquired shares in the First Appellant, which possessed a permit, authorising it to convey upholstering materials, carpets, floor mats, curtains, cushion and other soft furnishings. The appellants had been convicted in the Magistrate's Court for contravening section 31(1)(b) of the Road Transportation Act, 74 of 1977 in that they had unlawfully conveyed 302 cartons of yarn, destined for various factories in the Cape Peninsula. Six months before the commission of the offence the Second Appellant had obtained an opinion from his legal advisors to the effect that the conveyance of the yarn fell within the definition of conveyance of upholstering materials and as such was authorised by the permit. The Court found that where an accused places reliance on legal advice or counsel's opinion taken as a precautionary measure in order to obviate a finding of *culpa*, the opinion should relate to a single transaction or act about to be entered into or about to be carried out and not to a course of conduct extending over a considerable time in future. That said, the Court held that the appellants had not acted with the requisite degree of circumspection and lacked the requisite *mens rea*.

37. In **S v Claasens 1992 (2) SACR 434 (T),** the Court noted that it largely depends on the specific circumstances of each case whether or not a client should place a question mark over the legal advice having been obtained. In this matter the appellant was convicted in a Regional Court on 16 counts of contravening section 2(10) of the Usury Act and sentenced. In an appeal against the conviction, it appeared that the appellant, a financial consultant and broker, had been unaware of the provisions of section 2(10). It appeared further that he had consulted his attorney and an advocate and had discussed his business with them. He had also had his client mandate form checked by them when he had started his business. He had however never instructed his attorney to investigate the provisions of the Usury Act. The appellant had been informed by his attorney that there could be no legal problems in the way he conducted his business. He had never been informed by any of the lawyers he had consulted that he was contravening the Act. The Court ultimately held that the appellant had not exceeded the bounds of reasonableness and that he had not been negligent under the circumstances.

38. As a result and in the absence of any other evidence to the contrary, I am satisfied that Mr Magashula, Mr Pillay and Minister Gordhan did not have the requisite intention to act unlawfully.

39. I am of the view that this matter could easily have been clarified had there been proper engagement and cooperation between the Hawks and Mr Magashula, Mr Pillay and Minister Gordhan.

40. In the circumstances I have decided to overrule the decision to prosecute Mr Magashula, Mr Pillay and Minister Gordhan on the charges listed in the summonses.

41. As such, I have directed the summonses to be withdrawn with immediate effect and there would thus no longer be any need for Mr Magashula, Mr Pillay and Minister Gordhan to appear in court in respect of the charges listed in the aforementioned summonses.

Thank you

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no. 23576/2015

DELETE WHICHEVER IS NOT APPLICABLE
1. REPORTABLE: YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED

DATE SIGNATURE

GAUTENG DIVISION, PRETORIA

IN THE MATTER BETWEEN:

THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA Applicant

and

NOMCGOBO JIBA 1st Respondent

LAWRENCE SITHEMBISO MRWEBI 2ND Respondent

SIBONGILE MZIYATHI 3RD Respondent

JUDGMENT

LEGODI J:

HEARD ON: 30 May - 1 June 2016

JUDGMENT HANDED DOWN ON: 14 September 2016

Admission of Advocates Act. Counsel for GCB was quizzed as to why the agreement and expenditure thereof if any should not be referred to the Audit-General to investigate possible contraventions of Departmental Financial Instruction (DFI) and the provisions of Public Finance Management Act. To this enquiry, the court was assured by Adv. Burger SC on behalf GCB that no cent of public funds was spent or is intended to be spent or recouped by GCB for having instituted the present proceedings based on the alleged agreement with the NPA. Consequently, the intended referral to the Audit-General will not be made. I now turn to deal with the complaints raised as the basis for the present proceedings.

BOOYSEN CASE AND COMPLAINTS AGAINST JIBA IN CONNECTION THERETO

[41] '...Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of section 35(5) of the Constitution. Allowing such litigation will often place prosecutor between a rock and a hard place. They must, on the one hand, resist preliminary challenges to investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure that prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court deciding the pertinent issues is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard; however. The courts' doors should never be completely closed to litigants... But in ordinary course of events, and where the purpose of the litigation appears merely to be avoidance of the application of section 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interest of all concerned. If that approach is generally followed the state would be sufficiently constrained from acting unlawfully by the application of section 35(5) and by the possibility of civil and criminal liability'[16].

[42] The office of the National Director of Public Prosecutions is closely related to the functions of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice[17]. Courts are not overly eager to limit or interfere with the legitimate exercise of prosecuting authority. However, a prosecuting authority's

[16] Thint (Pty) Ltd v National Director of Public Prosecution & Others 2009 (1) SA 1 CC para 64.
[17] Democratic Alliance V President of the Republic of South Africa & Others 2013(1) SA 248 (CC) at [26]

discretion is not immune from the scrutiny of a court which can intervene where such discretion is improperly exercised[18].

[43] Courts have on rare occasions expressed their disapproval of the fact that a prosecution was instituted[19]. Courts do not interfere with the prosecuting authority's bona fide exercise of its discretion because prosecuting authority has the power to decide to prosecute and, once the accused is on trial, he or she will have the fullest opportunity to put his defence to the court, cross-examine prosecution witnesses and to reply on his right not to be convicted unless the prosecution can prove his guilt beyond reasonable based on admissible evidence and prevented in terms of a regular procedure[20]. Courts can intervene where mala fide is alleged, or where it is alleged that the prosecuting authority never applied its mind to the matter or acted from ulterior motive [21]. (My emphasis).

[44] The complaints against Jiba, in her capacity as the then Acting National Director of Public Prosecutions in Booysen case, arose from the exercise of her statutory power to authorise the charging of Major-General Booysen (Booysen) with contravention of section 2(1) (e) and (f) of the Prevention of Organised Crimes Act no.121 of 1998 ("POCA"). A person shall only be charged with committing an offence contemplated in subsection (1) of section 2 POCA if prosecution thereof is authorised in writing by the National Director[22]. Any person who whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity, manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participated in the conduct, directly or indirectly, of such enterprise affairs through a pattern of racketeering activities shall be guilty of an offence[23].

[45] On 18 August 2012 Jiba, Acting as a National Director of Public Prosecutions, issued written authorisation to have Booysen charged with contraventions of section 2(1) (e) and (f) referred to in paragraph 44 above. Booysen successfully challenged the

---

[18] Minister of Police & Another V Du Plessis 2014 (1) SACR 217 (SCA) at [31]
[19] S v F 1989 (1) SA 460 (ZH), S v Bester 1971 (4) SA 281(T)
[20] Commentary on the Criminal Procedure Act by Du Tiot, De Jager, Paizes, Skeen and Van Der Merwe at 1-29.
[21] Mitchell V Attorney-General, Natal 1992 (2) SACR 68 (N)
[22] Section 2(4) of POCA
[23] Paragraph (e) and (f) of the section 2(1) of POCA.

authorisation in Kwa-Zulu Natal Division before Govern J. In his replying affidavit, before Govern J, Booysen stated that Jiba was: *"mendacious" when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the 'docket' before making the impugned decisions. She could not have considered the statements referred to in her answering affidavit. She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision".*

[46] What is quoted above is the gist of the complaint against Jiba in the handling of Booysen case. In its founding papers, GCB articulates the conduct complained of as follows:

> *"On the evidence of her conduct in the Booysen matter as (with respect, correctly) described by Govern J in this judgment, Jiba signally failed to comply with the NPA's Code of Conduct. More pertinent to this application, the statements made by Jiba under oath is seeking to justify her decision to issue the POCA authorisations, were evidently untruthful. As such her conduct indicates that she is not a fit and proper person to practice as an advocate."*

[47] These averments seem to be based on the finding by Govern J which inter alia, included:

> *"[30] This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets. [Jiba] says that they are all statements made under oath. [Jiba] says in addition that they implicate Mr Booysen in one or more of the offences in question".*

[48] Then in paragraphs 31 and 34 of his judgment, Govern J made adverse remarks against Jiba as follows:

> *"[31] The submissions of Mr Booysen in his replying affidavit can be summarised as follows: two of the annexures are sworn statements made under the name of one Colonel Alyer. They are annexures NJ2 and NJ4 respectively. Mr Booysen described these statements which concern 'office politics and submit that they in no way implicate him in any of the offences with which he has been charged. The second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the first impugned decision was taken. The documents referred to as a statement by Mr Danikas, annexure NJ3 is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it could be attributed to the named person and even if it was sworn statement as claimed by the NDPP, the contents do not cover the period clearly in the indictment except for one event which does not relate to Mr Booysen...*

[34] *Mr Booyen was clearly within his rights to deal with in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is after all an officer of the court, she must be taken to know how important it is to ensure that her affidavit is entirely accurate. If is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and if appropriate correct any inaccuracies. Despite this, the invitation of Mr Booysen was not taken by the NDPP by way of a request or application to deliver further affidavit. In response to Mr Booysen's assertion mendacity on her part, there is deafening silence. In such circumstances the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her own version, the NDPP did not have before her annexures 4 at the time. In addition it is clear that annexure NJ3 is not a sworn statement. Most significantly the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offence in question..."*

[49] Before dealing with information placed before Jiba for written authorisation in terms of section 2(1) of POCA, it is important to reflect whether the invitation by Booysen and the adverse remarks by Govern J were based on correct evaluation and understanding of Jiba's answering affidavit. The challenge or invitation by Booysen to Jiba, was contained in the replying affidavit and at the risk of prolonging this judgment, I repeat the contents thereof in part:

> *"...She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision."*

[50] The invitation was made after having made allegations of 'mendacity' in the same paragraph with reference to paragraph 21 of Jiba's answering affidavit in Booyesen matter and because of the relevance thereto, paragraphs 16.6, 16.7 and 17 of Jiba's answering affidavit in that case are repeated hereunder:

> *"16.6 The information under oath which was placed before me also indicated that the applicant knew or ought to have known that his subordinates were killing suspects as aforesaid instead of arresting them.*
>
> *16.7 The information further revealed that unlawful activities of killing suspects and\or civilians were, in certain instances motivated by the Applicant's and members of his Unit's desire to enrich themselves by means of State monetary award and\or*

certificates for excellent performance. In this regard, I annex a copy of an example of such a monetary award claim document as "NJ1" in which inter alia, the Applicant is recommended for such an award resulting from the death of suspects.

17. *Particular reference is made in this regard to the statement made by Colonel Rajendran Sanjeevi, Mr Aris Danikas and Mr Ndlondlo from which it is apparent that the applicant is well aware of the information that the Respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the Applicant) for the instrumental part that he played in these crimes. Additionally, Mr Danikas has revealed some of the information that he has provided to the Respondents and to the press and even posted video footage thereof on You-Tube. I annex copies of these statements as NJ2, NJ3, NJ4 and NJ5, respectively."*

[51] Having regard to what is quoted above, it does not seem the statement: *"Jiba says that they are all statements made under oath"*, is correct. Nowhere in Jiba's answering affidavit did she make such a statement, neither did she say any of annexures, NJ2, NJ3, NJ4, and NJ5 were under oath. 'Under oath' statements or information were made only in paragraphs 16 and 16.6 of the answering affidavit without suggesting that all of the annexures referred to in paragraph 17 of the answering affidavit in Booysen matter were made under oath. Therefore the statement: '*The documents referred to as a statement by Mr Danikas, annexure NJ3, is not a sworn statement*', as stated in paragraph 31 of Govern J's judgment, has to be seen in context insofar as it was understood that Jiba averred that NJ3 was a sworn statement. The truth is, she never said NJ3 was a sworn statement and it could not reasonably have been so inferred particularly reading in the context of paragraph 16.7 of her answering affidavit in Booysen case quoted in paragraph 50 above.

[52] The fact that Jiba did not avail herself to the invitation to deal with the allegation of being "mendacious", meaning "not telling the truth", should also be seen in context. The allegation was made in the replying affidavit. This too, Govern J was mindful of. For the purpose of these proceedings, the criticism by Govern J should be seen in the context of what Jiba now has to say in these proceedings.

[53] When it was discovered that Booysen has raised certain issues in his replying affidavit, the prosecution team felt that it needed to respond thereto. On 14 August 2013 a meeting of the prosecution team was held. Subsequent to the meeting, a

memorandum was prepared and forwarded to the defence team led by Hodes SC, in terms of which it was expected that supplementary affidavit would be filed to explain the criticism against Jiba with regards to the annexures. On 19 August 2013 an email by Adv Mosing of NPA was sent to Adv Chauke Director of Public Prosecutions Johannesburg, enquiring what progress had been made with regard to filing of further affidavit to deal with Booysen's allegations. Subsequently, Jiba was advised by Adv. Mosing that counsel had indicated that no further actions were necessary.

[54] Based on the explanation above, it is clear that Jiba did not ignore the serious allegations of "mendacious" made by Booysen. By seeking to file further affidavit to explain the annexures after the replying affidavit was filed, is a clear indication that she was mindful of the need 'to explain and correct any inaccuracies' created by Booysen in his replying affidavit. Therefore the statement: '*Despite this, the invitation by Mr Booysen was not taken up by the NDPP by way of a request or application to deliver a further affidavit, in response to Mr Booysen's ascertain of mendacity on her part, there is a deafening silence*', made by Govern J in paragraph 34 of his judgment ought to be seen in the context of what is explained in paragraph 53 above.

[55] Similarly, the statement that '*as regards the inaccuracies, the NDPP referring to Jiba), is after all an officer of the court, she must be taken to know how important it is to ensure that her affidavit is entirely accurate...*', should be seen in the context of what is stated in paragraph 53, but even most importantly, in the context of her explanation now offered in the present proceedings.

[56] On 17 August 2012 Jiba approved the application for authorisation in terms of section 2(4) of POCA for contravention by Booysen of section 2(1)(e) and (f) of POCA. The provisions of section 2(1) (e) and (f) were referred to in paragraph 44 of this judgment. The information and advice that was placed before Jiba for the purpose of granting or refusing authorisation was prepared and compiled by Adv. Raymond K Mthenjwa and Adv. Gladstone Sello Maema, both deputy directors of public prosecutions, Adv Anthony Mosing, a senior deputy director of public prosecutions and the head of the special Projects Division, who acted as the liaison between Jiba and the prosecuting team.

[57] At the time Jiba deposed to the answering affidavit in Booysen's matter, the facts and the evidence against Booysen had been presented to her on many occasions and

she was acquainted with the case against Booysen. In her affidavit during proceedings before Govern J she referred to annexure NJ5, being the statement of Mr Ndlodlo and Annexure 6 being the statement of Booysen. These annexures apparently did not form part of the papers before Govern J and Jiba was not aware why that was not done. I revert to the essence of annexures NJ5 and NJ6 later when dealing with whether Jiba had information implicating Booysen when she issued the authorisation on 17 August 2012. NJ3 was the statement of Ari Danikas, which was obtained round about 18 April 2012 by General Mabula who led the Hawks investigation team against Booysen.. The drafted statement of Danikas was handed over to the prosecution team during June 2012 and formed part of the information she considered in authorising the prosecution of Booysen. Danikas was a police reservist in the Durban Organised Crime Unit based in Carto Manor and was at that time in Greece. He had security concerns and was unwilling to come on his own to South Africa. On or before 11 July 2012 Adv Maema asked General Mabula to leave the statement unsigned so that the information process outlined in the mutual legal assistance legislation, that is, sections 2 and 3 of International Cooperation in Criminal Matters Act 75 of 1996 be followed to formalise the statement, although the witness was willing to have it signed at the South African embassy. The prosecution was confident that the statement would ultimately be signed through the process outlined as contemplated in Act 75 of 1996, but it formed the basis of the briefings to be considered by her in issuing the authorisation. However, the process of signing the statement could not be finalised since the incumbent (Mr Mxolise Ntasana) at the time of deposing to the answering affidavit in the present proceedings, had instructed to halt the process.

[58] Whilst the statement in question did not relate to the specific incident covered in the indictment, it was however intended to corroborate the evidence in possession of the prosecution team that Booysen was involved in the various activities giving rise to the charges against him of similar facts evidence which is admissible in racketeering prosecutions.

[59] An explanation stated above is offered in these proceedings to set the record straight. Therefore the statement, *'the document referred to as a statement by Mr Danikas annexure NJ3... is not even signed by anyone. It is not dated. Even if it can be attributed to the named person and even if it was sworn statement as claimed by the NDPP the contents do not cover the period dealt with in the indictment except for one event which does not relate to Mr Booysen'*, as

stated by Govern J ought to be seen in the context of the explanation given by Jiba in these proceedings and the fact that Jiba never said annexure NJ3 was a sworn statement as stated earlier in this judgment. I need to caution. I should not be understood as seeking to review or upset Govern J's judgment. At the time, he did not have Jiba's responses as this court now has.

[60] Regarding the question how Jiba could have taken into account information on oath that objectively did not exist at the time the authorisation was made, the explanation by Jiba in these proceedings is as follows:

> *"217. There were also two statements by Colonel Aiger (reference to as Annexure NJ2 and NJ4). One was taken on 3 August 2012 setting out Booysen's managerial responsibilities, participation and interferences in the activities of a section of Durban Organised Crime Unit. The statement was obtained before 17 August 2012, being the date on which the authorities were granted by me. A second statement of Colonel Aiger was taken on 31 August 2012 following a consultation with the prosecution team during early July 2012. However the content of the statement was information already relayed to the prosecution team by Colonel Aiger at the consultation."*

[61] Therefore the statement: '*The second of these in addition to not implicating him in any of the offences in question, was deposed to on 31 April 2012, some two weeks after the first impugned decision was taken*', in paragraph 31 of Govern J's judgment, inasmuch as GCB seeks to rely on it for the complaint levelled against Jiba, should be considered in the light of explanation quoted in paragraph 60 above. I am unable to find any conduct on the part of Jiba that justifies an application contemplated in section 7 of the Admission of Advocates Act.

[62] As far as the allegation of lack of information implicating Booysen is concerned, an understanding of the applicable legislature framework, what was placed before Jiba and the core function of the prosecuting authority is necessary. The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated in subsection (2) of section 2 of the Act notwithstanding that such evidence might otherwise be inadmissible, provided that such

evidence would not render a trial unfair[24]. This should be seen in the context of the Preamble under POCA which inter alia, reads:

> *"AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular case, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of and related conduct in connection with enterprises which are involved in the pattern of racketeering activity.*
>
> *AND WHEREBY THE SOUTH AFRICAN common law and statutory law fail to deal effectively with organised crimes ... criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime ... and criminal gang activities.*
>
> *AND WHEREAS pervasive presence of criminal gangs in many communities is harmful to well-being of these communities, it is necessary to criminalise participation in or promotion of criminal activities."*

[63] In my view the provisions of section 2(1) (e) and (f) referred to in paragraph 44 of this judgment are meant for the criminalisation of such activities. The point I am making is this: Courts for the purpose of an exercise of its discretion in terms of section 2(2) referred to in paragraph [62] of this judgment, may rely on hearsay evidence, information and or documentation collected by the police and presented to it by the prosecution. If that is so, and courts are entitled to have regard to hearsay evidence during trial, so too should the National Director of Public Prosecutions (Jiba in Booysen's case) be entitled to rely on hearsay and similar facts evidence for the purpose of authorisation as contemplated in subsection (4) of section 2 of POCA. Otherwise, pervasive presence of criminal gangs will continue to rule with impunity and fear in many of our communities and resultantly pose harm to the well-being of many communities.

[64] As I said, one needs to be careful not to be understood as upsetting Govern J's judgment for having reviewed Jiba's decision to prosecute Booysen. That is not an issue before this court. The issue however is whether in granting authorisation in terms of section 2(4), Jiba was mala fide or had ulterior motive, in which event, the requirements of "*fit and proper person*" to remain on a roll of Advocates becomes relevant. For this purpose, further provisions of POCA are necessary to consider, also taking into account offences under section 2(1) (e) and (f).

---

[24] See section 2 (2) of POCA

[65] 'Pattern of racketeering activity' means 'the planned, on-going, continues or repeated participation or involvement in any offence referred to in Schedule 1 and included at least two offences referred to in Schedule 1'. On the other hand, "enterprise" 'includes any individual partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact'[25].

[66] The essence of the information before Jiba, can be summed up as follows: In addition to what is stated in paragraphs 56, 57 and 60 of this judgment, Booysen was the head of Carto Manor Organised Crime Unit in the South African Police Services. Members of the police in his unit and under his command had allegedly committed crimes of serious nature including murders against suspects who were sometimes framed in the commission of offences. Booysen knew, approved and or ought to have known of the commission of these offences. In reward to the members' unlawful activities, Booysen motivated for incentive of R10 000.00 for each of the 26 members of the Carto Manor Crime Unit including Booysen himself. Booysen was also commended for outstanding services rendered in that he 'was part of a team, who through their commitment and dedication, arrested several crime and dangerous suspects for the murder of a police officer'.

[67] I cannot find any mala fides and or ulterior motive in the authorisation by Jiba as contemplated in POCA. POCA is like a cry out loud for declaration of war against serious, continuous and organised crimes. That needs specialised investigation and prosecution. Most importantly, POCA requires the freedom and space to be given to the members of the prosecuting authority in the exercise of their legislative power to investigate through members of their Investigating Directorate and under the watchful eye of a special director so appointed to prosecute without fear, favour and prejudice those implicated in the commission of serious crimes. Anything short of this, or anything which tends to impede on this constitutional and legislative imperative, for example, hauling Jiba to the proceedings in terms of Section 7 of the Admission of Advocates Act, ought to be based on very cogent, serious and exceptional circumstances.

[68] You do not want members of the prosecution authority to unduly watch their backs for fear of being dismissed or removed from the roll of advocates every time when they make mistakes in prosecuting and presenting cases in court, or every time when an

[25] See definition under Section 1 of POCA

application for authorisation is made in terms of section 2(4) of POCA. An overriding factor for them for consideration should be to adhere to the rule of law and the Constitution. It suffices for now to conclude on Booysen matter by stating that no case has been made for removal or suspension from the roll of advocates. I now turn to deal with the other matter and basis of complaints thereto against Jiba.

SPY TAPES CASE

[69] The listening of telephone conversation recorded on tapes between Bulelani Nqcuka, the then National Director of Public Prosecutions and Mr McCarthy, the then Director of Public Persecutions for Durban and withdrawal on 1 April 2009 of several of criminal charges against Mr Jacob Zuma, (currently the President of the Republic of South Africa), became to be known in South Africa as a "Spy tape case." It was a case instituted by Democratic Alliance Party against the National Prosecuting Authority in terms of which the latter's decision to withdraw several charges against Mr Zuma was challenged. It is the handling of that case by Jiba in her capacity as the then Acting National Director of Public Prosecutions which forms the basis of the application and dispute in these proceedings. The case in question is also referred to in these proceedings as a "Spy tapes case."

[71] On 6 April 2009, the then acting National Director of Public Prosecutions, Adv. Mokotedi Mpshe, after having listened to the conversation aforesaid recorded on tape publicly announced the withdrawal of corruption and other several related charges against Mr Zuma.

[72] During April 2009 and subsequent to the withdrawal of the charges, the Democratic Alliance (DA), a registered political party and official opposition in South African national parliament instituted review proceedings in the North Gauteng High Court for an order reviewing, correcting and setting aside the decision to discontinue the prosecution against Mr Zuma and declaring the decision to be inconsistent with the Constitution of the Republic of South Africa. DA further required Mr Zuma and NPA to deliver to the registrar of the High Court, in terms of rule 53(1) of the Uniform Rules, the record on which the impugned decision was based, which included representations made by Mr Zuma for the withdrawal of the charges. The prosecuting authority, as the

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 87643 / 16

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Appellant
And	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SHAUN ABRAHAMS	Second Respondent
DR JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

FOURTH RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned

SIBONGILE MZINYATHI

S.M

do hereby state under oath that:

1. I am the Director of Public Prosecutions for the Gauteng Division (Pretoria) of the High Court of South Africa.

2. The facts contained in this affidavit are to the best of my knowledge true and correct, and within my personal knowledge, unless stated or indicated otherwise by the context.

3. If I express a legal opinion, I do so on the advice of my legal representatives, even though I am a lawyer myself. Where I respond to any allegation by indicating that I note the contents of the paragraphs in which the allegations are made, I mean to be understood as essentially saying that I neither deny nor admit the allegations made.

4. In any event, as will be clear in the course of this affidavit, I have taken a particular view of the allegations that are made against me, which is to deny that I have done anything warranting the relief the Applicants seek against me. To the extent, therefore, that anything I note is inconsistent with the tenor of my defence against the allegations made against me, to that extent, I must be understood to deny them.

5. The prayers applicable to me in the Notice of Motion are paragraphs 1.5; 1.6; 4; 5 and 6. I note that paragraph 1.6 of the Notice of Motion refers to *"the sixth respondent"*, which I accept might be an error. There is no sixth respondent in

these proceedings and the paragraph's context indicates that it clearly refers to me.

6. I am opposing the application brought against me on a number of grounds which I set out below. It is my view that the application against me is founded on an incorrect factual analysis of available evidence, - largely because, by and large, the Applicants rely, unduly, on unsubstantiated media reports and fanciful allegations, as well as in- vogue catch phrases like "capture" of the National Treasury, and so on, - all intended to create agitational atmosphere. In the end, as will be shown, on a closer examination of the facts and the law, the Applicants' prayers have no basis in fact and fact that does

7. Besides, the call by the Applicants upon the President to suspend me in circumstances where the President has not consulted me, and/or has not called upon me to make representations to him as to why, in light of allegations made by the Applicants against me, he should not suspend me, cannot be correct in law, due regard being had to rights that I solemnly declare I enjoy in terms of our constitutional order, one of which is the right to be heard before any decision which is detrimental to my interests, - like a suspension - is taken against me.

8. My suspension is a drastic step that would be taken by anyone, even by the President, considering that suspension, in and of itself has reputational connotations. Further, to be suspended from my current position would entail a drastic interference with my conditions of employment. A suspension without me having been given an opportunity to make representations would go against the grain of any tenets of our labour law regime.

S.M

9. Whist it is arguably so that when the President acts in terms of section 12 (6), he exercises executive power, and that his decision does not constitute administrative action, our constitutional order clearly militates against any decision, even by the President, that would adversely affect the interests of anyone against whom that decision is made, if that person has not been given an opportunity to be heard.

10. This was a basic tenet of our law of natural justice even in pre-Constitution days, and was founded on a very fair basis. I humbly aver that it is today, even more so a cornerstone of our law which is based on the values of fairness, freedom, equality and dignity, as foundational to our supreme law of the land, the Constitution, 108 of 1996, as amended.

11. I reiterate that at the time of deposing to this affidavit I have not received any correspondence from the President. I have not been asked to make any representations to him as to why the President should not suspend me in light of allegations made to him about me by the Applicants.

12. I do not believe that the President wants to deny me an opportunity to be heard. On the contrary, I believe the reason the President has not asked me to make representations is the unseemly haste with which this application is brought.

13. The application is an abuse of this Court's process, and this Honourable Court, respectfully submitted, should visit this ostentatious conduct of the Applicants, largely aimed at whipping up public opinion wrongly, with an appropriate order of costs.

J.M

14. For these reasons, I am unable to agree with the Applicants that the President has taken a decision not to suspend me, or must be deemed to have taken a decision not to suspend me. In my humble and considered opinion, the President is being stampeded, unreasonably, under immense pressure, and under threat of this ill-advised litigation, to take a decision without even affording me an opportunity to be heard. That cannot be right.

15. Indeed, it would be unlawful for him to have taken a decision to suspend me without giving me an opportunity to be heard.

16. I therefore humbly plead with the Honourable Court not to be subjected by the Applicants into earning for itself the dubious distinction of being the first court in our constitutional order, to grant Applicants like these, relief that compels the President, in these circumstances, to suspend me when I have not been given an opportunity to be heard. Legal argument in this regard will be advanced at the hearing of the application.

17. I also oppose the hearing of the matter on an urgent basis. In my view the founding affidavit does not set forth explicitly the circumstances which Applicants aver render the matter urgent. Most importantly, and which is a requirement for hearing of a matter on an urgent basis, the Applicants do not state whether they will not be afforded substantial redress at a hearing in due course. Legal arguments will be presented by my legal representatives on this aspect at the hearing.

18. Before I proceed, I wish to point out that paragraph 36 of the Founding Affidavit alleges that my place of business is Victoria and Griffiths Mxenge

S.M

Building, 123 Westlake Avenue, Weaving Park, Silverton, Pretoria. This is not true.

19. My place of business is at the Office of the Director of Public Prosecutions situated at 28 Church Square, Pretoria. I mention this in the context of the Applicants alleging that they will serve papers at Victoria Griffiths Mxenge Building, and electronically at the various e-mail addresses listed in par 36 of the Founding Affidavit. None of the listed e-mails addresses is mine or that of anybody in my office.

20. I only received the properly issued papers on 10 November 2016. Effectively, this gave me very little time for me to engage in the various internal administrative processes to have counsel appointed on my behalf. Consequently the State Attorney's Office was only advised to instruct counsel by e-mail shortly after 15h00 on the 11 November 2016.

21. I submit that the alleged urgency of the matter leaves me with very little time to engage in detail in all the factual allegations relating to me in the Founding Affidavit. I reserve the right to supplement this answering affidavit.

22. Par 126 of the Founding Affidavit alleges that the allegations in relation to Second Respondent, which constitute the bulk of the Founding Affidavit, apply ***"with equal force"*** to me. This is denied as factually incorrect, out of context, irrelevant and speculative.

23. It is also legally wrong to allege that all allegations against Second Respondent apply ***"with equal force"*** to me. This legally untenable allegation

S.M

would mean that I am vicariously liable for the Second Respondent's actions about which there are complaints by Applicants in the Founding Affidavit.

24. Against that backdrop, I now proceed to address the allegations in the founding affidavit ***seriatim***, and will use the same headings as that followed by the Applicants, to the extent necessary.

Ad Par 1

25. I have no knowledge of the contents of this paragraph.

Ad Par 2

26. I note that the deponent alleges that he is authorised to depose to this affidavit. However there is no copy of any document authorising him to depose on behalf of both the Applicants.

Ad Par 3

27. I dispute that the facts alleged by the deponent are within his personal knowledge. As it appears throughout the Founding Affidavit, the deponent, on behalf of the Applicants, relies on media stories / publications and various perceptions which he alludes to.

28. The contention that where facts are not within the personal knowledge of the deponent, reference is made to Mr WJ Timm is of no help at all. Mr WJ Timm's confirmatory affidavit confirms the contents of the Founding Affidavit

S.M

insofar as it relates to him and Webber Wentzel. There is no specific reference to Mr WJ Timm in the Founding Affidavit. Consequently I do not know what Mr WJ Timm confirms.

Ad Par 4

29. I take note of the contents of this paragraph.

INTRODUCTION

Ad Par 5

30. I take note of this paragraph's contents. In the press conference of the 11 October 2016 I said nothing. I fail to understand how what was said by Second Respondent in that Press Conference would apply ***"with equal force"*** to me.

Ad Par 6

31. I have no knowledge of the prior correspondence referred to in this paragraph, and I deny the rest of the contents of this paragraph if any of the consequences are attributed to me.

Ad Par 7

J.M

32. In my view the charges were sustainable in law, as will be fully explained in the following paragraphs where I deal with the consultation process. I deny the rest of the contents of this paragraph in as far as they are alleged to apply, **with equal force,** to me.

Ad Par 8 – 10

33. I note the contents of this paragraph. I refer the above Honourable Court to paragraphs 3 and 4 above.

Ad Par 11 - 12

34. The contents of these paragraphs are denied. There is no decision that I took that leads to any conclusion that I am incompetent and not fit to hold office, and / or that I did not act independently or that I am beholden to others, and that I am acting contrary to the mandate of the NPA in order to promote and further my or others' ulterior purposes.

35. In line with the general sensationalist tone of the averments peppering the length and breadth of the Founding Affidavit, all of the emotive language used in these paragraphs is, as I indicated earlier, intended to create a certain atmosphere. It contributes nothing to what this Court is entitled to be given by way of appropriate evidence, in order for it to come to a just and equitable decision in making up its mind as to whether it should grant the relief sought

S.M

or not. The allegations, stated as hyperboles, are unhelpful, respectfully submitted.

Ad Par 13 - 15

36. The contents of this paragraph are denied to the extent of their inconsistency with my defence in this affidavit.

Ad Par 16 - 18

37. I deny that I acted recklessly. I deny that I acted with any ulterior motive. I deny that I acted with wanton disregard for the law. I deny that I am incompetent, unfit and improper for office. I also deny that I acted with any political interference.

Ad Par 19

38. I deny that I failed in my duties. I deny that I have to resign. I deny that there is ***incontrovertible*** evidence that illustrates that I misconducted myself. I have tried, with difficulty, and in vain, to find in what way a claim can be made that there is "incontrovertible evidence" that I have misconducted myself. I solemnly declare that there is no evidence, let alone "incontrovertible evidence" other than ill-advised innuendos, demonstrated in this paragraph that I have misconducted myself.

Ad Par 20

39. The contents of this paragraph are denied. Despite the flowery language of this paragraph (and the rest of the Founding Affidavit) the fact of the matter is that the Applicants are asking the court to speculate about a presumed risk allegedly posed.

40. The fact of the matter is that the accused were issued with summons to appear in court and subsequently the charges were withdrawn because of, ***inter alia***, representations made by some of the accused.

41. Such a process is usual in the NPA, and what happened in this case should not be regarded as a reckless process because of the personalities involved. That would fly in the face of the constitutional imperative that all persons are equal before the law.

42. Furthermore as will be demonstrated below, as Director of Public Prosecutions, the bulk of my work and my mandate (and that of the NPA) is not constituted by consultation with Special Directors. In terms of Section 20 of the National Prosecuting Authority Act 32 of 1998 the bulk of my work is to institute and conduct criminal prosecutions in the Gauteng Division (Pretoria) for which I am appointed as Director of Public Prosecutions.

Ad Par 21

S.M

43. I do not know of any new or threats of new charges against Minister Gordhan.

Ad Par 22 – 23

44. I deny that I misused power or that the Republic must be protected from me.

Ad Par 24

45. I confirm that as Director of Public Prosecutions I make dozens of prosecutorial decisions. I deny that I am a proven severe threat to the economy of the Republic. I repeat that I know of no further charges against Min Gordhan.

Ad Par 25

46. I deny that my office has been abused or unlawfully compromised. I deny that any of my actions indicate my unfitness to hold office, or that my actions contribute to the perception of the Applicants that the integrity of the NPA is compromised.

Ad Par 26

47. I note the contents of this paragraph.

Ad Par 27 – 28

48. I deny that there are jurisdictional facts or that there are appropriate circumstances for the First Respondent to suspend me and institute a disciplinary enquiry.

Ad Par 29 - 35

49. I note the contents of these paragraphs. However, I specifically deny that the NPA, in as far as my actions in relation to this application, has acted unlawfully, irrationally and contrary to its mandate as the law enforcement body tasked with the prosecution of crimes in South Africa.

Ad Par 36

50. I deny that the Applicants have justified that this matter must be heard as one of urgency. In fact, I have been told, and I verily believe it, that the Applicants, having set down the matter as one of urgency for hearing on the 22nd November, 2016, have, without even as much as contacting my Counsel, accosted the Deputy Judge President of this Honourable Court to reschedule

S.M

the hearing date to the, 23rd November, 2016, so much for their case that the matter is urgent. .

Ad Par 37

51. I note the contents of this paragraph.

Ad Par 38 – 39, 40 and 46

52. I take note of the contents of these paragraphs. However, I am unable to respond to the other allegations. I do not know the constitutional crisis referred to and the other independent institutions referred to and what relevance that is to the present application, if any.

53. In so far as I am concerned, and with reference to my involvement in this matter, I deny any abuse of the NPA, and I deny that my involvement is a result of any suggested capture, whatever this "in- vogue" term has come to mean to different people at different times. I deny the insulting suggestion that I have been carrying out my obligations in terms of the statute and the Constitution as a result of so-called undue influence by unnamed third parties.

S.M

54. I further deny that I acted irrationally or arbitrarily for ulterior motives and for the political gain or financial gain of others. I also deny that I lack the required competence or that I acted in a manner glaringly at odds with my mandate.

55. I deny that my actions immediately require my suspension. I invite the Applicants to bring proof that in as far as it relates to me, the NPA has been captured (whatever that means), and to name the third parties who allegedly influenced me.

Ad Par 41

against me.

Ad Par 42, 43, 44, 45, 47

57. The contents of these paragraphs are noted. However I deny that the jurisdictional facts exist in relation to me.

Ad Par 48 - 53

58. I take note of the contents of these paragraphs, which are irrelevant to me.

Ad Par 54 - 66

59. The contents of these paragraphs are noted.

Ad Par 67

60. The contents of this paragraph are noted. However I need to explain that the number '3000' is from an Internal Memorandum from Oupa Magashula to Min Gordhan dated 12 August 2010[1]. The relevant paragraph of the said memorandum reads, *"Over the past five years the GEPF has approved over 3000 requests from various government departments for staff members to retire before the age of 60 with full benefits. The statistics are attached to this memorandum as received from the GEPF(Appendix A)*

61. I and Third Respondent asked the prosecutors to go to SARS to find the Appendix A referred to in the memorandum as explained above. The investigators went to SARS and the said Appendix A was never found. Consequently it is not known whether the 3000 early retirement matters referred to were exactly on the same facts as that of Mr Pillay. Besides, the Applicants, as far as I know, have not annexed the so-called Appendix A. Unless that so called Annexure A is produced by way of credible and acceptable evidence, I do not admit these allegations.

62. In any event, even if the other 3000 matters were on the same facts as that of Mr Pillay, and there were no criminal prosecutions in relation thereto, this does not imply that when subsequent investigations are conducted which reveal a commission of an offence, charges should not have been considered, as was done in this particular matter.

[1] Page 100 – 103 of the paginated papers

Ad Par 68 - 73

63. The contents of these paragraphs are noted.

Ad Par 74

64. The contents of this paragraph are denied. The Applicants never saw the contents of the docket. I further dispute that the very fact that the NDPP instituted further investigations illustrates that there was obviously insufficient evidence to sustain the charges is [illegible] investigations even after an accused has been served with summons and actually appeared in court.

65. In many cases, the need to conduct further investigations sometimes justifies a legitimate denial, by a Court, of an Accused being admitted to bail. Consequently, these averments by the deponent are nonsensical, and are an abject revelation of how the deponent is out of touch with the workings of the criminal procedure system under our Constitution.

Ad Par 75

66. The contents of this paragraph are noted. However, I specifically deny that there was plainly no evidence that warrants the charges at the time.

Ad Par 76

67. The contents of this paragraph are noted.

Ad Par 77 – 78

68. I deny that there was insufficient evidence to formulate the charges. As pointed out above, it has not been established that the 3000 cases referred to are on the same facts as that of Mr Pillay.

69. It happens on a regular basis that accused persons are summoned whilst investigations are underway. Summons do not mean that investigations are finalised. Consequently it is denied that there was substantial irrationality in the decision to draft the charges. It is further denied that there was any ulterior motive. As far as I know, there is no principle of law that requires all facts with the potential to corroborate lawfulness must be sought before charges are drawn. Legal argument will be advanced in support of this averment when the matter is heard.

Ad Par 79 - 82

70. The contents of these paragraphs are noted.

Ad Par 83

71. I deny that the charges were unsupportable. In my view, and to the extent that I was consulted, there was basis to draft the charges. 571

Ad Par 84 – 85.2

72. The contents of these paragraphs are noted.

Ad Par 85.3 – 85.4

73. I deny that there was no evidence to support the charges.

74. Any suggestion that prosecutors should have looked at the allegations against the backdrop of a so-called battle to "capture" National Treasury and the removal of the Minister as a perceived impediment would be to ask prosecutors to consider irrelevant factors.

75. Any further suggestion that such factors alone, combined with political and economic sensitivities of a particular case under investigation, should be considered by prosecutors, slavishly, and be regarded as determinative of whether they should or should not prefer charges against anyone, rich or poor, weak or strong, high profile or not, would be a disastrous recipe for prosecutorial decision-making sliding onto a slippery road to chaos, and a consequent failure of the fair administration of justice under our constitutional dispensation..

76. I reiterate that the decision to draft charges was taken on the basis of sufficiency of the available evidence to make such a decision. Applicants are invited to explain what significant amount of evidence they are referring to, and which officials at SARS were still required to be consulted, before charges could be drafted.

77. At the time the charges were drafted, and at the time I was consulted, I was not aware that the Symington memorandum existed. I understand that at the time the Third Respondent consulted me, he also did not have the Symington memorandum.

78. The Applicants, with the greatest of respects, cannot make the quantum leap, permissibly, that ***because*** at the time the consultation between me and the Third Respondent took place we were not aware of the existence of the Symington Memorandum, ***that*** in and of itself translates into incompetence, ulterior motive, misconduct, or any of the hyperbolical epithets that the Applicants have resorted to, in their transparent effort to emotionalise the case in the way they attempt to portray me and the Third Respondent as deserving of being suspended, relief they are clearly not entitled to on any basis, in my humble and respectful submission,

Ad Par 85.5 – 85.6

79. The contents of these paragraphs are noted.

Ad Par 86 - 102

80. The contents of these paragraphs are noted.

Ad Par 103

81. The letter referred to in this paragraph was sent to the First Respondent. I never saw it until I received the papers in this application. Even if I had seen it, I would not have resigned on the basis of the allegations contained in it, which are largely what is contained in the Founding Affidavit.

Ad Par 104 - 123

82. The contents of these paragraphs are noted.

Ad Par 124 – 130

83. The contents of these paragraphs are denied in their entirety in as far as they relate to me. The paragraphs below clearly indicate the consultation process with me before the charges were drafted.

84. My primary functions are set in for in section 24 (1) and (2) of the NPA Act. The functions of Deputy Directors are also set out in this section. Over and above me being accountable for the Deputy Directors appointed in my area of jurisdiction, I am also accountable for prosecutors employed in my area of jurisdiction.

85. Powers, duties and functions of prosecutors are set in section 25 of the NPA Act.

86. As it is, in my area of jurisdiction, I have a staff establishment of about 500 staff members, consisting of Deputy Directors, prosecutors and an administrative component. The bulk of my responsibility is to deal with, and be accountable for, the prosecutorial decisions by these staff members.

87. In terms of section 24 (3) of the NPA Act, a Special Director shall exercise the powers, carry out and perform the functions conferred or imposed on, or assigned to him or her by the President subject to the directions of the National Director provided that if such powers, duties and functions include any of the powers, duties or functions referred to in section 20 (1), such shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned.

88. The powers referred to in section 20 (1) relate to the institution and conducting of criminal proceedings on behalf of the state; carrying out any necessary functions incidental to instituting and conducting of such criminal proceedings; and discontinuing of criminal proceedings.

89. A Special Director, like the Third Respondent in this matter, also has his or her own staff consisting of Deputy Directors, Prosecutors and administrative staff who account to him or her.

90. In the NPA, the normal practice of the interactions between Special Directors and Directors of Public Prosecutions is that when the Special Director is seized with an investigation, the management of such an investigation and the

J.M

engagements between the investigating authorities and the Deputy Directors and prosecutors under the control of the Special Director happen without the involvement of the Director of Public Prosecutions.

91. It is only when such a Special Director is contemplating making a decision that he or she initiates discussions with the Director of Prosecutions concerned. It is the culmination of these discussions that will determine if the decision of the Special Director was taken in consultation with the Director of Prosecutions or not, in other words, determining whether the Director of Prosecutions agrees with the decision or not.

92. Essentially, the agreement or otherwise of the Director of Public Prosecutions with the decision of the Special Director is on the basis of information provided by the Special Director.

93. In such instances, the Director of Public Prosecutions is not the original decision maker nor is s/he accountable for the decision as in instances when decisions are taken by staff in his/her area of jurisdiction for whom the Director of Public Prosecutions has the accountabilty.

94. It is not the function of the Director of Public Prosecutions to review or substitute the role of the Special Director in managing the activities falling under the auspices of the Special Director.

95. Ordinarily, the Special Director would summarise what the decision entails. This is normally done either through personal engagements, or through the submission of memorandums summarising the facts of the decision. If there are aspects that the Director of Public Prosecutions is not clear about, he or

she usually asks the relevant aspects to be clarified by the Special Director, and the Special Director would cause such clarifications to be made.

96. The Director of Public Prosecutions does not get involved in the normal day to day activities of the work of the Special Director. In the case of an investigation, for instance, he or she does not usually call for the dockets, or instruct which further investigations should be followed up, etc. This day to day running of the activities remains the responsibility of the Special Director.

97. To expect the Director of Public Prosecutions to be actively involved in the work and activities in the office of the Special Director would render the Special Director irrelevant, and the very purpose of the creation of the Special Directorate would be defeated.

98. The above exposition of the decision making process by Special Directors ordinarily followed in the NPA is the process that was followed in this matter.

99. In this regard, I confirm that the Third Respondent took the decision in this matter in consultation with me as more fully set out below.

My first involvement in this matter was when I was invited by the Third Respondent to a presentation at Head Office on the 6th September 2016. The presentation was made by two Deputy Directors of Third Respondent's office, hereinafter referred to as the prosecuting team.

100. This presentation outlined the history of the investigation that the prosecuting team were dealing with, and how the allegations against Min Gordhan and Messrs Magashula and Pillay were part of the investigation. They also explained why in their view the matter of the early retirement of Mr

Pillay had to be separated from the broader investigation of the so-called Rogue Unit investigation.

101. The explanation related to possible issues of misjoinder in that the three accused, Pillay, Magashula and Gordhan would be charged separately from the other suspects in the Rogue Unit investigation. I specifically recall the prosecuting team being asked about the 3000 cases referred to in the memorandum attributed to Mr Magashula. As already indicated, there was a later confirmation that in a follow up investigation and inquiry, the said addendum could not be obtained at SARS.

102. During the presentation, the prosecuting team members were asked certain questions about the charges, the available supporting evidence, the outstanding witness statements and the progress of investigations.

103. When I saw Mr Magashula' s memorandum, dated 12 August 2010, addressed to the Minister, I observed that there was space at which the Deputy Minister had to sign. The space was blank. In my observation, the Minister approved the memo on 18 October 2010, without the Deputy Minister having signed at the place at which he was designated to do so.

104. I suggested that an enquiry be made from the DPSA about the normal route of such memoranda, in particular, whether it is normal for the Minister to sign off an approval document, where it appeared it is a document that does require also the signature of his Deputy in order for it to have been validly executed, without the recommendations of the Deputy Minister. I was later informed that such was not unheard of.

J.M

105. In the evening of 13 September 2016, I met with the Third Respondent for a discusssion on the outstanding investigations. During this meeting we also talked about the public interest considerations of the matter and the implications the decision might have for the economic situation of the country.

106. On 15 September 2016, there was a briefing for the Second Respondent, and the Head of NPS (then Adv Jiba), by the prosecuting team in which the Third Respondent was also present. During this briefing, I recall that two specific further statements were deemed to be important and the prosecuting team undertook to obtain them.

107. I specifically suggested that Marco Granelli's statement was important, and should be obtained. This statement was later obtained.

108. Later, on 15 September 2016, a memorandum dated 7 September 2016 by the prosecuting team was endorsed by the Third Respondent and me in his office. Prior to signing this memorandum I and the Third Respondent discussed the outstanding investigations, and he informed me what was still outstanding in his view. Specifically because of the involvement of Min Gordhan in the matter, in our discussions we discussed public interest considerations, and the balancing thereof with considerations of the rule of law and equality of all before law.

109. The Third Respondent informed me that he supported the recommendations of the prosecuting team, but that before he could make his decision, he wanted further statements to be obtained. I endorsed the memorandum confirming my discussions with him.

110. It is my understanding that this memorandum was furnished to the Second respondent.

111. On 22 September 2016, the Third Respondent called me to inform me that there was another memorandum prepared by the prosecuting team which provides an update on the further investigations. I went to the office of the Third Respondent and it transpired that the two statements referred to above had been obtained. The Third Respondent gave me the memorandum dated 19 September 2016.

112. The recommendation by the prosecuting team was as follows, *"We submit that there is enough evidence to warrant the prosecution of Messrs Oupa Magashula, Irvin Pillay and Pravin Gordhan as per the previous recommendation".* The Third Respondent remarked as follows, *"I agree with the recommendation. I will conduct research into public interest".*

113. In endorsing the memorandum I remarked as follows, *"I have discussed the matter with Dr Pretorius, and I have read all the statements referred to herein. I also agree with the recommendation. I also agree that research into public interest should be undertaken".*

114. In this discussion, the Third Respondent indicated that he wished to conduct research on public interest jurisprudence, and the extent to which such may be applicable to the contemplated decision. The Third Respondent signed the memorandum, and I endorsed it, confirming the discussions with him. It is my understanding that this memorandum was also furnished to the Second Respondent.

115. On 30 September 2016, there was a briefing session by the prosecuting team attended by the Second respondent, the acting Head of NPS (Adv Majokweni) and the NPA Head of Administration (Dr Ramaite). Of particular importance, the role of the Auditor General in relation to this matter was discussed, and the prosecuting team undertook to follow up on this aspect.

116. On 4 October 2016, the Third Respondent called me again to inform me that there was an updated memorandum prepared by the prosecuting team which he wanted us to discuss. I met the Third Respondent in his office and we discussed the contents of the memorandum and the recommendations by the prosecuting team and his views thereon. He explained to me his rationale thereof.

117. He signed the memorandum, which is dated 3rd October 2016 and I endorsed it on the 4th October 2016, confirming our discussions as follows, *"Discussed the contents of the memo with Dr Pretorius and agree with the recommendation".* It is my understanding that this memorandum was furnished to the Second Respondent. The memoranda referred to were classified "Top Secret". For that reason, I request the permission of this Court to avail these memoranda to it, and to whomsoever the Court may direct. As things are, because they are TOP SECRET documents, and in my view, correctly so, I am rather wary of attaching them to these papers.

118. From my recollection, the meeting of the 4th October was the last meeting at which discussion with the Third Respondent prior to the

announcement of the decision to charge the accused took place. The announcement of the charges was made by the Second respondent in the press conference of 11 October 2016. Later the Second Respondent called a meeting and told us that he had received representations, and that, as a consequence thereof, as I understood him, he was persuaded that the charges should be withdrawn. I never saw the representations. The withdrawal of the charges was subsequently announced in the press conference of the 31st October, 2016.

119. The above exposition, in my most humble and respectful submission, demonstrates the lengths to which I and the Third Respondent in particular went to ensure that what was presented to us as a ***prima facie*** case was fully investigated, and that all possible loop-holes in the investigation were dealt with.

120. It is my submission that the above exposition indicates that there was no ulterior motive, on the part of any of the Respondents, in the way they conducted themselves in this investigation. I can speak for myself and I can categorically and humbly say that I never had any ulterior motive, nor should I have any, in the way I executed my duties as I understand them in terms of the relevant legislation. There was no breathtakingly reckless and incompetent fashion in which the matter was handled, as alleged by the Applicants.

121. I solemnly aver that my detailed account of what happened in the consultative process that I had with the Third Respondent clearly demonstrates that it is not correct for the Applicants to allege that there was

no proper legal analysis. It further disproves the Applicants' assertion that the prosecutors failed in their constitutional and statutory duty to ensure that the charges were properly grounded.

122. It also belies the largely unsubstantiated, and in any event, unsustainable allegation that there was a failure on our part to take an impartial, independent and objective view of all the facts that were presented before us as members of the prosecutorial authority, who, in one way or the other, were involved in the investigation and eventual decision making process that led to the prosecution of the Accused persons..

123. It also disproves the allegation that the prosecutors did not apply their minds to the facts and to the law, and accordingly I deny the allegations that there was no basis in law or in fact for the charges.

124. It would be inappropriate to expect that the prosecutors should take decisions based on untested media allegations, about the so called state capture, and or alleged attempts to capture National Treasury, and or alleged attempts at the removal of a National Minister. To expect the prosecutors, in the execution of their duties, to regard these speculative reports and speculations as fact and evidence on the basis of which the President is asked to take drastic steps as prayed for in the Notice of Motion, is most unfortunate.

125. It is a posture, on the part of the Applicants, that seriously undermines the integrity of the prosecutorial services, and the legitimacy of the NPA as a constitutionally ordered institution, charged, in the words of section 179 of the

Constitution, with the power (and indeed duty and responsibility) to institute criminal proceedings on behalf of the State.

126. The Constitution, and the National Prosecuting Authority Act, enjoin us to exercise our functions without fear, favour or prejudice, and I, for one, having pledged myself to uphold these solemn values and responsibilities that come with my position in the NPA, will not shirk performing my functions as enjoined by the Constitution and legislation, simply because there are self-appointed human rights organisations like the Applicants ---and I say this with the greatest of respects.

127. In their conduct in this litigation, the Applicants, ostensibly and allegedly acting in the public interest, have thrown their weight around, dictating what must be done, by whom, when and how. It is unacceptable behaviour, and one that must be condemned in the strongest terms possible.

128. It would not be in the best interests of the administration of justice that institutions like the Fifth Respondent should be disrupted on mere allegations of untested media reports. This is even more so when regard is had to what the Applicants themselves say about us, namely, that the *"second to fourth respondents wield enormous public power and occupy high level positions within the NPA"*[2].

Ad Par 131 - 140

129. The contents of this paragraph are noted.

[2] Par 17 of the Founding Affidavit.

S. M

Ad Par 141 - 144

130. The contents of these paragraphs are noted. However any suggestion that I acted in any manner that requires the First Respondent to suspend me or discipline me in any way is disputed as it is not supported by the "facts" alleged by the Applicants.

Ad Par 145 - 151

131. The contents of these paragraphs are noted. However, I submit that the Applicants have not furnished any compelling grounds for the relief sought.

URGENCY

Ad Par 152 – 156

132. The contents of these paragraphs are denied insofar as any suggestion of impropriety on my part is being implied by the terms thereof. To the extent that they are meant to demonstrate that this is a matter that must be heard as of urgency, I have more than articulated how even by their conduct of desiring to have the matter heard a day after that they had originally set I down for, they themselves do not regard it as urgent. As for the rest, I have already addressed all allegations against me in the Founding Affidavit.

CONCLUSION

133. I pray that the application be dismissed with costs. The costs should include the costs occasioned by the employment of two Counsel. I have had to employ two Counsel for a variety of reasons that will be addressed in argument.

134. I further make the point that this is not one of those **BioWatch Trust** types of cases where civil society organisations like the Applicants are often not ordered to pay costs because of a perception that they litigate in the public interest, and in pursuit of vindicating constitutional rights.

135. These Applicants have become notorious for litigating, at the drop of a hat, in many forums throughout the country. Their liberal use, in this case, of politically charged phrases, used by politicians nowadays, of "capture" of the National Treasury, and so on, would suggest, justifiably in my humble and respectful submission, that the Applicants are "playing politics", and, in the process, are abusing the Court process for what in the end amounts to a judicialisation of politics, or the politicisation of the judicial process. This is regrettable, and should not be encouraged by the Courts.

136. This Honourable Court, I pray, should refuse to allow an abuse of its process in such a way, and the way to express its displeasure at such abuse of its process is to mulct the Applicants in costs, and so I pray. Further articulation of this submission will be made by way of argument when the matter is heard.

J. M

498
586

DEPONENT

Thus signed and sworn to before me at PRETORIA on this 15 day of NOVEMBER 2016, the deponent having acknowledged that he knows and understands the contents of the affidavit, which are true and correct and that he has no objection in taking the prescribed oath, which considers to be binding on him.

COMMISSIONER OF OATH

STEPHEN MWIM
Commissioner of Oaths
Practising Attorney RSA
Suite 309 Van Erkom Building
217 Pretorius Street, Pretoria

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

CASE NO: 87643/2016

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 JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

REPLYING AFFIDAVIT

I, the undersigned

FRANCIS ANTONIE

do hereby make oath and say that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("**HSF**"), situated at 2 Sherborne Road, Parktown, Johannesburg.

2. I am duly authorised to depose to this affidavit on behalf of the applicants. I also deposed to the founding affidavit in this matter on behalf of the applicants ("**the founding affidavit**").

3. The facts set forth in this affidavit fall within my personal knowledge unless the contrary is stated or appears from the context. They are, to the best of my knowledge and belief, both true and correct. Where I make any legal submissions, I do so on the advice of the applicant's legal representatives.

4. Words and phrases defined in the founding affidavit shall bear the same meaning in this affidavit, unless expressly indicated otherwise.

PURPOSE OF AFFIDAVIT

5. This Court has been mired in hundreds of pages of answering affidavits, which are largely irrelevant in relation to the crisp issues for determination before this Honourable Court.

6. The purpose of this affidavit is not to engage with each and every paragraph or allegation in the answering affidavits filed by the first to fifth respondents, but rather to focus on the case before Court. As such, a thematic approach is adopted in reply.

THE NARROW CASE BEFORE THIS COURT

7. Whether by design or error, the respondents mischaracterise the case before this Honourable Court.

8. Neither this Court nor the President is being asked to run the enquiry envisaged in section 12(6) of the NPA Act. The President must merely initiate the enquiry on the basis of the *prima facie* evidence of the unfitness

and impropriety of the second to fourth respondents for office. There is thus no need for this Court, or the President, to consider competing representations as to what conduct the second to fourth respondents ("**the NPA officers**") partook in (or failed to partake in), or whether the NPA officers are, in fact, fit to hold their positions, or should be suspended pending an inquiry.

9. Instead, the narrow issues which are before this Court are:

9.1 is there a duty on the President to exercise his powers under s 12(6) of the NPA Act where the facts of a matter indicate that an enquiry into the conduct or fitness for office of the relevant member of the NPA is warranted; and

9.2 is there a (separate) duty on the President to exercise his powers under s 12(6) of the NPA Act where the facts of a matter dictate that such member should be suspended pending the outcome of such enquiry;

9.3 if so, do the facts of this case warrant:

9.3.1 enquiries into the fitness and propriety for office of the NPA officers ("**the Enquiries**"),

9.3.2 the provisional suspension of these NPA officers pending the outcome of such Enquiries;

9.4 if so, do the President's actions fall short of the above steps required of him in our constitutional democracy?

10. The extensive representations of the NPA officers on the merits of their conduct are thus of little assistance - these representations will be mobilised

in the Enquiries. It is not for the President (or this Court) to run a quasi-enquiry, considering the merits and defensibility of the NPA officers' actions, based on their representations, before deciding that an enquiry, with or without a suspension, should proceed.

11. It is only in a case where there is patently no basis for any enquiry (or suspension) in the first place that the President may refuse to institute an enquiry. The present is plainly not such a case.

12. It is thus the President's actions, and affidavit, which are of primary importance, as read with the averments in the applicants' founding papers which show that at the very least the conduct complained of requires an Enquiry (and related suspension pending the outcome of the Enquiry).

13. As will be demonstrated, the President's affidavit puts up no substantive defences as to why the Enquiries should not proceed, or why these individuals should not be suspended pending the outcome of the Enquiries. To the extent relevant, neither do the NPA officers' affidavits.

14. The President's affidavit appears to conflate these two issues as being a single decision - instead, the correct approach is that there must be a decision whether or not to hold an enquiry; once this is taken, there is a concurrent (but separate) decision whether or not to suspend pending the outcome of the enquiry. This conflation has significant implications for any argument that *audi* must be afforded to the NPA officers in respect of both the issues of suspension and whether an enquiry is warranted.

RIPENESS

15. The President and the NPA officers allege that, as the President has now constructed a timeline whereby he will only be considering the representations of the NPA officers on 28 November 2016 (noticeably a date chosen after the hearing of this matter on 24 November), and has yet to take a decision whether to initiate the Enquiries, the matter is not ripe for hearing. It is alleged that there has been no failure or refusal to take a decision, but rather that the process which leads to the taking of a decision has been initiated, and thus the applicants, the administration of justice and the public, must wait for this process, however long it takes, to culminate in a decision before the applicants (or anyone else) may approach the Courts.

16. This is a regrettable line of reasoning designed to delay, and to avoid the President immediately discharging his duty by initiating an enquiry when the objective facts show that such an Enquiry is manifestly called for – and that the President has failed to institute such an Enquiry of his own accord, and also in response to the applicants' requests that he do so. By this construct the President is enabled to delay the making of his actual decision and thereby to avoid judicial intervention and scrutiny of his conduct. By way of example, it would permit the President to call for further, or competing representations, in early December, so as to delay the actual decision-making further.

17. Of course, this is not what our law provides - if the President has failed to make a decision within a reasonable period of time, then there is a failure to decide, which is justiciable.

18. The timeline of events confirms that the President has failed, alternatively refused, to take a decision in a reasonable time.

19. By 1 November the President had not himself taken any steps to initiate an Enquiry, despite the public outcry over the events detailed in the founding papers which had occurred in the preceding month. Accordingly, on 1 November 2016, the applicants wrote to the President (annex "FA11"), putting the President on terms to initiate the Enquiries and suspend the NPA officers by no later than 7 November 2016. Significant information was provided in the letter which sufficed to ground both the urgency and the need for the Enquiries and suspension. Moreover, detailed court papers were provided, dealing with the bringing of the Charges, the utter incompetence and lack of conscientiousness of the NPA officers and / or the fact that their actions were motivated by ulterior purpose (or may be perceived as being motivated by ulterior purpose).

20. This letter was sent to the email addresses which:

20.1 the President concedes (at least one of which) were correct ("FA12");

20.2 appear from the Presidency's own website;

20.3 appear from the National Government Directory, dated 1 November 2016;

20.4 are addresses used previously, without objection, and have elicited a reply;

20.5 include an email address expressly identified in correspondence by the private office of the President in another matter.

21. In any event, there was no allegation that these email addresses did not receive the papers, but rather that the recipients were not authorised recipients and could not, for some reason, forward the information to the President or relevant officials. This is set out in annex "FA13".

22. Although the President thus had all the required information to make the decision to initiate the Enquiries ("**the enquiry decision**") and the decision provisionally to suspend the NPA officers ("**the suspension decision**") by 1 November 2016, he certainly had all this information by 7 November 2016.

23. Despite the urgency of the matter, the President did not take any decision immediately after 7 November 2016. Instead, he requested a further two weeks to take the decisions, requesting an extension until 21 November 2016. The applicants did not grant this extension, owing to the manifest urgency and public importance of the matter, but invited the President to make the enquiry and suspension decisions by 21 November 2016, which would have preceded the initial hearing date of this application (being 22 November 2016).

24. On 14 November 2016, the parties received directions from the Honourable Deputy Judge President, indicating that this matter would be heard on 24 November 2016. Serendipitously, on the very same day that the date of 24 November was identified, the President called for representations from the NPA officers.

25. There had been no call for representations in over a week since the President, at the latest, was aware of the applicants' complaints. When the President now did call for representations, these representations were to be received not prior to 24 November 2016, so as to allow the President to make

a decision timeously and possibly obviate the need for this hearing, but instead on to 28 November 2016. It is thus clear that, whether by cynical design or otherwise, the President is intent on pushing this decision well past 28 November 2016 - indeed, it is unlikely that any decision will be taken before December 2016, and this assumes that there are no calls for clarification, further or competing representations, or additional information.

26. As the applicants noted in their 1 November 2016 letter, should the President have failed to take the enquiry and suspension decisions by 7 November 2016, it would be assumed that the President had decided not to suspend the NPA officers or initiate the Enquiries. Moreover, in the founding affidavit, the President was invited to take the enquiry and suspension decisions before 22 November 2016, failing which his actions would constitute a further decision to refuse to initiate the Enquiries or suspend the NPA officers (paragraph 108 of the founding affidavit).

27. It is thus clear that the President has failed, alternatively refused, to take the enquiry and suspension decisions timeously. I am advised that the failure to take a decision within a reasonable period of time constitutes a reviewable decision. If this were not so, the President could simply initiate a "consultation" process, and then drag it out for weeks, if not months, all the while being immunised from review.

28. Moreover, to the extent that any *audi* was required, this *audi* was required to be exercised reasonably, in line with the exigencies of the case. The NPA officers have been afforded an opportunity to place whatever contentions they had as to the need for the Enquiries and suspensions before this Court (and the President) on oath. The President will thus have the benefit of these affidavits to make a decision before 24 November 2016, which is over twenty

days since this urgent matter of great national importance was first formally brought to his attention, to the extent that he did not otherwise – like all other South Africans who followed the events in October (including Parliament) – have knowledge of the crisis that has beset the NPA, its leadership, and the NPA officers involved.

URGENCY AND A REASONABLE TIME PERIOD TO TAKE THE DECISIONS

29. In deciding whether an Enquiry is called for (and a related suspension), the facts are to be assessed objectively as against a simple test: is an Enquiry called for on account of the allegations levelled against the NPA officers involved. The applicants need not prove either gross incompetence or ulterior purpose here - indeed, that is the purpose of the Enquiries. The relevant facts, which are not seriously disputed or capable of serious dispute, are as follows:

29.1 charges against the accused were announced to the world at a press conference, led by Mr Abrahams, on 11 October 2016. Mr Abrahams, as the NDPP and head of the NPA, lent his unequivocal support to the charges and the process followed in bringing them. He later confirmed that he had been briefed by the third and fourth respondents as to the charges, and, as his conduct in announcing the charges to the world evidences, where he lent his significant *imprimatur* as the NDPP, clearly was satisfied as to their legitimacy;

29.2 almost immediately, and as a result of this prosecution, over R50 billion was wiped off the Johannesburg Securities Exchange;

29.3 these charges came at a time where speculation was rife that at least Min. Gordhan was being targeted for prosecution as a means to remove

him as the Minister of Finance as a perceived obstacle to further ulterior purposes;

29.4 it later emerged that the night before the announcement of these charges, the NDPP attended a meeting behind closed doors at the political headquarters of the African National Congress, Luthuli House;

29.5 the NDPP, at the 11 October press conference, spent a significant amount of time informing the public that, as a matter of fact and law, the SARS rogue unit (as it was termed by the NDPP) was unlawful and unconstitutional, despite conceding that the investigation into such unit was ongoing and that no charges could or would be preferred at that stage. There is no conceivable basis on which the lengthy exposition of unconstitutionality of the "rogue unit" was warranted. It was later confirmed that this investigation remains ongoing, and speculation is rife that Min. Gordhan will be charged in relation to this unit (where the NDPP has now pre-judged its lawfulness);

29.6 the announcing of the charges led to an outpouring of support for Min. Gordhan, with numerous elements of society identifying the charges as being completely baseless and clearly punctuated by ulterior purpose;

29.7 the NDPP then performed a remarkable *volte face*, seeking to distance himself from the charges, by announcing that he had played no part in the bringing of the charges and would be reviewing them;

29.8 during this review process, it came to light that critical evidence had been overlooked by the NPA, including evidence which spoke to the lawfulness of the impugned payments forming the basis of some of the charges and to whether intention on the part of the accused could ever

be proven. In fact, it is clear that the NPA never had any evidence of a furtive or fraudulent intent. There was also no evidence of a fraudulent misrepresent of a *concretatio* on the part of Min. Gordhan at all;

29.9 it emerged that the NPA in fact did not (or chose not to) understand the legal framework for payments under the Government Employees Pension Fund, with explanatory affidavits being sought in this regard after the announcing of the charges;

29.10 it is further notorious that, as part of the post-charging investigative process, a Mr Symington of SARS, whose 2009 legal opinion to SARS was deemed, by the NPA, to be of pivotal import, was subjected to intimidation and harassment as elements of the State attempted to receive documentation from him. The so-called Symington "hostage drama" has been widely reported on - media reports are annexed marked "RA1";

29.11 at a press conference on 31 October 2016, the NDPP withdrew the charges, indicating that basic jurisdictional criteria, such as *animus*, could not be, and could never have been, established;

29.12 as such, the charges were clearly never good in law and the manner in which they were preferred against the accused was impossible to reconcile with professional, diligent, conscientious and independent conduct on the part of the NPA, more particularly its head;

29.13 in interviews and statements, including the two press conferences, a session before Parliament and an interview with Ms. M Weiner of EWN, the NDPP displayed not only a complete lack of remorse at the NPA's actions (going so far as to apportion blame to the accused for their own

botched prosecution), but also made a number of contradictory statements. At least one of his versions could not possibly be true.

30. Moreover, the background to Min. Gordhan's appointment cannot be overlooked, and neither can the well-publicised tension among Min. Gordhan, National Treasury and various individuals or factions within the State. It was clear that any prosecution of Min. Gordhan, in the politically charged environment, would attract international interest, have economic implications and create internal division. As such, there was a heightened duty that all aspects of such prosecution were required to be done responsibly and lawfully – and without any apprehension being raised that the independence of the NDPP (or his officers) was compromised. Instead of avoiding such an apprehension, the NDPP elected on the day before the charges were made public to meet with the President at Luthuli House. The NDPP to this day refuses to acknowledge that such a meeting (whatever the discussions thereat) could give rise to an apprehension that his independence and impartiality are undermined.

31. The preferring of charges, knowing the inevitable results, where a basic element, such as the intention to act unlawfully, was never capable of being established, smacks either of extreme recklessness and incompetence, or ulterior purpose, or both.

32. The NDPP, Dr Pretorius and Mr Mzinyathi are now perceived as being either incompetent or being activated by ulterior purpose.

33. Every day that they remain in office and are entitled to wield the powers of their office is a day that potentially irreparably prejudices the work of the NPA

and further detracts from the perception of independence and competence of the NPA.

34. In light of these facts, there can be no debate that an Enquiry is called for immediately, together with a suspension. The applicants need not prove either gross incompetence or ulterior purpose here - indeed, that is the purpose of the Enquiries. It suffices that a cloud of uncertainty taints the NPA officers; the perception of their incompetence and/or lack of independence is sufficient to warrant urgent Enquiries and suspension.

35. This is particularly so when one has regard to the especial powers the NDPP enjoys, as well as his status as the *de facto* leader of the NPA. This is a high office which yields enormous power and is charged, as its core mandate, to oversee the NPA and all prosecutions (or decisions not to prosecute) by the NPA, as well as to determine prosecution policy. The NPA is an institution of immense 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. Any apprehension of the NDPP's compromised integrity or competence must immediately result in a temporary suspension, so as to preserve the integrity of the NPA for such period until such factual averments and apprehensions are disproved (or proved and a removal takes place).

36. Moreover, Dr Pretorius and Mr Mzinyathi, as Directors of Public Prosecutions, take decisions daily which affect the rights of numerous individuals, whether they be positive or negative decisions.

37. Every day that the NPA officers remain in office they may make, or fail to make, multiple decisions. These decisions include decisions to prosecute, or not to prosecute, and decisions as to the conduct of prosecutions on a daily basis. Given their performance in relation to the Charges, these officers are operating under a cloud of suspicion as to their motives, competence and independence. Every decision that they take, or fail to take, may now detract from at least the perception of the NPA's independence and competence. There is also a very real risk, and likely probability, that those decisions (of the highest order and remit) may be without any legal foundation.

38. The applicants, and the Republic, may be in a position to (try to) remedy those positive decisions taken by the NPA officers, but will never know of those decisions not taken by the NPA officers. It is not required of the applicants to identify each and every decision taken, or not taken, by the NPA officers, during the period whilst an enquiry into their fitness and propriety for office is live. It is enough that the NPA officers take and are ordinarily empowered to take such decisions, and that they now do so in circumstances where every action of theirs calls into question prosecutorial independence.

39. Public confidence in a critical constitutional institution is being eroded at an alarming rate - the only means to stop the rot is immediately to suspend the NPA officers and conduct the Enquiries.

40. The applicants, and the Republic, cannot be afforded redress, let alone substantial redress, in due course. It would be of scant comfort to learn, some weeks or months in the future, that indeed the NPA officers are incompetent, or lack independence, but have, despite these issues being raised as far back as 1 November 2016, been taking decisions daily for a

significant period of time. These decisions, as mentioned above, may not be capable of easy identification, much less reversal.

41. Accordingly, the matter is manifestly urgent. The President was required to take the Enquiry and suspension decisions within a reasonable time, given this urgency. He has failed to do so, and instead has indicated that no decision will be made before, realistically, December 2016.

42. This constitutes a failure, alternatively refusal, to make the Enquiry and suspension decisions; the matter is accordingly ripe for determination by this Honourable Court.

THE PRESIDENT'S ACTIONS

43. The President is given weighty and important powers under the NPA Act. The President is charged to exercise this power *mero motu*, timeously and responsibility. This application should never have been required to prompt the President to consider engaging his powers under s12(6) of the NPA Act. As a responsible President, he could hardly have failed to be aware of the facts that the charges were withdrawn by the NDPP, or of the effects the announcement of the charges had on the Republic. Indeed, both aspects dominated media attention at the relevant time. Despite this, the President, in his letter of 7 November 2016, alludes only to having some vague, peripheral notion of what has transpired, being "*obliquely aware of media reports*" pertaining to the matter. This is unacceptable. The President must surely have had knowledge of these events, or, at the very least, was required to have knowledge (or seek the knowledge) as a responsible leader of the Republic and the individual vested with the s12(6) powers. Parliament was well aware of the issues in this matter and quizzed the NDPP on them during the week of 31 October 2016. It was thus incumbent upon the President, at least after the 31 October 2016 press conference, to start the

s12(6) enquiry. The fact that this application was necessary, and that the President only called for representations from the NPA officers some 2 weeks later, simply compounds the perception that the President fails, completely, to grasp the urgency of this matter, the damage being done to the NPA and the Republic and the need for action. These unfortunate realities buttress the ripeness of this application, as well as strengthening for the need for judicial redress.

44. The President, on 14 November 2016, placed the NPA officers on terms, stating that "*I hereby afford you an opportunity to make written representation as to why I should not place you on suspension pending the outcome of the enquiry into your fitness to hold office. Such representation must reach my office on or before 28 November 2016*" (see annex "SA2" to the second, third and fifth respondent's answering affidavit at page 333 - 338 of the bundle).

45. Facially, such letters are indicative of the following:

45.1 the President has taken a decision that an enquiry will be held into the fitness for office of each NPA officer ("*pending the outcome of the enquiry into your fitness to hold office*"); and

45.2 the President has not yet taken a decision as to whether the NPA officers will be suspended pending the outcome of this enquiry.

46. Yet the President in his answering papers denies having taken any decision at all. This lacks all logic, as the issue of suspension would never arise unless there was an enquiry to be instituted.

THE CORRECT INTERPRETATION OF S 12(6) OF THE NPA ACT

47. It appears common cause that section 12(6) affords the President the power to initiate enquiries into the fitness of members of the NPA to hold office, and

that the President may suspend such members pending the outcome of such enquiry.

48. The corollary to this power is a duty to exercise the power when the facts of a matter necessitate the power's invocation. It is not open to the President, who is expressly and specifically identified by legislation to be the upper guardian of the NPA, to do nothing or drag his heels where urgent action is clearly required. Instead, he is called upon properly, responsibly and timeously to wield his power to call for enquiries into the conduct of those potentially unfit for office, and to safeguard the public and the NPA for the duration of these enquiries.

49. In order to exercise this power, the President (and seemingly the NPA officers) contends that *audi* is an essential element, which forestalls his ability lawfully or rationally to suspend the NPA officers (or perhaps even order enquiries into their fitness to hold office).

50. Section 12(6) of the NPA Act does not, however, require any *audi* rights being afforded to the NPA officers before a decision is taken to institute enquiries with or without a provisional suspension of the officers who are subject to the enquiry. Instead, the President is called upon, based on the facts before him, to determine whether an enquiry, with or without a suspension, is necessary. In discharging this obligation, the President must act lawfully and rationally.

51. The nature of this power is clearly an executive where procedural fairness does not play a role, but even if procedural fairness is required, then the second to fourth respondents have been given more than ample opportunity to state their case in full in these proceedings.

52. The President adopts a schizophrenic approach to the characterisation of his s12(6) power - when dealing with *audi*, he asserts that *audi* is necessarily a precursor to the exercise of his s12(6) power as this power is administrative in nature (see paragraph 6.1.14 of the President's answering affidavit). In the same breath, however, the President asserts that "*I am advised that the Constitutional power to suspend an NDPP is a power in terms of section 84(2)(e) of the Constitution read with section 12(6) of the NPA Act. This power can only be exercised by the President. It is therefore an executive constitutional power...*" (para 6.3.1). Although the conclusion - that the section 12(6) power is executive in nature -is correct, the reference to section 84(2)(e) of the Constitution is inapposite. This section relates to power of the President, acting other than as head of the National Executive, to make appointments required by the Constitution or legislation. It is not clear how it relates to a duty to initiate enquiries into the conduct of NPA members, and suspend them during such enquiries. This power of appointment reflected in section 84(2)(e), in any event, has been held to be subject to the principle of legality, and is justiciable before the Courts by way of a rationality and lawfulness enquiry.

53. Of course, the definition of administrative action expressly does not include executive actions. Even if administrative action, however, the President's actions do not escape review. The precise characterisation is thus of little moment - whether executive or administrative, the impugned actions must be rational and lawful, whether under PAJA or the principle of legality, and this Court has jurisdiction to interrogate the impugned decisions and grant the relief sought.

54. In any event, section 12(6), properly interpreted, builds in no jurisdictional requirement of *audi* prior to the President exercising his powers under such section.

55. In the alternative to the above, if section 12(6) of the NPA Act is deemed to include an element of *audi* whether through the Promotion of Administrative Justice Act, 2000 ("PAJA") or otherwise, then this element is limited to the question of suspension, and not whether an enquiry must be initiated. That is because at the enquiry, the accused will be afforded full *audi* rights to defend his or her conduct - this defence cannot be required as a necessary precursor to initiating the enquiry. This would result in a Presidential enquiry on the merits preceding the section 12(6) enquiry on the merits, which is not what the NPA Act envisages.

56. If *audi* is at all part of section 12(6) (which is denied), then *audi* can only speak to the issue of whether or not an individual should be suspended pending the outcome of an enquiry. It is entirely irrelevant for purposes of considering whether an enquiry must be initiated.

57. In any event, by the time the matter is heard by this Court, the NPA officials will have been afforded every opportunity to provide their answers to the complaints contained in the applicants' founding affidavit. They have been provided that opportunity, and taken the opportunity, in filing their full answering affidavits. It is not clear what else they would say in their representations to the President – and obviously they would not be permitted to say anything different to the versions that they have now advanced before this Court.

58. In the circumstances, under the principle of legality, alternatively PAJA, the allegations about a lack of *audi* are unsustainable.

FAILURE TO INSTITUTE ENQUIRIES

59. If the President has decided to initiate the enquiries into the NPA officers' fitness to hold office, then there is no dispute on this score - a decision has been made, and the applicants agree that the enquiries must be held, forthwith and concluded as a matter of urgency.

60. If the President has not, however, made a decision in this regard (and he states on oath he has not, or has refused candidly to explain to the Court what his position is), then it is ripe for determination now.

61. The allegations levelled against the NPA officers are serious ones. They are accused of being – and on their own versions have been shown to be – either:

61.1 gross incompetent, failing to appreciate basic legal requirements and acting with reckless disregard to the interests of the accused and the Republic; or

61.2 motivated by ulterior purpose (assuming competence), and are accused of acting to advance their or other's unlawful interests.

62. It is, moreover, trite that the NPA officers' actions received global publicity (as they knew it would), resulted in calamitous financial consequences (as they accepted would be the result – witness the discussions between the third and fourth respondents about the potential impacts on the economy of the decision) and gave rise to speculation that the NPA officers had improperly

been influenced and were pursuing a vendetta against, at least, Min. Gordhan.

63. It is further trite that the decision to prefer charges was taken in an environment where suspicions are rife that Mon. Gordhan and the Treasury are at battle with various third parties, and that there is a concerted effort by various parties to undermine, intimidate or remove Min. Gordhan from his office. The cavalier attitude displayed by the second to fourth respondents is even more egregious is this context.

64. Finally, it cannot be disputed that the bulk of the press conference at which the Charges were announced was little more than a pronouncement, by the NDPP, as to the illegality of the SARS rogue unit and the unlawfulness of the actions by, *inter alios*, the accused. This was manifestly improper where, as the NDPP conceded, investigations were ongoing and no charges had been brought.

65. It cannot be ignored that the charges preferred by the NPA officers (or at least the third and fourth respondents) were then withdrawn, with it being made clear that these charges were never sustainable in law.

66. The sole enquiry for the President to make is whether, faced with all the above, and the facts identified in 29 above, any questions arise which warrant an enquiry into the NPA Officers' fitness and propriety to hold office.

67. The threshold to trigger such an enquiry is, it is submitted, a low one. It cannot be that this threshold is not crossed, given the allegations of recklessness and / or incompetence and / or ulterior purpose, and where the bringing of admittedly unsustainable charges has irreparably damaged not only the Republic's reputation and economy, but also (including through the

NDPP's reckless decision to meet at Luthuli House the day before the charges were made public) the perception of competence and / or independence of the NPA.

68. Moreover, given the contradictory versions mobilised by the NDPP, it cannot be that no further answers are required.

69. Accordingly, the only rational course of action is that which the Constitution and the NPA Act require: that an enquiry into the actions of the NPA officers in respect of the charges be instituted immediately, to determine whether they remain (or ever were) fit and proper to hold their offices in the NPA.

70. It is not necessary for the applicants to prove a case that the NPA officers are, in fact, not fit and proper to hold their offices in the NPA before this Court. Indeed, neither the President nor this Court need decide this issue - that is the preserve of the Enquiry to be constituted.

71. What the applicants must demonstrate is that there exist factors which necessitate the calling of an enquiry. The calling of an enquiry is not an infringement of any rights of the NPA officers - it will simply require them to defend their actions, in due course. Of course, an enquiry may be called without a suspension (although, as traversed below, this would be inappropriate in this case) - as such, there is no need for the affording of *audi* in this regard.

72. In any event, it is not for the NPA officers to exculpate themselves prior to the calling of an enquiry - this would render the enquiry process potentially nugatory, as the President would first be required to form a view on the merits (as opposed to a view on the need for an enquiry) before the enquiry then formed a view on the self-same merits. This double-tiered proceed is

not what s12(6) of the NPA Act envisages. In any event, it is precisely to ensure the independence of the NPA and its officials that the merits of any disciplinary action were not left to a member of the Executive, but are vested in an independent enquiry, uninfluenced by political considerations.

73. If the President has not taken a decision to initiate the Enquiries, then this Court is seized with all the relevant material to determine whether such Enquiries should be initiated. It even has before it the submissions on the merits by the NPA officers, defending their impugned conduct, should the Court believe *audi* to be relevant or these submissions to inform the need for an enquiry.

74. Accordingly, it is submitted that the only lawful course of action was for the President to institute the Enquiries; his failure to do so necessitates this Court ordering him to do so.

FAILURE TO SUSPEND

75. The power to suspend is a separate decision, where the President wields a different power.

76. The Enquiry will deal with the merits of the NPA officers' conduct. It will either confirm their unsuitability or ineligibility for office, or will vindicate their actions.

77. The aspect of suspension, however, deals with the interim regime - namely, what is to happen to the NPA officers pending the finalisation of the Enquiries.

78. The purpose of the power to suspend is to protect not only the Republic, but also the integrity of the NPA, and public confidence in law enforcement,

during the period in which an enquiry is live. The President must be, and is, empowered to exercise this power expeditiously, unilaterally and immediately where the facts of a matter warrant that this be done.

79. This is an important power, as it safeguards the NPA from being manned by individuals suspected of lacking the requisite competence, integrity or character. It also prevents such individuals doing further harm before their removal (or potentially being seen to do harm before their vindication), and protects against a host of unlawful decisions being made by such individuals before an enquiry is concluded.

80. It is, further, an important safeguard to protect the perception of independence of the NPA, where members, particularly those with immense decision-making power, are, or may appear to be, abusing said power for ulterior purpose or through incompetence.

81. In this matter, the President has clearly not taken any decision to suspend within a reasonable time; in fact, on his newly crafted time-line, this decision will only be taken in early December, at best.

82. This is clearly not a reasonable time for the taking of the decision, given, *inter alia*, the reasons identified in paragraphs 32 to 40 above, and the fact that the President is aware that this Court is dealing with this litigation and had convened the Full Court to hear the matter expeditiously on 24 November.

83. In addition, the President has been seized with all the relevant material to make a decision whether or not to suspend the NPA officers from 1 November 2016. To the extent necessary, he now has their further submissions, in affidavit form. There is thus no reason to push out his

decision until after the hearing date of 24 November 2016, and certainly not after 28 November 2016.

84. The President has thus failed to take a decision to suspend.

85. Moreover, in the circumstances of this case, based on the information before the President, it is clear that the only lawful decision is that the President must suspend the NPA officers pending the Enquiries.

86. This can be the only rational exercise of the President's suspension powers under section 12(6) of the NPA Act, given that the NPA officers are accused of such glaring incompetence or ulterior purpose that they cannot remain in office or be permitted to wield any power within the NPA without further tainting the operation of the NPA, public confidence in this important constitutional institution and / or the perception of the independence and competency of the NPA.

87. The test is not whether the NPA officers are in fact exercising their power unlawfully; instead, the test is whether the public may perceive the exercise of their power to be unlawful. This clearly is the case here - as such, in order to protect at least the perception of independence of the NPA, an immediate suspension of the NPA officers is warranted.

88. Even if, as the President and the NPA officers contend, some element of *audi* is required before the decision to suspend must be taken, then this *audi* opportunity must be exercised within a reasonable period of time. Here the NPA officers have been afforded the opportunity, on oath, to explain why they should not be suspended (in response to the applicants' submission that they must be). These affidavits now serve before this Court and the

President. There is no reason why the President requires further submissions, and certainly not submissions only by 28 November 2016.

89. The NPA officers' affidavits mobilise no reasons which militate against the Enquiry proceeding or which indicates that that should the Enquiry proceed but that they not be suspended in the interim.

89.1 Mr Mzinyathi, essentially, argues that he must be afforded further *audi* in relation to this point, and that any suspension would impact upon his reputation. His reputation as a Director of Public Prosecutions ("DPP"), of course, cannot be of greater significance than the reputation of the NPA as a constitutional institution, whose independence, and the need for the perception of independence, has been stressed by Courts throughout the land, including the Constitutional Court. Accordingly, the test proposed by Mr Mzinyathi, namely that the damage to his reputation must be weighed against the damage to the NPA and the Republic, can only have one winner. In the circumstances, where Mr Mzinyathi has taken a decision unsustainable in law which has caused severe harm to the reputation and economy of the Republic, the interests of justice dictate that the Republic be immunised from any further action by him as an NPA DPP. Mr Mzinyathi may well be suspended on full pay, and, should he be vindicated, his reputation will suffer no harm at all. Should Mr Mzinyathi not be suspended, however, the perception will remain that he may be grossly incompetent or motivated by ulterior purpose; public confidence in, and the perception of independence of, the NPA will be diminished and a hue of suspicion will colour each and every decision he takes as DPP.

89.2 Any argument that Mr Mzinyathi's conditions of employment place him beyond the NPA Act and beyond the constitutionally afforded powers of the President is simply unsustainable. As a DPP of the NPA, he clearly is subject to all legislation dealing with such position - to suggest that he has, somehow, contracted out of the law is baseless.

89.3 Similarly, Mr Abrahams and Dr Pretorius mobilise no reasons which warrant against their suspension. Much time is devoted to bald denials of misconduct, or explanations of their understanding of pension fund law, but these are, at best, aspects which fall to be addressed at the Enquiry, to explain whether they should remain in office. These factors do not speak to the issue of suspension at all.

89.4 The same reasons which motivated for a suspension in respect of Mr Mzinyathi apply with equal force here. The need for suspension is further heightened when one has regard to the especial powers the NDPP enjoys, as traversed above and in the founding affidavit.

90. The NPA officers also mobilise arguments that the conduct of one of them cannot be attributed to the others. The applicants do not seek to attribute conduct. It is clear that, on the most benevolent version to the NPA officers, Mr Mzinyathi and Dr Pretorius took the decision to prosecute. This decision was hopelessly bad in law and fact and, for the reasons traversed above and in the founding affidavit, demonstrates gross incompetence, an alarming lack of conscientiousness, the use of prosecutorial pwoewrs for purposes other than those set forth in legislation and/or lack of independence. It is remarkable that, between the voluminous justifications mobilised by the NPA officers, which include dozens of paragraphs of legal interpretation of pension fund law, not a single averment is made that there was evidence that the accused had

acted with the requisite animus; moreover, not a single piece of evidence is put up which proves that the NPA officers, prior to the preferring and announcing of the charges, had any evidence before them which spoke to or proved any unlawful intention on the part of the accused. Of course, this is a basic requirement of the charges, and was later admitted by the NDPP to have been absent. This evidence must therefore have been absent from the outset, yet the NPA officers still preferred and announced the charges. This smacks of either remarkable incompetence, or, more sinisterly, ulterior purpose by preferring charges bad in law not to achieve a prosecution, but ulterior outcomes. Quite apart from a lack of evidence of fraudulent intention, there was also no evidence of an unlawful and fraudulent misrepresentation or *concretatio* as required for fraud and theft.

91. The NDPP bears ultimate responsibility for the actions of the NPA. At the very least, he lent his *imprimatur* to the bringing of the Charges. He further improperly expounded upon the unlawfulness of the SARS rogue unit, and has presented multiple and contradictory versions to the Public and Parliament in explaining the saga of events which led to the bringing and dropping of the charges, and has acted in a manner that is reckless as to the vital constitutional duty to ensure that his office (and the NPA more broadly) is not tainted by any suspicion of bias or impartiality.

92. For the reasons traversed above and in the founding affidavit, the NDPP's conduct demonstrates gross incompetence and/or lack of independence.

93. All three were present at both press conferences and Dr Pretorius and Mr Mzinyathi said nothing to contradict the NDPP's assertion. In fact, the NDPP has indicated that the first press conference was called on 11 October 2016 on the back of the briefing he received from Dr Pretorius and Mr Mzinyathi.

94. The exact role of each of the NPA officers will, no doubt, be more fully revealed at the Enquiries - there is, however, a *prima facie* case against each of them for their actions that warrants immediate suspension and the institution forthwith of the Enquiries. The belated attempt now to apportion blame amongst themselves, or distance themselves from decisions jointly presented to the world, does not behove their case, and simply further illustrate their unfitness to take responsibility for the high offices they currently hold.

95. Accordingly, even if *audi* is required under s12(6) in relation to the question of suspension, this *audi* has been exercised through the affidavits filed by the NPA officers and does not disturb the conclusion that these officers fall immediately to be suspended. As the President has not made this decision, such failure is unlawful, and the Court, seized with all the relevant material, is called upon to order the President to suspend the NPA officers pending the outcome of the Enquiries.

COURT'S DISCRETION TO ORDER A SUBSEQUENT HEARING REGARDING SUSPENSION, IF NECESSARY

96. It is submitted that the Enquiries must be instituted forthwith, and the NPA officers immediately suspended.

97. If, however, this Court is minded to afford the NPA officers (more) *audi* in relation to the suspension issue, and this Court is further of the opinion that such *audi* has not yet properly been exercised, then the applicants contend that it is open to this Court to postpone any hearing on the narrow issue of suspension until after the representations have been received (by 28 November 2016).

98. It is submitted that, as just and equitable relief, the Court may order the President to make a decision in relation to suspension by no later than a specific date, such as 2 December 2016.

99. If the President does not institute the Enquiry and suspend the second to fourth respondents, the Court may reconvene on a date in the near future to finalise this application: such as 12 December 2016, with parties being afforded an opportunity to supplement their papers before the hearing, to the extent necessary.

100. The applicants stress that they do not believe the above regime to be necessary, as this Court is empowered to order the institution of the Enquiries now, with suspension of the NPA officers pending the outcome of the Enquiries. The above regime caters only for a scenario where the Court is minded that the President is entitled to consider the NPA officers' representations, pertaining only to the issue of suspension, on 28 November 2016 and thereafter to make a decision in regard to suspension.

THE TERMS OF THE SUSPENSION

101. The NDPP argues that the applicants' relief pertaining to suspension is incomplete, as it fails to set out the terms governing the suspension.

102. The applicants have always contended that the NPA officers must be suspended pending the outcome of their Enquiries. The applicants do not dictate to the President, or call upon the Court to inform the President, what other terms must apply to this suspension, inasmuch salary is concerned.

103. It remains for the President to exercise his s12(6)(e) powers to determine whether or not the suspended officers receive a salary, and, if so, what salary, for the duration of their suspension.

PRESIDENT'S INCORRECT UNDERSTANDING OF LEGAL REQUIREMENTS

104. It is telling, and worrying, that the President appears to fail to appreciate the factors which trigger the exercise of his s12(6) powers. In paragraph 7.4 of his affidavit, the President indicates that any enquiry into the NPA officers' being "fit and proper" is limited to an enquiry into their integrity and formal qualifications.

105. At the outset, this line of reasoning, quite apart from being incorrect, is irrelevant. It is not for the President to perform the Enquiry now - instead, he is simply called upon to determine whether objective factors warrant the initiation of an Enquiry, where fitness and propriety will properly be examined.

106. Moreover, the President seemingly omits critical factors such as competence; fitness for position; independence and misconduct.

107. In his affidavit, the President, even without receiving the NPA officers' representations, indicates that, on the facts before him, no challenge against the NPA officers' integrity is made out, and that no evidence of ulterior purpose exists. This assertion is, of course, untrue. More importantly, the President fails to appreciate that he is not called upon to run the Enquiry. He is called upon merely to assess the need for an Enquiry, where these assertions will be tested in the correct proceedings.

108. Quite apart from the President's failure to appreciate the s12(6) trigger, his affidavit in fact indicates that he has already determined that the applicants'

case and assertions are baseless; the ineluctable conclusion is thus that he will not be taking the Enquiry and suspension decisions.

109. Moreover, within the (incorrect) context where the President tests the merits of the Enquiry, the President has demonstrated that his call for representations is in fact a sham, as he has already indicated under oath that he does not believe the NPA officers' to have a case to answer. His call for representations is thus surprising, if not merely a dilatory tactic.

110. Even if there is a minimum substantive threshold, which echoes the grounds of the Enquiry, which must be overcome before the President should call for an Enquiry, then the test is not one merely of "*integrity*", as understood by the President.

111. It is worth emphasising that:

111.1 Section 9 of the NPA Act sets out the requirements for the appointment of the NDPP and any Director. These requirements include, under section 9(1)(b) that the NDPP and any Director "*be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.*"

111.2 Under section 12(6)(a)(iv) of the NPA Act, the NDPP and/or any Director may be suspended and an enquiry into their fitness to hold office initiated "*on account thereof that he or she is no longer a fit and proper person to hold the office concerned*".

111.3 The requirement to be "*fit and proper*" is not exhaustively defined or described in legislation and it is left to the subjective interpretation of,

and application by, seniors in the profession and ultimately the court.[1] The NPA Act does set out certain non-exhaustive list of factors which should be considered when deciding on fitness and propriety, including experience, conscientiousness and integrity to be entrusted with the high office in question. Not only are competence and independence an integral part of conscientiousness (and integrity), but they are also relevant factors in their own right.

112. The President, in his answering affidavit, seeks to limit the requirement of fitness and propriety to formal qualifications (which are not in issue) and integrity alone.

113. Though integrity is an important and multifaceted aspect of fitness and propriety, it does not stand alone, and it is clear there are a number of qualities that a lawyer, and indeed a prosecutor, should readily possess. I am advised that in *The General Council of the Bar v Nomcgobo Jiba*[2] it was stated that the minimum qualities that a lawyer should possess include, *inter alia*, impeccable honesty, dignity, respect of legal order and a sense of fairness. Furthermore, the Court noted that it was relevant to the "*fit and proper*" person requirement, in respect of prosecutors, to consider the directives of the Code of Conduct for Members of the National Prosecuting Authority (**"the Code of Conduct"**), which was published by the then NDPP.[3]

114. Relevant directives of the Code of Conduct include the following:

A Professional Conduct

---

[1] *The General Council of the Bar v Nomcgobo Jiba* 4 All SA 443 (GP) (15 September 2016) (**"Jiba"**).

[2] Ibid.

[3] Published in terms of section 22(6) of the NPA Act, *Government Gazette* 33907, notice number 1257, 29 December 2010.

Prosecutors must-

(c) protect the public interest;

(d) strive to be and to be seen to be consistent, independent and impartial;

(f) strive to be well-informed and to keep abreast of relevant legal developments...

B Independence

The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be free from political, public and judicial interference.

C Impartiality

Prosecutors should perform their duties without fear, favour or prejudice. In particular, they should-

(c) take into consideration the public interest as distinct from media or partisan interests and concerns, however vociferously these may be presented;

(d) avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence and impartiality;

(g) take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether

these enquiries are to the advantage or disadvantage of the alleged offender;

D Role in administration of justice

1. Prosecutors should perform their duties fairly, consistently and expeditiously and-

(d) in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence; and

(e) throughout the course of the proceedings the case should be firmly but fairly and objectively prosecuted.

2. Prosecutors should, furthermore-

(b) refrain from making inappropriate media statements and other public communications or comments about criminal cases which are still pending or cases in which the time for appeal has not expired.

115. All of this must be borne in mind when the fitness and propriety of any member of the NPA to hold office is considered, and must particularly be borne in mind when having regard to the "*experience, conscientiousness and integrity*" of that office bearer.

116. Accordingly, if the President is obliged to consider the conduct of the NPA officers in order to determine whether an Enquiry is necessary, the "*integrity*" of those persons is not dispositive of whether they are "*fit and proper*" –

although on the facts as set out in the founding affidavit the integrity of the NPA officers is very much in question.

117. In any event, the Enquiry is not only held when fitness and propriety are at stake, but also where there has been a serious allegation of misconduct. The second to fourth respondents have plainly misconducted themselves in this matter, and have a serious case of misconduct to answer.

118. The competence of an individual to hold the office of prosecutor is clearly of great import and relevance. It is submitted that this standard is even more important for the NDPP as chief prosecutor, head of the NPA and overseer of all the prosecutors below him. Similarly, Directors of the NPA should have a commensurately higher standard to meet than their subordinates. The President's attempt, in his version, to simplify, narrow and lower the bar for the fitness of propriety, and to disregard the misconduct, of the NDPP and the Directors must be rejected.

119. Instead, it is submitted that the NDPP, the Special Director and the DPP must be held to the "*highest standards of the legal profession*" with respect to, *inter alia*, all of the above considerations and, in general, to conscientiousness, including competence, and integrity.

120. Ultimately, of course, the President need not engage in this exercise on the merits, which is the preserve of the Enquiries. Instead, he must merely be satisfied that the objective criteria warrant the initiation of the Enquiries - clearly, in this matter of immense national importance, where botched prosecutions have wreaked havoc on the Republic, the economy, the NPA and the Executive, the Enquiries are required.

COMPETENCE OF THE RELIEF SOUGHT

121. The President adopts a somewhat schizophrenic approach to the nature of his own actions / inaction, vacillating between his powers being administrative or executive in nature.

122. With respect, it matters little how the President characterises his actions; the fact is that the failure, alternatively refusal, to take the relevant decisions, is clearly justiciable, and falls to be reviewed either under the principle of legality or under PAJA.

123. Where objective criteria necessitate that the President must take a certain decision, even where he has failed to take any decision, the Court may order the taking of the necessary decision. Legal argument will be addressed on this score.

JIBA

124. Significant time is committed to vilifying the applicants due to their perceived reliance on the *Booysen* matter. The applicants, however, do not rely on that case.

125. In error, the applicants indeed cited an incorrect case, which they rectified, by way of a supplementary founding affidavit, well before any of the respondents had answered. As noted in the supplementary founding affidavit, the reference to the "*Booysen*" matter was in error, with the matter concerning Mr Richard Mdluli instead being the correct matter (being the case of *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP)).

126. The second and third respondents thus misconstrue the allegations made in the founding papers, by dealing with the *Booysen* matter, as opposed to the Mdluli matter.

CONDONATION

127. It is noted that all of the respondents filed their answering papers outside of the time periods set forth in the applicants' notice of motion, which had the effect of curtailing the applicants' time period to assimilate the answering material and prepare a reply.

128. In addition, the respondents cumulatively filed in excess of 300 pages of answering affidavits, which required substantial time to assimilate and answer. Counsel for the applicants were both abroad on work commitments, but availed themselves at short notice and after hours to expedite the finalisation of the replying affidavit.

129. The applicants have done everything possible to produce this affidavit within the time periods set forth in the notice of motion (and simultaneously draft heads of argument which were directed by the Honourable Deputy Judge President to be filed on Friday, 18 November 2016, a day after this replying affidavit was to be delivered). In light of the prolixity of the answering affidavits coupled with the importance of the issues raised in this matter, the applicants were required to engage substantively with the issues raised in the answering papers on an extremely truncated basis and did so as swiftly as possible.

130. In any event, the respondents are not prejudiced by the late filing of this replying affidavit as it was filed, effectively, hours after the deadline set forth

in the notice of motion, and the respondents are afforded sufficient time to consider this reply for the purposes of heads of argument (the respondents' sole remaining written contributions to the piece).

131. In light of the national importance of this matter, coupled with the minimal delay and lack of prejudice, the applicants humbly request this Honourable Court to condone the late filing of this replying affidavit for the reasons set forth above.

COSTS

132. It is unfortunate that the NPA officers seek to characterise the applicants' actions as falling outside of the prescripts of *Biowatch*, and instead being abusive and/or vexatious.

133. The applicants act in the public interest. It cannot be denied that the Republic is entitled to an NPA which is independent, is seen to be independent and is manned by independent officers who are characterised by integrity, and conscientiousness (including competence) and proper conduct. Approaching Court to ensure that this is the case can hardly be said to be a matter where public interest organisations are acting for financial benefit, or seeking to abuse Court processes. Indeed, a costs order against litigants in the position of the applicants may well stifle approaches to Court, which appears to be the desire of the NPA officers.

134. The actions by the NPA officers have impacted upon the rights and interests of every person in the Republic. The relief sought by the applicants goes some way to vindicate these rights.

135. Accordingly, even if unsuccessful, the applicants contend that the constitutional principles outlined in *Biowatch* should apply.

136. It is regrettable that the Mr Mzinyathi impugns not only the conduct of the applicants, but also that of the Honourable Deputy Judge President, by suggesting that the Honourable Deputy Judge President somehow colluded with the applicants to secure the hearing date of 24 November. Such a scurrilous suggestion is entirely without merit is based on no evidence, is unbefitting of an individual in the position of the Mr Mzinyathi and is abusive in the extreme. It simply reaffirms his lack of fitness for his high office. The applicants reserve their rights to apply for the striking out of this statement and to bring it to the attention of the necessary authorities. It is submitted that the Court ought to express its displeasure at Mr Mzinyathi's irresponsible allegations through a punitive costs award, *de bonis propriis*.

PRESIDENT HAS DISABLED HIMSELF FROM MAKING A LAWFUL DECISION IN FUTURE AND CONCLUSIONS

137. The President has failed to take the Enquiry and suspension decisions. This is in spite of the facts before him, the national importance of the matter and the manifest urgency punctuating the matter.

138. Instead, the President has crafted a timetable which, by design or otherwise, will push out any taking of an actual decision until after the hearing of this matter. Based largely on this fact, ripeness has become the lynchpin of the first to fourth respondents' arguments.

139. The failure to take a decision in a reasonable period of time, however, is reviewable. Moreover, the material before the Court warrants the Court

ordering the President to institute the Enquiries forthwith, and suspend the NPA officers pending the outcome of such Enquiries.

140. It is, moreover, concerning to note that the President has misconstrued the jurisdictional factors which trigger the obligation to exercise his s12(6) powers; he has, moreover, indicated a failure to appreciate what factors are considered when one considers the fitness and integrity of the NPA officers, and has apparently already decided (even before seeing their representations) that they do not have a case to meet. Based on the President's assertions he has adopted an unlawfully rigid stance and has effectively disable himself from making a lawful and rational decision. This speaks both to the reviewability of his failure or refusal to make a decision and whether this Court should substitute its decision for that of the President.

141. Ultimately neither the President nor the Court is called upon to decide whether the NPA officers are fit and proper and should remain in office. This is the terrain of the Enquiries.

142. The issue before this court is a crisp one - does the second to fourth respondents' conduct the facts of a botched prosecution, which damaged numerous facets of the Republic, in a politically charged environment where ulterior purpose and/or recklessness appears manifest, warrant <u>at least</u> an official enquiry to determine whether the NPA officers acted properly and are fit to remain in their positions of significant power and responsibility? Moreover, for the duration of such enquiry, should the Republic and the NPA be shielded from those who played a pivotal, and disastrous, role in the botched prosecution?

143. The answers to both questions, it is submitted, should be a resounding yes.

WHEREFORE, the applicants pray for the relief set forth in the notice of motion to which the founding affidavit is attached.

FRANCIS ANTONIE

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Sandton on 16 November 2016, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1643 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS
Full names:
Address:
Capacity:

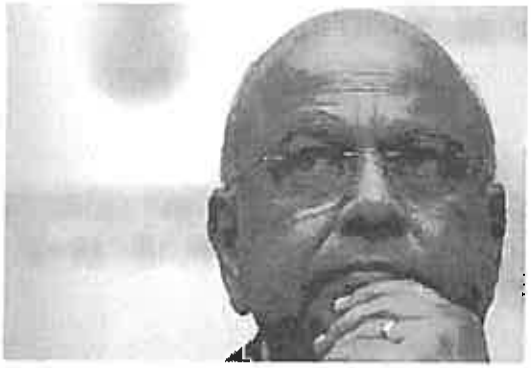
RUAN DICKINSON
Commissioner of Oaths Ex Officio
Registered Attorney R.S.A.
KISCH IP
Inanda Greens Business Park
54 WIERDA RD WEST, WIERDA VALLEY, SANDTON
P.O. BOX 781216, SANDTON, 2146

Print this page (#)

SARS deputy director Vlok Symington has opened a case of kidnapping, Ipid confirms

Oct 27, 2016 | Nomahlubi Jordaan

The Independent Police Investigative Directorate (Ipid) has confirmed that South African Revenue Service (SARS) deputy director of law Vlok Symington has opened a case of kidnapping with it.



Pravin Gordhan. File photo.
Photograph by: REUTERS

The Independent Police Investigative Directorate (Ipid) has confirmed that South African Revenue Service (SARS) deputy director of law Vlok Symington has opened a case of kidnapping with it.

This follows a video clip and media reports on Thursday indicating that Symington had been locked in a boardroom in the SARS head office while the Hawks, and SARS boss Tom Moyane's bodyguards attempted to get him to make an affidavit in the fraud case against Finance Minister Pravin Gordhan.

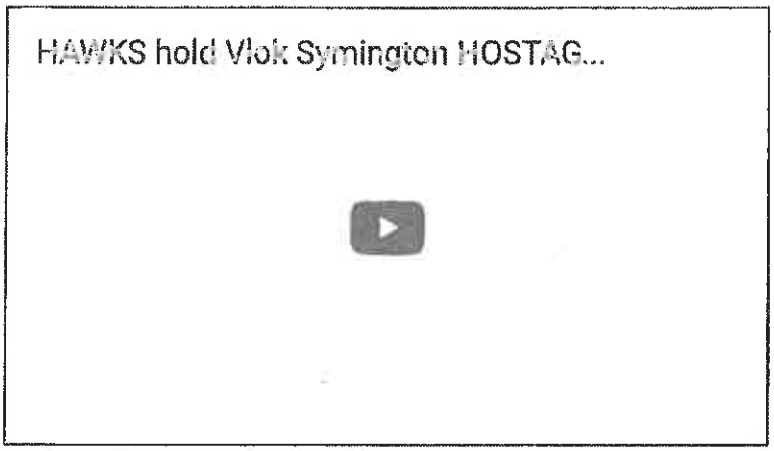
- Save South Africa campaign calls for sacking of Abrahams, Moyane (http://www.timeslive.co.za/politics/2016/10/27/Save-South-Africa-campaign-calls-for-sacking-of-Abrahams,-Moyane)

"I can confirm that we've opened a case of kidnapping. It was registered late yesterday [Wednesday]. It has been assigned to an investigator," said Ipid spokesperson Moses Dlamini.

"It's still the beginning of the investigation. It's difficult to say more."

- Gordhan on SARS hostage drama report: 'totally unacceptable behaviour' (http://www.timeslive.co.za/politics/2016/10/27/Gordhan-on-SARS-hostage-drama-report-totally-unacceptable-behaviour)

Dlamini said Ipid was in possession of the video footage and other evidence.



Video posted to YouTube by Sebastien Bonart (https://www.youtube.com/channel/UCcE4X7kIGWKMCXIGKpCSlOw).

Symington was the author of the 2009 legal opinion which the Helen Suzman Foundation and Freedom Under Law used to file an application to the Pretoria High Court requesting that the fraud charges against Gordhan be set aside. In that opinion, he states that there was "no technicality" stopping SARS from reappointing former deputy commissioner Ivan Pillay on a contract basis after an early retirement payout.

~oOo~

EWN
EYEWITNESS NEWS

QUESTIONS OVER PRESENCE OF MOYANE'S BODYGUARD IN SARS 'HOSTAGE' DRAMA

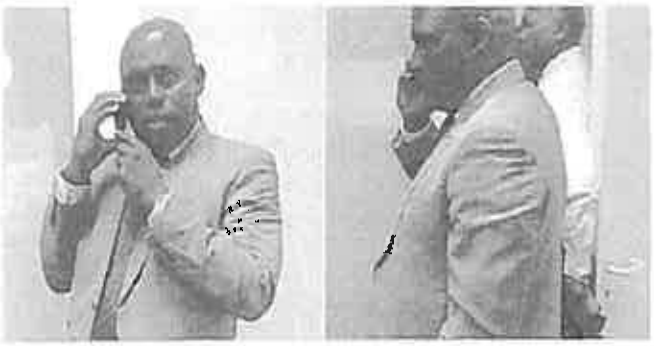
Video footage Vlok Symington recorded shows him being blocked from leaving Sars officer over a document.

Picture: Sars.

SARS (http://ewn.co.za/Topic/SARS) Tom Moyane (http://ewn.co.za/Topic/Tom-Moyane) Hostage (http://ewn.co.za/Topic/Hostage)
Barry Bateman | 21 days ago (21 days ago)

PRETORIA - Questions have emerged as to why Sars (http://ewn.co.za/Topic/SARS) commissioner Tom Moyane's personal bodyguard was helping the Hawks take a statement from a revenue service employee and eventually played a part in holding him hostage (http://ewn.co.za/2016/10/27/dramatic-recording-reveals-details-of-the-sars-hostage-situation).

Senior Hawks officials, including the head of the crimes against the state unit Brigadier Nyameka Xaba, wanted a statement from the staff member who gave former deputy commissioner Ivan Pillay advice on his request for early retirement in 2009.



EWN Reporter
@ewnreporter

Follow

#SARShostage SARS commissioner Tom Moyane's bodyguard, Thabo Titi, He blocked the door. SB

5:50 PM - 27 Oct 2016

28 6

Finance Minister Pravin Gordhan has been charged together with Pillay with fraud for approving Pillay's early retirement and subsequent re-appointment on a contract.

Vlok Symington recorded shows him trying to leave a boardroom while Moyane's bodyguard who was on the phone and seemingly receiving instructions blocks his path.

"Can I open the door? Why not? Why can't I open the door?"

EWN Reporter
@ewnreporter

Follow

#SARSHostage two other Hawks officials were in the office. BB
5:47 PM - 27 Oct 2016

30 13

It's understood the drama started when Xaba mistakenly gave Symington copies of an email exchange which revealed that Sars' own attorney disagreed with the prosecution of Gordhan.

Xaba wanted it back.

"We want that document. We are saying that one doesn't belong to you."

The Independent Police Investigative Directorate has confirmed that a case of kidnapping has been opened.

EWN Reporter
@ewnreporter

Follow

#SARSHostage among the alleged hostage takers was CATS boss Brig Nyameka Xaba (left). BB
5:47 PM - 27 Oct 2016

13 5

Sars has not commented on the incident.

(Edited by Wiseman Tholotsane)

633

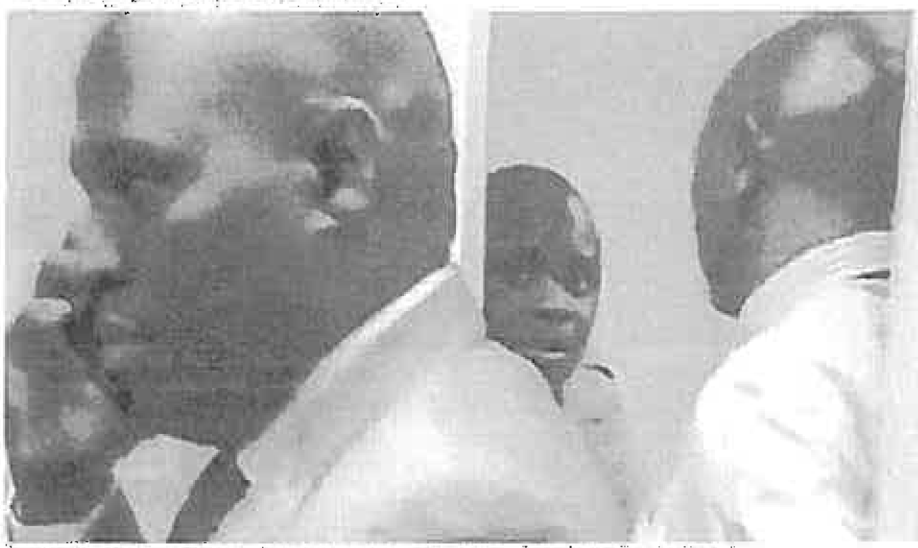
"RA1" 545

The Meaning of Africa
Decolonising Knowledge Thought Leader Series
Mail & Guardian Africa
EVENT PARTNER

NATIONAL (HTTP://MG.CO.ZA/SECTION/NEWS-NATIONAL)

Violent showdown in Sars office exposes plot against Gordhan

Pauli van Wyk (http://mg.co.za/author/paulivanwyk) 28 Oct 2016 00:00



Visual evidence: A video screen grab of Tom Moyane's bodyguard, Thabo Titi, (left) and Hawks's lead investigator Nyameko Xaba (right)

(http://mg.co.za/article/2016-10-28-00-violent-showdown-in-sars-office-exposes-plot-against-gordhan)

The prosecution of Minister of Finance Pravin Gordhan is ethically dubious, a South African Revenue Service lawyer said in an email exchange that set off an explosive series of events in the past 10 days, including an alleged hostage drama at a Sars office in Pretoria.

Four Hawks officials are accused of using physical force and "apartheid-style tactics" to retrieve a printout of the damning email from a senior Sars employee, Vlok Symington.

Among them was Brigadier Nyameko Xaba, the Hawks's lead investigator in the case against Gordhan. Symington was allegedly left with bruises on his forearms and hands from the altercation.

- READ MORE: The case against the NPA's shoddy work (http://mg.co.za/article/2016-10-28-00-the-case-against-the-npas-shoddy-work)

Dramatic video and audio recordings suggest that Sars commissioner Tom Moyane might have been consulted and updated during the alleged hostage drama.

The recordings were made by Symington and handed over, with other evidence, to the Independent Police Investigative Directorate (Ipid), which is now investigating the matter.

The *Mail & Guardian* was still waiting for comment from all parties at the time of going to press.

This bizarre twist in the Gordhan saga was triggered by an email Moyane seemingly erroneously shared last week.

The chain of events began with Torie Pretorius, the lead prosecutor targeting Gordhan, emailing Xaba, asking him to obtain a statement from Symington. That happened just before 5pm on October 17. Pretorius attached a list of questions for Symington to answer.

They relate to a legal opinion Symington wrote in 2009 about whether Sars was permitted to pay out former Sars deputy commissioner Ivan Pillay's pension fund and rehire Pillay on a contract basis.

Symington's legal opinion stated that there was "no technicality" that prevented Sars from reappointing Pillay and that he was "entitled" to request Gordhan [minister of finance at the time, during his first stint] to waive the early retirement penalty.

Charges of fraud recently brought against Gordhan, Pillay and former Sars commissioner Oupa Magashula relate to this pension payout.

A few minutes after receiving the email from Pretorius, at 5.07pm, Xaba asked Sars's lawyer, David Maphakela from law firm Mashiane, Moodley and Monama, to deal with the NPA's request as a "matter of urgency".

Maphakela then emailed Moyane the following damning message: "Kindly find this for your urgent attention. On ethical reasons, I cannot be involved in this one, as I hold a different view to the one pursued by the NPA and the Hawks."

This essentially says Sars's own lawyer did not agree with the prosecution of Gordhan and his co-accused.

It set off the chain of events that led to the alleged hostage incident.

By Moyane's own doing, this message has now found its way into the public domain.

It seems that at some point after the email exchange, Moyane handed a hard copy of Pretorius's questions, along with the entire

email trail, to senior Sars employee Nicole Louw, to which Symington replied. Louw asked Symington to answer Pravin's questions.

At about 10am on Tuesday October 18, Moyane's bodyguard, Thabo Titi, and the Hawks, including Xaba, met Symington.

The meeting seems to have been congenial, with the Hawks explaining what they would need from him. Why Titi accompanied the investigators is not clear.

They then left Symington and walked across the road to Lehae in Sars, the main building and location of Moyane's office.

Sometime later, Titi and the Hawks returned at 1pm, matters no longer appeared to be so pleasant. From a recording of the events, Titi appeared to be blocking Symington from leaving the boardroom, as well as preventing Sars security officials and Symington's personal assistant from entering.

In one recording, Titi can be heard telephonically consulting a person whom he addressed as "commissioner" and "Sir", while ordering Sars security to stay outside.

Insiders said Titi was speaking to Moyane.

The Hawks can be heard demanding that Symington hand over the printout of the email and questions.

At some point, a clearly agitated and intimidated Symington pushed the record button on his phone. He can be heard repeatedly shouting that he was "being held against my will" and "I'm being held hostage".

The recording seemed to have been done in secret – until Symington is heard warning Titi that he was filming them preventing him from leaving the boardroom.

Symington made at least three phone calls – two to his personal assistant and one to 10111. He is heard asking his PA to call the building's security guards because he was being held hostage and "against my will". The second time he called his PA it was to ask what was delaying the guards from responding.

Symington seemingly got no joy from 10111. The operator asked whether Symington knew the people holding him hostage and why they were allowing him to phone. She also struggled to grasp where Symington was – in Sars's Lehae building in Brooklyn, Pretoria.

From the recordings, it is clear that between 10am and 1pm on Tuesday October 18 the Hawks's attention suddenly shifted from getting Symington to answer the NPA's questions urgently to their panicked attempts to get him to return the email printout.

Symington can be heard expressing his surprise by the change in the Hawks's tone.

Sars insiders say this was after the Hawks left Symington for the building where Moyane's office is.

Xaba appeared determined about retrieving the document that contained the email trail and, crudially, the Sars lawyer's comment sent to Moyane.

He can be heard saying the document had been given to Symington "by mistake".

It appears from the recordings that Xaba wanted to trade the document for another copy of the NPA's questions – without the message from the Sars lawyer.

Symington bluntly refused.

During the recorded conversation, it is clear that he had caught on to why Titi and the Hawks so desperately wanted the document back.

"It must be about the attachments," he is heard saying to Xaba, a reference to the email with its damning message from the lawyer.

At one stage, Louw and Symington's colleagues, Eric Smith and Mark Lurgan, joined the unravelling meeting.

Louw asked the Hawks to leave the room and give Symington's colleagues "five minutes" alone with him. They're heard trying to placate him and apparently to coax him into giving the document to the Hawks.

Symington did not budge.

It is at this time – about an hour after he first mentioned being held "against my will" – that Symington lost his patience.

"The commissioner's bodyguard is holding me hostage," Symington is heard shouting.

The bodyguard then seems to have retreated but, when Symington left the room, all hell broke loose.

In the recording shouts can clearly be heard. An insider said it was the moment "the Hawks pounced on him and roughed him up a bit, while taking the document by force at the moment Symington exited the room".

Symington's repeated shouts of "he stole the document" intermingle with the soothing voices of his colleagues, saying: "Vlok, bly near nou" (Vlok, calm down now).

The desperation displayed by the Hawks, with the seemingly tacit consent of Moyane, is the clearest show yet of the lengths some powerful organs of state are willing to go to prosecute Gordhan and his co-accused.

It further confirms, from within the prosecutorial camp, what legal experts have said – that the case against the finance minister is fatally flawed.

It also displays the increasingly desperate lengths they are willing to go to execute their plan.

Violence and intimidation – tactics reminiscent of the apartheid-era state of emergency – seem to be back in vogue.

'It's unacceptable if it's true'

In Parliament on Wednesday, Finance Minister Pravin Gordhan was quizzed about whether he had knowledge of the alleged South African Revenue Service "hostage drama", before the *Mail & Guardian* broke the story.

"The incidents at Sars, I heard whispers about it, to be frank. I have no formal report yet. I believe there's something on the wires this morning, but I haven't had a chance to look at it," Gordhan said. "I will ask Mr [Tom] Moyane for an explanation as soon as I get a chance. If this is true, it's unacceptable behaviour. But let's get the facts first and we will take it from there."

Cars said the Hawks did not reply to questions from the M&G. They were asked if Mayani had ordered the Hawks to retrieve the document from Vlok Symington and, if so, under what authority.

The National Prosecuting Authority said its head, Shaun Abrahams, had considered representations from Ozias Magashula and Ivan Pillay, and had "directed that further investigations be conducted to clarify some issues. The review process is underway; please give the NDPP [national director of public prosecutions] space to apply his mind to the matter in a judicious manner."

717
SHARES

READ MORE

We recommend

From around the Web

COMMENTS

WEBBER WENTZEL
in alliance with > Linklaters

His Excellency, Mr JG Zuma
The President of the Republic of South Africa
Union Buildings
Government Avenue
Pretoria
0001

c/o The State Attorney

Mr RJ Sebelemetsa

By email: rsebelemetsa@justice.gov.za

90 Rivonia Road, Sandton
Johannesburg, 2196

PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 11 530 5000
F +27 11 530 5111

www.webberwentzel.com

Your reference	Our reference	Date
	V Movshovich / P Dela / D Cron / W Timm / J Coyle / T Dye 3012607	7 December 2016

Dear Sir

Impropriety and unfitness for office of Mr Abrahams, Mr Mzinyathi and Dr Pretorius SC ("the Prosecutors")

1. As you know, we act for Freedom Under Law NPC and the Helen Suzman Foundation ("our clients").

2. We refer to your letters to Mr Abrahams, Mr Mzinyathi and Dr Pretorius SC ("the Prosecutors") dated 14 November 2016, in which you requested reasons as to why the Prosecutors should not be suspended from their respective offices at the National Prosecuting Authority pending inquiries into the Prosecutors' respective fitness for office ("the requests"). We note that the requests gave the Prosecutors until 28 November 2016 to respond.

3. Our clients request that any representations received from the Prosecutors ("the representations") be made available to our clients as soon as possible.

4. Furthermore, our clients request that you indicate, as soon as possible, a date on which you will make your decision, under section 12(3) of the National Prosecuting Authority Act,

1998 ("NPA Act"), as to whether you will institute the enquiries into fitness and propriety of the Prosecutors and suspend the Prosecutors pending such enquiries. We note that you and your legal representatives have previously indicated that this is a matter of urgency and great public importance.

5. Please note that our clients reserve all their rights in respect of the judgment of the Full Court handed down on 24 November 2016 in respect of GP case no. 87543/2016, including their right to seek leave to appeal.

Yours faithfully

pp. JCapp

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5367
Direct fax: +27 11 530 6567
Email: vlad.movshovich@webberwentzel.com

Cc: The State Attorney, acting for the National Director of Public Prosecutions; Dr JP Pretorius SC; and Sibongile Mzinyathi; by email: rsebelemetse@justice.gov.za

the doj&cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE STATE ATTORNEY: JOHANNESBURG

Private Bag X9, JOHANNESBURG, 2000
10TH Floor, North State Building, 95 Albertina Sisulu Street (cnr Kruis), JOHANNESBURG, 2001

Docex 960, Johannesburg
Tel: 011 330 7600

My ref : Mr Lekabe/P1 Your ref: V Stevanovich/ Dated: 0 Cron/ M Thom/ J Coyle/ T Dyc

Enq : MR KG Lekabe
E-mail : KLekabe@justice.gov.za
Fax : 086 587 1152

Date: 13 December 2016

WEBBER WENTZEL
P.O BOX 61771
JOHANNESBURG
2107

*per fax.: 011 530 5878
email.: Vanja.Stevanovich@webberwentzel.com

Dear Sir/Madam

RE: HELEN SUZMAN FOUNDATION & FREEDOM UNDER LAW

1. We refer to your letter dated the 07th December 2016 and note the contents thereof.

2. Submissions were received by the office of the Presidency from the relevant parties, the purpose of which was to place His Excellency President Zuma in a position to give due and proper consideration to the same in light of the serious allegations levelled, coupled with the request directed to the President to act against the mentioned individuals.

3. Indeed the matter is both urgent and of public importance and it is within this context that President Zuma will apply his mind

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc; LLM)(Law); ; Z N S O Ntsoyi (B Proc); V Durham (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: S Du Preez (B. Iuris, B Proc); M C Engelbrecht (BA, LLB); A H Fourie (B Proc, LLB); O D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Makenete (B Proc); S J Mandishona (B Proc); L Pinsela (B Proc, LLM) ; Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) F Patel(BA;LLB); R T Poso (B Proc); J H Van Schalkwyk (LLB); ; H R Jaskolka (B Proc , LLB) S Naidoo (BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Hgai (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Labenya (B Proc); H S Linde (BA, LLB); I T Mahgo (LLB);, LLB); M H Manonya (B Proc);E L Matloa (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoane (LLB); M J Sefanya (LLB); C T Sethaole (B Proc, LLB); R R Ramaloanda (LLB, LLM); D Mahapfu (B Proc);K Thovar (B.Iuris,LLB) M L Matlabana(LLB);A Nkhahlheto (LLB);L Makungo (LLB);O S Matlo (LLB); Z Sahib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Mngcakini (LLB); C G Josslo (LLB); N Sonda (LLB); O Poso (LLB); N Zitumi N (LLB); S R Mogapi (LLB) ; K A Phokoane (LLB)

having regard to all the prescripts of law which apply, where after an evaluation will be done and a decision made.

4. The decision will firstly be communicated to the affected parties and thereafter communicated publicly.

Yours faithfully

K.G LEKABE (Mr)
STATE ATTORNEY

(Always quote my reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc; LLM(Law); ; Z N S O Nhlayisi (B Proc); V Dhulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Mahanna (B Proc); S J Mahlahona (B Proc); L Flatela (B Proc, LLM) ;) Matheba (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) ;F Patel(BA;LLB); R T Pooe (B Proc); J H Van Schalkwyk (LLB) ; H R Jnakolia (B Proc , LLB) S Naidoo (BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebonya (B Proc); H S Linda (BA, LLB); I T Malapa (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Sethatole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc);K Thaver (B.Iuris,LLB) M L Makabane(LLB);A Netshifhefhe (LLB);L Mabunga (LLB);O S Matjila (LLB); Z Sehlo (Bsoc; LLB); S Sheik (Bsoc; LLB); S Magcaikni (LLB); C G Jooste (LLB); N Sanda (LLB); O Puno (LLB); N Zibani N (LLB); S R Mogapi (LLB) ; K A Pholosana (LLB)

01 March 2017

Dear Adv. Abrahams,

REPRESENTATIONS PURSUANT TO NOTICE IN TERMS OF SECTION 12(6)(A) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO. 32 OF 1998)

Reference is made to your written submission of 28 November 2016.

In considering the matter I factored in the provisions of section 179 of the Constitution of the Republic of South Africa, 1996, read with section 39 of the National Prosecuting Authority Act, 1998 ("the Act") which guarantee the independence of the National Prosecuting Authority and those of its officials.

I am alive to the provisions of section 12(5) of the Act which prohibit the provisional suspension or removal from office of the National Director of the Public Prosecutions except in accordance with the provisions of subsection 6, 7 and 8.

Having considered your submission and concerns raised by the Helen Suzman Foundation and Freedom under Law regarding your conduct in as far as it relates to the decision to charge and review the charges against Minister Gordhan, Mr Pillay and Mr Magushula I could not find substantiation for the claim that your conduct was actuated by ulterior motive or any other improper motive which would give rise to a charge of misconduct or that you are no longer fit and proper to hold office.

It is my considered opinion that there is no *prima facie* evidence pointing to your conduct, constituting misconduct or lack of fitness and propriety to warrant the invocation of the provisions of section 12(6) of the Act.

Taking the aforementioned into consideration I have decided not to provisionally suspend you and hold an enquiry as envisaged in section 12(6) of the Act.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Adv SK Abrahams
National Director of the Public Prosecutions
Private Bag X752
Pretoria
0001

CC: Advocate TM Masutha: Minister of Justice and Correctional Services

01 March 2017

Dear Dr Pretorius,

REPRESENTATIONS PURSUANT TO NOTICE IN TERMS OF SECTION 12(6)(A) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO. 32 OF 1998)

Reference is made to your written submission of 28 November 2016.

In considering the matter I factored in the provisions of section 179 of the Constitution of the Republic of South Africa, 1996 read with section 39 of the National Prosecuting Authority Act, 1998 which guarantee the independence of the National Prosecuting Authority and those of its officials.

Having considered your submission and concerns raised by the Helen Suzman Foundation and Freedom under Law regarding your conduct in as far as it relates to the decision to charge and review the charges against Minister Gordhan, Mr Pillay and Mr Magushula I could not find substantiation for the claim that your conduct was actuated by ulterior motive or any other improper motive which would give rise to a charge of misconduct or that you are no longer fit and proper to hold office.

It is my considered opinion that there is no *prima facie* evidence pointing to your conduct, constituting misconduct or lack of fitness and propriety to warrant the invocation of the provisions of section 12(6) read with 14(3) of the Act.

Taking the aforementioned into consideration I have decided not to provisionally suspend you and hold an enquiry as envisaged in section 12(6) read with 14(3) of the Act.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Dr JP Pretorius
Acting Special Director of Public Prosecutions
Private Bag X752
PRETORIA
0001

CC: Advocate TM Masutha: Minister of Justice and Correctional Services

01 March 2017

Dear Adv. Mzinyathi,

REPRESENTATIONS PURSUANT TO NOTICE IN TERMS OF SECTION 12(6)(A) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT NO. 32 OF 1998)

Reference is made to your written submission of 28 November 2016.

In considering the matter I factored in the provisions of section 179 of the Constitution of the Republic of South Africa, 1996 read with section 39 of the National Prosecuting Authority Act, 1998 ("the Act"), which guarantee the independence of the National Prosecuting Authority and those of its officials.

Having considered your submission and concerns raised by the Helen Suzman Foundation and Freedom under Law regarding your conduct in as far as it relates to the decision to charge and review the charges against Minister Gordhan, Mr Pillay and Mr Magushula I could not find substantiation for the claim that your conduct was actuated by ulterior motive or any other improper motive which would give rise to a charge of misconduct or that you are no longer fit and proper to hold office.

It is my considered opinion that there is no *prima facie* evidence pointing to your conduct, constituting misconduct or lack of fitness and propriety to warrant the invocation of the provisions of section 12(6) read with 14(3) of the Act.

Taking the aforementioned into consideration I have decided not to provisionally suspend you and hold an enquiry as envisaged in section 12(6) read with 14(3) of the Act.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Advocate S Mzinyathi
Director of Public Prosecutions
Private Bag X752
PRETORIA
0001

CC: Advocate TM Masutha: Minister of Justice and Correctional Services

WEBBER WENTZEL
in alliance with > Linklaters

The State Attorney
SALU Building
316 Thabo Sehume Street
Cnr Thabo Sehume and Frances Baard Streets
Pretoria

90 Rivonia Road, Sandton
Johannesburg, 2196
PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa
Docex 26 Johannesburg
T +27 11 530 5000
F +27 11 530 5111
www.webberwentzel.com

By email: klekabe@justice.gov.za

Your reference	Our reference	Date
Mr Lekabe/P1	V Movshovich / P Dela / D Cron / W Timm / J Coyle / T Dye 3012607	21 February 2017

Dear Sir

Impropriety and unfitness for office of Mr Abrahams, Mr Mzinyathi and Dr Pretorius SC ("the Prosecutors")

1. We refer to your letter on behalf of the Honourable President Jacob Zuma ("**the President**") dated 13 December 2016 ("**your letter**"), as well as our letter of 3 January 2016 ("**our letter**").

2. Notwithstanding the acknowledgement in your letter that "*the matter is both urgent and of public importance*", we are yet to receive a response to our letter. Moreover, it has now been almost three months since the President received the submissions by the Prosecutors on 28 November 2016 ("**the Submissions**"). Despite the acknowledgment in your letter, it appears that, to date, no decision has been made in respect of the propriety and fitness of the Prosecutors to hold office ("**the Decision**").

3. As you will no doubt appreciate, this is a matter of paramount public importance and, with respect, a reasonable time has elapsed since receipt of the Submissions. The President's delay in the making of the Decision is unreasonable and, respectfully, does violence to his constitutional mandate.

Webber Wentzel is associated with ALN

4. You will further be aware that the Full Court of the High Court, Pretoria, has handed down judgment on the understanding that the President is actively discharging his mandate under section 12(6) of the National Prosecution Authority Act, 1998. The President's failure to act, however, is inconsistent with the version presented to (and accepted by) the Court.[1]

5. We accordingly repeat, as a matter of great urgency, our clients' request that you:

5.1 provide an indication as to when the President intends to take the Decision; and

5.2 provide our clients with the Submissions.

6. Should our clients not receive a response to these requests by 7 March 2017, they will assume that the President does not intend to make the Decision, in which case our clients will be forced to approach a court for appropriate relief.

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

Cc: The State Attorney, acting for the National Director of Public Prosecutions; Dr JP Pretorius SC; and Sibongile Mzinyathi; by email: rsebelemetsa@justice.gov.za

[1] Our clients do not, however, necessarily accept the correctness of the Court's findings and reserve all rights in this regard.

the doj & cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE STATE ATTORNEY: JOHANNESBURG

Private Bag X9, JOHANNESBURG, 2000
10TH Floor, North State Building, 95 Albertina Sisulu Street (cnr Kruis), JOHANNESBURG, 2001

Docex 688, Johannesburg
Tel: 011 330 7600

My ref : Mr KG Lekabe
Enq : MR KG Lekabe
E-mail : KLekabe@justice.gov.za
Fax : 086 687 1162

Your ref: V Movshovich/P Dela/D Cron/ W Timm/ J Coyle/ T Dye 3012697

Date: 03 March 2017

WEBBER WENTZEL ATTORNEYS
SANDTON

"Fax no.: 011 530 6867"
"Email.: vlad.movshovich@webberwentzel.com"

Sir

RE: IMPROPRIETY AND UNFITNESS FOR OFFICE OF MR ABRAHAMS, MR MZINYATHI AND DR PRETORIUS SC ("the Prosecutors")

We refer to your letter dated 21 February 2017 and respond as follows:

1. The President is alive to the fact that it does not fall within the purview of the President to adjudge whether Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi are guilty of misconduct or are not 'fit and proper' to hold office. That is the task of an inquiry, if established, in terms of s12(6) of the National Prosecuting Authority Act. What falls within the purview of the President is to establish whether, prima facie, there is evidence of misconduct or lack of fitness and propriety to hold

(Always quote my reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc, LLB) [illegible] V Dhulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: [illegible]

OFFICE MANAGER:

office on the part of Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi.

2. In considering your request that the President must establish an enquiry to look into the fitness or otherwise of Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi to hold office, the President had to place weight to the constitutional provisions of section 179 of the Constitution of the Republic of South Africa, 1996, which guarantees the independence of the National Prosecuting Authority and those of its officials.

3. The President also took into consideration the provisions of section 12(5) of the National Prosecuting Authority Act, 1998 which prohibits the provisional suspension or removal of office of an NDPP except in accordance with the provisions of subsection 6, 7 and 8 of the National Prosecuting Authority Act, 1998.

4. Having considered the concerns raised by your clients, Dr Pretorius and Advocate Mzinyathi, the President could not find substantiation for the claim that their conduct was actuated by ulterior motive or any other improper motive which would give rise to a charge of misconduct or that any one of them is no longer fit and proper to hold office.

5. The President has also considered the career records of Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi, both qualifications and experience have to date of their decision to charge and to review the charges against Minister Gordhan, Mr Pillay and Mr

(Always quote my reference number)

STATE ATTORNEY: K G Letebe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc, LLM) (Law) ; Z N S C Ntlaga (B Proc); V Dhulam (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** S Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Makenna (B Proc); S J Mantshantsha (B Proc); L Fatela (B Proc, LLM) ; Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Kacas (B Proc); V Manamela (B Proc) F Patel (BA LLB); R T Pose (B Proc); J H Van Schalkwyk (LLB) ; H R Jacobs (B Proc , LLB) S Naidoo (BA Law, LLB) **ASSISTANT STATE ATTORNEYS:** H T Hiya (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lasenga (B Proc), H S Linde (BA, LLB); J T Masopa (LLB) ; LLB), M H Maponya (B Proc); E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkosana (LLB); M J Sethunya (LLB); C T Setlhatlole (B Proc, LLB); R R Namakoola (LLB, LLM); D Mphephu (B Proc); K Thaver (B Iuris LLB) M L Makanasa (LLB) A Nesamvuni (LLB) L Mokwena (LLB) O S Manjia (LLB); Z Sello (Bproc LLB); S Shaik (Bproc LLB); S Magabane (LLB); O G Josias (LLB); N Sande (LLB); C Pussi (LLB); N Zibani N (LLB); S R Magedi (LLB) ; K A Phakwane (LLB)

OFFICE MANAGER:

Magashula, stood above reproach.

6. The President is of the view that there is no prima facie evidence pointing to the conduct of Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi, constituting misconduct or lack of fitness and propriety to warrant the invocation of the provisions of section 12(6) of the National Prosecuting Authority Act.

7. Having carefully considered the matter the President decided not to provisionally suspend Advocate Shaun Abrahams, Dr Torie Pretorius and Advocate Sibongile Mzinyathi and institute an enquiry into their fitness to hold office.

Yours faithfully

K.G LEKABE (Mr)
STATE ATTORNEY
JOHANNESBURG

(Always quote my reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc LLM) Law) ; Z N S O Ntlabati (B Proc); V Dhulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preez (B. Iuris, B Proc); M C Sngalimen (BA, LLB); A H Fourie (B Proc, LLB); D D Govender (B Proc); W R I Mochitele (B Proc, LLB); S L Masemola (B Proc); S J Mankahana (B Proc); L Ratefa (B Proc, LLM) S Maharaj (B Iuris)(LLB) M S Smith (B Proc) C R Kazas (B Proc); V Manamela (B Proc) F Patel (BA LLB); N T Ponto (B Proc); J H Van Schalkwyk (LLB) ; H R Jacobs (B Proc , LLB) S Naidoo (BA Law, LLB) ASSISTANT STATE ATTORNEYS: N T Higa (B Proc), N T Honga (BA Economics and Accounting, LLB); O Lebanya (B Proc); H S Lieta (BA, LLB); I T Malepe (LLB), LLM; M H Maponya (B Proc) E L Mashug (B Iuris, LLB); N T Ngobeni (B Iuris, LLB); R P N Mvana (LLB); M J Sethunya (LLB); C T Sethlabole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphasha (B Proc) K Thaver (B Iuris LLB) M L Mokabale (LLB) A Nesamvhelwe (LLB) L Makunga (LLB) O S Matjila (LLB) Z Sahib (Bcom LLB); S Shaik (Bcom LLB) S Magashoni (LLB); C B Jossie (LLB); N Sands (LLB); O Phala (LLB); N Zibeni N (LLB); S R Mogadi (LLB) ; K A Phokwane (LLB)

OFFICE MANAGER.

The State Attorney
SALU Building
316 Thabo Sehume Street
Cnr Thabo Sehume and Frances Baard Streets
Pretoria

[redacted]

By email: klekabe@justice.gov.za

Your reference	Our reference	Date
Mr Lekabe P1	V Movshovich / P Dala / D Cron / W Timm / J Coyle / T Dye 3012607	8 March 2017

Dear Sir

Impropriety and unfitness for office of Mr Abrahams, Mr Mzinyathi and Dr Pretorius SC ("the Prosecutors")

1. We refer to your letter on behalf of the Honourable President Jacob Zuma ("the President") dated 3 March 2017 ("your letter").

2. We note that the President has taken the decision not to suspend the Prosecutors provisionally and not to establish an enquiry into the propriety and fitness of the Prosecutors to hold office ("the Decision"). Your letter further points out that the President considered:

2.1 the concerns raised by our clients;

2.2 the submissions received by the President on 28 November 2016 ("the Submissions"); and

2.3 the career records, qualifications and experience of the Prosecutors ("the additional information").

3. We assume your letter encompasses the reasons for the Decision. Should our assumption be incorrect we ask that you provide us with the reasons by no later than Monday, 20 March 2017.

4. We again request that you provide our clients with the Submissions. Furthermore and in light of the Decision, we request that you provide our clients with the additional information and any other documentation or information on which the President relied in coming to the Decision.

5. Please furnish the Submissions and all other information and documentation to our clients by 20 March 2017.

Yours faithfully

P.P. WEBBER WENTZEL.
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

Cc: The State Attorney, acting for the National Director of Public Prosecutions; Dr JP Pretorius SC; and Sibongile Mzinyathi; by email: rsebelemetsa@justice.gov.za

the doj & cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE STATE ATTORNEY: JOHANNESBURG

Private Bag X9, JOHANNESBURG, 2000
10TH Floor, North State Building, 95 Albertina Sisulu Street (cnr Kruis), JOHANNESBURG, 2001

Docex 689, Johannesburg
Tel 011 330 7600

My ref : Mr KG Lekabe
Enq : MR KG Lekabe
mail : KLekabe@justice.gov.za
Fax : 086 637 1152

Your ref: V Movshovich/P Dela/ D Cron/ W Timm/ J Coyle/ T Dye 3012697E-

Date: 03 April 2017

WEBBER WENTZEL ATTORNEYS
90 RIVONIA ROAD
SANDTON
JOHANNESBURG

PER EMAIL "vlad.movshovich@webberwentzel.com"

Sir

RE: IMPROPRIETY AND UNFITNESS FOR OFFICE OF MR ABRAHAMS, MR MZINYATHI AND DR PRETORIUS SC ("the Prosecutors")

1. Your letter dated 8 March 2017 enquires whether the reasons for the President's decision regarding the above matter are as outlined in the President's response in the letter dated 3 March 2017. My instructions are that the reasons for the decision of the President are set out in paragraph 6 of the letter dated 3 March 2017.

2. In amplification thereof, the concerns raised in your letter dated 1 November 2016, are addressed below.

(Always quote my reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc; LLM)I Law); ; Z N S O Nhlapo (B Proc); V Dhulam (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabiletsa (B Proc, LLB); S L Makenna (B Proc); S J Manitshana (B Proc); L Fatela (B Proc, LLM) ;) Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);,V Manamela (B Proc) ;F Patel(BA;LLB); R T Pooe (B Proc); J H Van Schalkwyk (LLB) ; H R Jaakolka (B Proc , LLB) S Naidoo (BA Law; LLB) **ASSISTANT STATE ATTORNEYS:** H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebonya (B Proc); H S Linda (BA, LLB); I T Malapo (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sehunya (LLB); C T Selhatlole (B Proc, LLB); R R Namakonde (LLB, LLM); D Mphuphu (B Proc);K Thaver (B.Iuris,LLB) M L Makabate(LLB);A Netshifhefhe (LLB);L Makunga (LLB);O S Matjila (LLB); Z Sahib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Magcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB) ; K A Phokwane (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

Surrounding circumstances

3. The concern raised in paragraph 6 of your letter states that surrounding circumstances for the preferring and withdrawal of charges by Advocate Shaun Abrahams ("the NDPP") shows misconduct and that he is not fit and proper to hold office; lacks conscientiousness and integrity to be entrusted with the responsibilities of the office of the NDPP; and that he has brought the administration of justice and the high office into disrepute. Is a conclusion made by your clients.

4. No evidence is furnished of precisely what circumstances regarding the preferring and withdrawal of the charges supports the conclusions that your clients are making. The President's decision is that it would be irrational and therefore unconstitutional for him to react on an opinion expressed by your client which is not corroborated by discernible facts.

Violation of the rights

5. The next concern appearing in paragraph 7.1 of the your letter asserts that the NDPP has violated the rights of Messrs Gordhan, Pillay and Magashula ("the accused persons") and abused his position in an attempt to use the media to influence public opinion against the "accused persons".

STATE ATTORNEY: K G Lekaba (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc; LLM(I Law); ; Z N S O Nhlayisi (B Proc); V Dhulam (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Mekenna (B Proc); S J Manitshana (B Proc); L Flatela (B Proc, LLM) ;) Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) F Patel(BA,LLB); R T Pooe (B Proc); J H Van Schalkwyk (LLB) ; H R Jackolka (B Proc , LLB) S Naidoo (BA Law; LLB) **ASSISTANT STATE ATTORNEYS:** H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Malepe (LLB);, LLB); M H Maponya (B Proc);E L Mathou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkosana (LLB); M J Sethunya (LLB); C T Sethabile (B Proc, LLB); R R Namakonde (LLB, LLM); D Mphephu (B Proc);K Thavar (B.Iuris,LLB) M L Makabata(LLB);A Netshitenzhe (LLB);L Malunga (LLB);O S Matjila (LLB); Z Sehib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Megcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB) ; K A Phokwane (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

8. Apart from making the conclusion that there was any violation of rights by holding a press conference, no factual evidence is given why a holding of a press conference regarding a matter of wide public interest would constitute a violation of the accused person's rights. It is more so when, everyone is equal before the law.

Defence of the charges

7. Paragraph 7.2 concludes that the NDPP stridently defended and justified the charges; which was not only a vehement assertion of the validity of the charges but in effect a personal assurance.

8. Your clients have not provided any facts as to why the defence and justification of charges brought by the prosecutors of the NPA carries with it a consequence of misconduct at the time the decision is made to prefer charges. Prosecutors have a constitutional duty to exercise their functions without fear, favour or prejudice

Applying his mind

9. It is contended that the NDPP did not apply his mind to the charges prior to 11 October 2016 and therefore shows that the NDPP was reckless in

(Always quote any reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc; LLM(I Law); ; Z N S O Nhleyisi (B Proc); V Dhulsim (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Makenna (B Proc); S J Manitshana (B Proc); L Flatela (B Proc, LLM) ;) Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) :F Patel(BA;LLB); R T Pooe (B Proc); J H Van Schalkwyk (LLB) ; H R Jaskulka (B Proc , LLB) S Naidoo (BA Law; LLB) **ASSISTANT STATE ATTORNEYS:** H T Higo (B Proc); N T Hongo (BA Economics and Accounting, LLB); O Lebanya (B Proc); H S Linda (BA, LLB); I T Melepe (LLB);, LLB); M H Maponya (B Proc);E L Mattou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkosana (LLB); M J Sethunya (LLB); C T Setlhatlole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc);K Thaver (B.Iuris,LLB) M L Makobate(LLB);A Netshithothe (LLB);L Makunga (LLB);O S Matjila (LLB); Z. Schib (Bcoc; LLB); S Shaik (Bcoc; LLB); S Magcokini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB) ; K A Phokwane (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

the extreme; showed a spectacular dearth of conscientiousness; and asserting facts as unequivocally true while he was aware that he had no knowledge of those facts or the documents to support them, was plainly dishonest.

10. No specifics have been provided to the President which shows that the NDPP did not apply his mind and that he was reckless in the extreme. Without facts pointing to why this is a spectacular dearth of conscientiousness and plainly dishonest, the President cannot form a prima facie view supporting this concern.

Imprimatur of office

11. In paragraph 7.4 your client states that at the press conference of 11 October 2016, the NDPP lent his imprimatur of his office to the charges and that if the NDPP did not know the facts or the evidence which led to the preferring of charges then his presentation and defence of the charges was misleading at best and potentially disingenuous.

12. No particularity as to what about that matter is misleading and why it is potentially disingenuous. Absent facts on why that is misleading and potentially disingenuous the President cannot find any prima facie

STATE ATTORNEY: K G Lebabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc; LLM) (Law); ; Z N S O Nhlayisi (B Proc); V Dlulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preez (B. Iuris, B Proc); M C Engelman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabilaela (B Proc, LLB); S L Makenna (B Proc); S J Mmilishana (B Proc); L Fiatela (B Proc, LLM) ; Matharbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) :P Patel(BA,LLB); R T Pooe (B Proc); J H Van Schalkwyk (LLB) ; H R Jacobolka (B Proc , LLB) S Naidoo (BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lekonya (B Proc); H S Linda (BA, LLB); I T Malope (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Setlhatole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc);K Trower (B.Iuris,LLB) M L Makabate(LLB);A Netshitheine (LLB);L Makunga (LLB);O S Matjila (LLB); Z Sahib (Bcuc; LLB); S Shaik (Bcuc; LLB); S Mngcekini (LLB); C G Josais (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogopi (LLB) ; K A Phokwane (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

evidence supporting this concern.

NDPP conduct

13. Your clients conclude in paragraph 7.7 that without the NDPP applying his mind to the charges he showed a stupefying, disabling and disqualifying lack of competence; at worst, his failure betrays ulterior purpose and a lack of integrity.

14. The President has not been furnished with information that the NDPP did not apply his mind. The concern that the NDPP showed a stupefying, disabling and disqualifying lack of competence is conclusions unsupported by facts. Your clients have not stated what ulterior purpose there was or why the NDPP lacks integrity. Devoid of such facts, any decision made by the President would be irrational as it would be groundless.

Priority Crimes Litigation Unit

15. In paragraph 7.8 it is stated that the use of the Priority Crimes Litigation Unit was not legislatively mandated and was therefore irregular and confounding.

(Please quote our reference number)

STATE ATTORNEY: K G Lekobe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc, LLM)(Law); ; Z N S O Nhlayisi (B Proc); V Dhufam (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Mahenna (B Proc); S J Manitshana (B Proc); L Fiatela (B Proc, LLM) ; Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) :F Patel(BA;LLB); R T Pose (B Proc); J H Van Schalkwyk (LLB) ; H R Jankolke (B Proc , LLB) S Naidoo (BA Law; LLB) **ASSISTANT STATE ATTORNEYS:** H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Malape (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sathunya (LLB); C T Setlhalole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc);K Thawe (B.Iuris,LLB) M L Makeketa(LLB);A Netshithmbe (LLB);L Matunga (LLB);O S Matila (LLB); Z Sahib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Magcakini (LLB); C G Jessie (LLB); N Sandi (LLB); O Puso (LLB); N Zitseni N (LLB); S R Mogapi (LLB) ; K A Phokwane (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

16. There is no evidence to support this conclusion. Your clients do not contend that, as a fact, there was no mandate given to the Priority Crimes Litigation Unit to do the investigation.

Representations

17. Your clients conclude, in paragraph 9, that instead of withdrawing the charges on receipt of the representations, the NDPP ordered further investigations after the fact; the investigations were not competent and were aimed at finding new evidence; the NDPP recognised the fatal deficiencies of the charges and embarked on investigations so as to rescue the charges; and the NDPP fundamentally misunderstood the laws applicable to his powers.

18. No evidence is tendered to show that the investigations embarked upon were to rescue the charges; or on what basis the NDPP fundamentally misunderstood the laws applicable to his powers. The lack of particularity provided does not assist the President in forming a view of whether to institute an enquiry based on misconduct.

Abuse of power

19. Your clients concern as reflected in paragraph 8 provides that the NDPP abused his power or even when he is perceived to be abusing his

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc; LLM)(Law); ; Z N S O Nhlaylsi (B Proc); V Dhulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preez (B. Iuris, B Proc); M C Engelman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Makannu (B Proc); S J Mmilishana (B Proc); L Fletela (B Proc, LLM) ;) Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) :F Patel(BA,LLB); R T Poee (B Proc); J H Van Schalkwyk (LLB) ; H R Jeskoba (B Proc , LLB) S Naidoo (BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Malope (LLB);, LLB); M H Maponya (B Proc);E L Matibu (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkosna (LLB); M J Sethunya (LLB); C T Setlhatlole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc);K Thaver (B.Iuris,LLB) M L Makabate(LLB);A Netshitheihe (LLB);L Makunga (LLB);O S Motlla (LLB); Z Sahib (Bcoc; LLB); S Shaik (Bcoc; LLB); S Magcaldai (LLB); C G Jessie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB) ; K A Phokoana (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

power, it fundamentally undermines the public confidence in the integrity of the institution; his conduct was a bona fide blunder and casts a long shadow of doubt over his future conduct; and that his is tasked with making dozens of critical, and potentially irreversible decisions on a daily basis which reinforce the potential of irreparable harm.

20. No evidence has been tendered which demonstrate that the NDPP has abused his power; and more importantly what decisions are potentially irreversible and has the potential for irreparable harm. Without knowing the underlying facts for these concerns, the President cannot determine on a prima facie basis whether to hold an enquiry or not.

Fit and proper

21. Your clients' paragraph 9 concluded by saying that the NDPP is not a fit and proper person to occupy his high office and should be suspended and disciplined urgently. This is an opinion.

22. Again, this opinion is unsupported by any evidence to show, why the NDPP is not a fit and proper person. Absent discernible facts, the President cannot form a prima facie view whether to establish an enquiry.

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc; LLM Law); ; Z N S O Nhlayisi (B Proc); V Dhulam (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabituela (B Proc, LLB); S L Makenna (B Proc); S J Manikshana (B Proc); L Fintela (B Proc, LLM ;) Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) ;F Patel(BA;LLB); R T Poos (B Proc); J H Van Schalkwyk (LLB) ; H R Jaskolla (B Proc , LLB) S Naidoo (BA Law; LLB) **ASSISTANT STATE ATTORNEYS:** H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Makapa (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sebunya (LLB); C T Sathekolo (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc);K Thaver (B.Iuris,LLB) M L Makabate(LLB);A Netshithelhe (LLB);L Makunga (LLB);O S Mafisa (LLB); Z Sahib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Magcakini (LLB); C G Josefa (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB) ; K A Pitakwana (LLB)

OFFICE MANAGER:
T T Mtshunuye (Dipl Public Admin; B-Tech Business Admin)

Ulterior purposes

23. Your clients allege, in paragraph 10, against Dr Pretorius and Advocate Mzinyathi ("the prosecutors") that the prosecution of the charges was pursued either for ulterior purposes or in a breathtakingly reckless fashion, without proper investigation or any regard to the evidence and proper legal analysis.

24. No evidence is offered as to why the decision to prefer charges was allegedly taken by someone other than Dr Pretorius. No facts are tendered to support the contention that the NDPP took the decision to prefer charges. The President cannot form a view of misconduct merely on what was provided by your client.

Questionable investigative work

25. The concern raised in paragraph 11 states that the prosecutors clearly failed in their fundamental constitutional and statutory duty to ensure that charges were properly grounded and to take an impartial, independent and objective view of all facts, including taking account of the questionable investigative work by the Directorate of Priority Crime Investigation.

(Always quote our reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc; LLM(Law); ; Z N S O Nhlayisi (B Proc); V Dhulam (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Foucha (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Makenna (B Proc); S J Mentshiane (B Proc); L Pinkie (B Proc, LLM) ; Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);V Menezes (B Proc) :F Patel(BA;LLB); R T Pope (B Proc); J H Van Schalkwyk (LLB) ; H R Jaskolka (B Proc , LLB) S Naidoo (BA Law; LLB) **ASSISTANT STATE ATTORNEYS:** H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Malape (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngoboni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Setlhatlole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc);K Thaver (B.Iuris,LLB) M L Mekabate(LLB);A Netshithetha (LLB);L Makunga (LLB);O S Metjila (LLB); Z Sishi (Bacc; LLB); S Shaik (Bacc; LLB); S Magcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zikalala (LLB); S R Mogapi (LLB) ; K A Phokwana (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

26. No facts have been produced to show that the investigation was questionable; that the prosecutors did not act impartially, independently and why they did not take an objective view of all the facts. Without a factual grounding, no prima facie view can be taken by the President to support a charge of misconduct.

No decision could have been taken

27. Your clients concern that no decision could have been taken by the NDPP and the prosecutors, had they applied their minds to the facts and law relevant to charges as a rational and conscientious prosecutor of integrity would have done when deciding to prefer charges.

28. Absent facts to demonstrate these concerns raised by your clients, the President cannot form a prima facie view as to whether the prosecutors should face an enquiry for misconduct.

Fraudulent or furtive intention

29. The prosecutors failed to take account of the most basic legal requirement for a succesful prosecution of fraud and theft. At best, their failures show a startling lack of competence and at worst betrays ulterior motive and a lack of integrity; and that the seniority of the prosecutors augments the case for ulterior purpose.

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc; LLM)(Law); ; Z N S O Nthayi (B Proc); V Dhulam (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Mokenna (B Proc); S J Moni[illegible]ana (B Proc); L Fietela (B Proc, LLM) ;) Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) :F Patel(BA;LLB); R T Poco (B Proc); J H Van Schalkwyk (LLB) ; H R Jaskolka (B Proc., LLB) S Naidoo (BA Law, LLB) **ASSISTANT STATE ATTORNEYS:** H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Labenya (B Proc); H S Linda (BA, LLB); I T Malepe (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Setlhatole (B Proc, LLB); R R Nemakonde (LLB; LLM); D Mphephu (B Proc);K Thaver (B.Iuris,LLB) M L Makebate(LLB);A Matshithetshe (LLB);L Mokunga (LLB);O S Matjila (LLB); Z Sahib (Bcoc; LLB); S Shaik (Bcoc; LLB); S Magcakini (LLB); C G Jossie (LLB); N Sands (LLB); O Poco (LLB); N Zikalala N (LLB); S R Mogapi (LLB) ; K A Phokoane (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

30. No evidence was tendered to support the conclusion that the prosecutors' seniority would augment the case for ulterior purpose and what that ulterior purpose would be; and why they would have such an ulterior purpose. Without the factual predicate to support this concern, the President cannot form a view of misconduct on the part of the prosecutors.

Integrity of the NPA

31. Your clients further state in paragraphs 14 to 16 that the integrity of the NPA has been undermined by the prosecutors bungling the matter; misconducting themselves; displaying lack of conscientiousness, including incompetence,; and the fact that they did not take great care in the execution of their official duties.

32. No facts have been established to support the opinion of your clients. Without these facts, the President would not be in a position to form a prima facie view that the conduct complained of should be the subject matter of an enquiry.

Conclusion

33. I attach the representations made from which it can be gleaned that the

(Always quote my reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc; LLM) (Law); ; Z N S O Nkayeli (B Proc); V Dhukan (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W.R I Mabitsela (B Proc, LLB); S L Meherina (B Proc); S J Montsharna (B Proc); L Patela (B Proc, LLM)) Matherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);.V Manamela (B Proc) .F Patel(BA;LLB); R T Pcoe (B Proc); J H Van Schalkwyk (LLB) ; H R Jackolka (B Proc , LLB) S Naidoo (BA Law; LLB) **ASSISTANT STATE ATTORNEYS:** H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Letanya (B Proc); H S Linda (BA, LLB); I T Malapa (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Setlhatole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc);K Thaver (B.Iuris,LLB) M L Makabate(LLB);A Nateniheths (LLB);L Makunga (LLB);O S Matlla (LLB); Z Sahib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Magezakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogopi (LLB) ; K A Photoane (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

implicated officials are equally blind to the reasons why accusations and concerns are made about them in your letter dated 1 November 2016.

34. Further, the constitutional protection for the independence of the NPA and its officials; the fact that the NDPP cannot be suspended unless in accordance with section 12(3) of the NPA Act makes me reticent to initiate your section 12(3) processes unsupported by evidence prima facie pointing to misconduct. Any impression that a decision of an NDPP or any of the prosecutors that may prove to have been wrong carries with it a consequence that they would be subjected to a suspension and an enquiry holds a real risk of undermining the constitutional independence of the NPA and its officials.

35. It is for those reasons that the President could not find prima facie evidence in support of your concerns stated in your letter of 1 November 2016. These are the reasons for the President's decision

36. I hope you find everything in order

Yours faithfully

K G LEKABE (MR)
STATE ATTORNEY

(Always quote my reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc; LLM) (Law); ; Z N S O Nhlayisi (B Proc; V Dhulem (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabilaela (B Proc, LLB); S L Makenna (B Proc); S J Manitshana (B Proc); L Fatola (B Proc, LLM) ; Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);V Manamela (B Proc) F Patel(BA;LLB); R T Pooe (B Proc); J H Van Schalkwyk (LLB) ; H R Jaskolka (B Proc , LLB) S Naidoo (BA Law; LLB) **ASSISTANT STATE ATTORNEYS:** H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebanya (B Proc); H S Linda (BA, LLB); I T Makipe (LLB);, LLB); M H Maponya (B Proc);S L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Sedhadole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc);K Thuver (B.Iuris,LLB) M L Makaba (LLB);A Netshithathe (LLB);L Makunga (LLB);O S Motjita (LLB); Z Sahib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Magcaldi (LLB); C G Josslo (LLB); N Sonda (LLB); O Puno (LLB); N Zibani N (LLB); S R Mogapi (LLB) ; K A Phokoana (LLB)

OFFICE MANAGER:
T T Mthimunye (Dipl Public Admin; B-Tech Business Admin)

In re:

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA / HELEN SUZMANN FOUNDATION AND FREEDUM UNDER LAW CASE NUMBER 87643/2016

REPRESENTATIONS IN RESPONSE TO THE PRESIDENT'S NOTICE OF 14 NOVEMBER 2016 IN TERMS OF SECTION 12(6)(A) OF THE NATIONAL PROSECUTING AUTHORITY ACT ("the NPA ACT")

OPINION

BY: **IAM SEMENYA SC**
A L PLATT SC

INSTRUCTED BY: **THE STATE ATTORNEY JOHANNESBURG**
Mr Lekabe
10th Floor, North State Building
95 Albertina Sisulu,
Corner Kruis Street,
Private Bag X9, Docex 688
Johannesburg 2000
Tel: 083 3774 872

INDEX

INTRODUCTION

1. The President of the Republic of South Africa ("**the President**") on 14 November 2016 provided Advocates SK Abrahams ("**Abrahams**"), Dr JP Pretorius ("**Pretorius**") and S Mzinyathi ("**Mzinyathi**") (referred to as "**the implicated officials**") with an opportunity to provide written responses as to why he should not place them on suspension pending the outcome of an enquiry into their fitness to hold office. These representations were submitted on 28 November 2016. This request was as a result of a complaint by Helen Suzman Foundation ("**HSF**") and Freedom under Law ("**FUL**") (together referred to as "**the complainants**") dated 1 November 2016 in which the complainants sought the suspension of the implicated officials. We say more about this later.

2. This opinion deals with whether there is a legal duty on the President to accede to the complaints and have the implicated officials provisionally suspended and secondly be subjected to an enquiry into the fitness to hold office. The opinion will take the following structure:

   2.1 Legal Framework

   2.2 History of the Matter and the Complaint

2.3 The Representations

2.4 Conclusion

LEGAL FRAMEWORK

3. It is important at this stage to deal with the legal regime governing the National Prosecuting Authority ("**NPA**") and the implicated officials.

Prosecutorial Independence

4. The NPA enjoys a special place in our constitutional democracy. It is one of the institutions which has a protected and guaranteed independence status. A demand that an National Director of Public Prosecutions ("**NDPP**") must be provisionally suspended and subjected to an enquiry into the fitness for him to hold office is one which must be approached with utmost circumspection and caution. To do otherwise would be inconsistent with the constitutionally protected status of the NPA. Were an NDPP to be provisionally suspended purely on the grounds of having made a decision which proves to be wrong, however spectacular the error, would threaten the independence of the institution.

5. As we demonstrate below there are four distinct areas, under the constitutional scheme, to cause the suspension of an NDPP or his removal from office. They are misconduct, continued ill-health, incapacity and where he or she is no longer a fit and proper person to hold that office. There is also an elaborate process including the establishment of an independent enquiry to determine whether an NDPP is guilty of any misconduct or suffers anyone of the other three incapacities.

6. The law also requires the concurrence of Parliament. If no such resolution is passed by Parliament recommending the removal of the NDPP, notwithstanding the finding of an enquiry, the NDPP will not be removed. It is further the President, as head of the executive, who can establish an enquiry and who can remove an NDPP when Parliament has resolved to recommend his or her removal.

7. In addition, there are timelines (14 days if in session or within 14 days after the commencement of its next session) which are specified in the statute in which the recommendation for the removal of the NDPP must be tabled in Parliament and Parliament must pass a resolution within a specific timeframe (30 days).

8. All these are specific indicators to guarantee the independence of the NPA, making it plain that a decision to remove an NDPP from office is not one that can be taken lightly. There is no doubt however, that where there are substantiated allegations of misconduct or that an NDPP is no longer fit and proper to hold office that the establishment of an enquiry to probe such allegations must be made. Even where there are substantiated allegations of misconduct on the part of the NDPP, a decision to provisionally suspend the NDPP pending such an enquiry must also be carefully considered so as not to impinge on the independence of that NDPP or the NPA.

9. In express terms, section 12(5) of the NPA Act prohibits a suspension of an NDPP or Deputy National Director or their removal from office unless and except in accordance with the provisions of subsections (6), (7) and (8). Subsection 7 concerns itself with the removal of the NDPP or a Deputy National Director if each of the respective houses of Parliament in the same session pray for such removal on any of the grounds of misconduct, continued ill-health, incapacity or on account that he or she is no longer a fit and proper person to hold such office. Subsection 8 deals with removal of an NDPP or a Deputy National Director at his or her request on account of his or her continued ill-health or for any other reason which the President deems sufficient.

10. In the light of the nature of the complaints regarding the implicated officials, the only relevant subsection, this opinion will concern itself with, is subsection 6.

11. Section 179 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") provides for a single Prosecuting Authority which is structured in terms of national legislation. Subsection 4 provides that national legislation must ensure that the Prosecuting Authority exercises its functions without fear, favour or prejudice. The national legislation referred to herein is the NPA Act.

12. Section 32(1)(a) of the NPA Act, in turn, mirrors the constitutional provisions regarding the prosecutorial independence and provides that:

"A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law."

13. Therefore the Constitution and the NPA Act obliges Prosecutors to act without fear, favour and prejudice and cements prosecutorial independence. Members of the NPA are required to undertake an oath or affirmation prior to commencement of their service to serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and be

subject only to the Constitution and the law. In doing so, the Constitution guarantees the professional independence of the NDPP and every professional member of his staff with the obvious aim of ensuring their freedom from any interference in their functions by even the powerful, well-connected, the rich and the peddlers of political influence[1].

14. In **Ex Parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the RSA**[2] the Constitutional Court held in respect of prosecutorial independence that:

"[Section] 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts."[3] *(own emphasis)*

15. This was also reinforced in **Pikoli v The President**[4] in which Du Plessis J held that:

"As the head of the national prosecuting authority the NDPP has a duty to ensure that this prosecutorial independence is maintained. It follows that a person who is fit and proper to be the

[1] S v Yengeni [2005] ZAGPHC 117 at paragraph 51
[2] [1996] ZACC 26; 1996 (4) SA 744 (CC)
[3] Supra at paragraph 146
[4] 2010 (1) SA 400 (GNP)

NDPP will be able to live out, and will live out in practice, the requirements of prosecutorial independence. That he or she must do without fear, favour or prejudice."[5]

16. The Constitution and the NPA Act enjoins Prosecutors to exercise their functions and duties in the spirit of prosecutorial independence. They should not be hamstrung by the notion that if their decision to prosecute is found to be ultimately wrong, that would ground a basis for their removal from office. This is sufficient authority that accepting that the decision to prosecute the Minister, Pillay and Magashula ("**the affected persons**") is found to be wrong, that in itself, cannot be a ground to subject the implicated officials to a removal process contemplated in section 12(6) of the NPA Act.

17. It is important therefore for the President, when exercising executive power, not to undermine the prosecutorial independence of the NPA or its officials. The President should only exercise his section 12(6) powers where there is *prima facie* evidence pointing to misconduct; continued ill-health; incapacity or where such an NDPP or official is no longer a fit and proper person to hold the office concerned.

[5] Supra at para 406E-F

Section 12(6) Requirements

18. We now turn to the jurisdictional requirements to invoke section 12(6) of the NPA Act. Section 12 (6) of the NPA Act provides that:

"(6)(a)The President may provisionally suspend the National Director or 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.

(b) the removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after commencement of its next ensuing session." (own emphasis)

19. Section 12(6) of the NPA Act, requires certain jurisdictional facts to be present in order to institute an enquiry and provisionally suspend the implicated officials. These are that:

19.1 the first ground to provisionally suspend/institute an enquiry, into the fitness or otherwise of an NDPP or any of the NPA officials to hold office, is on substantiated allegations of misconduct. The complainants allege that the implicated officials committed serious misconduct in preferring charges against the

affected persons and thereafter withdrawing the charges by way of press conferences dated 11 and 31 October 2016, respectively. The complainants seem to question the soundness of the decision to prosecute made by Pretorius and Mzinyathi and criticize Abrahams for reviewing and withdrawing that decision, without evaluating the correctness of the decision before the charges were preferred. As the judgment in the Pikoli matter concludes, it is not sufficient purely to invoke the provisions of section 12(6) where an NDPP or any of the officials is found to have made a decision that proves to be wrong. For misconduct proceedings more is required.

19.2 the second ground for provisionally suspending or instituting an enquiry into the fitness or otherwise of an NDPP or any of the NPA officials to hold office, is on account of continued ill-health. The complainants do not assert this as the basis for any possible suspension or removal from office of the implicated officials. For this reason we do not address this ground any further.

19.3 the third ground for provisionally suspending or instituting an enquiry, into the fitness or otherwise of an NDPP or any of the NPA officials to hold office, is on account of incapacity to carry

out his or her duties of office efficiently. The complainants do not mount such a case against the implicated officials. Equally, the opinion does not address this ground of removal.

19.4 the fourth and last ground on which the implicated officials can be provisionally suspended or an enquiry held into their fitness or otherwise of an NDPP or any of the NPA officials to hold office, is on account that he or she is no longer a 'fit and proper' person to hold the office concerned.

19.5 The issue of 'fit and proper' has two elements to it. The one relates to formal qualification and the other to integrity. The complainants are not questioning the formal qualifications of the implicated officials. The implicated officials have extensive formal qualifications and experience. No issue is raised against that aspect of 'fit and proper'. The only element on whether the implicated officials stand to be provisionally suspended or to hold an enquiry into their fitness to hold office is on the question of integrity/conscientiousness.

20. It is important to deal with the criteria and the test for the concept of 'fit and proper'. Section 9 of the NPA Act provides for the qualifications for

appointment as a National Director, Deputy National Director or Director and states that:

"(1) Any person to be appointed as National Director, Deputy National Director or Director must –

(a) Possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and

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

(2) Any person to be appointed as a National Director must be a South African citizen."

21. The test for the concept of 'fit and proper' was dealt with by a Full Bench of the Gauteng Division, Pretoria, in the matter of the **General Council of the Bar of South Africa v Jiba and Others**[6] **("Jiba Matter")** in which the Full Bench held that:

"[9] Section 7 (1) (d) of the Admission of Advocates Act authorises a court to remove an advocate from the roll of advocates, if satisfied that he or she is not a "fit and proper" person to continue to practice as an advocate. The test is a contemplation of three-staged inquiry as is also the -case in applying the provisions of section 22 (1) (d) of Attorneys Act 53 of 1979. First, the court must decide if the alleged conduct complained of has been established on a preponderance of probabilities. This is a factual inquiry. Secondly, it must consider if the person concerned is in the discretion of the court not a fit and proper person to continue to practice. This involves a weighing up of the conduct complained of against the conduct expected of a fit and proper person to practice. This is a value judgment consideration. Thirdly, the court must inquire whether in all of the circumstances the person in question is to be removed from the roll or whether an order of suspension from practice would suffice. This is also a matter for the discretion of the court. In deciding on what course to follow, the

[6] [2016] 4 ALL SA 443 (GP)

court is not first and foremost imposing a penalty. Rather, the main consideration is the protection of the public." (own emphasis)

22. However, the President is not called upon to determine whether the implicated officials are 'fit and proper'. Such a determination, in the meaning of section 12(6) of the NPA Act is to be made by the enquiry established to enquire into the misconduct or fitness to hold office by an NDPP or a Deputy National Director. What the President must do is to have substantiated allegations that the NDPP or such officials is *prima facie* guilty of misconduct or they are no longer fit and proper to hold office. The President would institute an inquiry, whose terms of reference would be to determine whether the implicated officials are still 'fit and proper' to hold office.

23. Therefore in order to meet the jurisdictional requirements to institute a section 12(6) enquiry, there has to be *prima facie* evidence which warrants the establishment of an enquiry. Prima facie evidence must be more than mere allegations of misconduct or assertions that the implicated officials are no longer fit and proper to hold their respective offices.

HISTORY OF THE MATTER

24. We now turn to deal with the history of the matter and the complaint arising therefrom.

25. On 1 November 2016 the President received a complaint by the complainants which required of the President to provide in writing by no later than 16h00 on 7 November 2016 that he provisionally suspend the implicated officials from their office pending enquiries into their fitness to hold office as contemplated in section 12(6)(a), read with, inter alia, section 14(3) of the NPA Act and that the President should forthwith institute the enquiries.

26. The complainants also stated that they had requested the implicated officials to resign from office without delay so as not to harm the law enforcement institutions any further. Failing a positive response from the President, the complainants alluded to bringing an urgent application to exercise their rights in this regard.

Background context

27. It is important to know the background context to the complaint. For ease of reference we quote from the 1 November 2016 letter what the complainants state is the context of their complaint:

> *"3 As you must be aware, on 11 October 2016, summons no. 574/16 was served on the Honourable Minister of Finance, Mr Pravin Gordhan, MP ("the Minister"), Mr Visvanathan "Ivan" Pillay and Mr George "Oupa" Magashula (collectively, together with the Minister, ("the accused persons"). In terms of the annexes to the summons ("the charge sheet"):*
>
> *3.1 the accused persons were charged with fraud, alternatively theft, in relation to the*

alleged payment by the South African Revenue Service ("SARS") to the Government Employees' Pension Fund ("the Fund") of R1,111,178.11 on behalf of Mr Pillay (count 1 and the alternative to count 1 of the charge sheet);

3.2 *Mr Pillay and Mr Magashula were charged with contravention of section 86 of the Public Finance Management Act, 1999 in that they failed to prevent SARS from incurring irregular, fruitless and wasteful and unauthorised expenditure (count 2 of the charge sheet);*

3.3 *Mr Pillay and Mr Magashula were charged with fraud, in that they represented to Human Resources of SARS that SARS was authorised to enter into an employment contract with Mr Pillay (count 3 of the charge sheet); and*

3.4 *the Minister and Mr Pillay were charged with fraud in relation to the re-hiring of Mr Pillay in or around April 2014 (count 4 of the charge sheet),*

(collectively, "the charges").

4. *Our clients launched an urgent application in the Gauteng Division of the High Court, Pretoria to review and set aside the charges which related to the Minister essentially as unlawful ("the application"). The notice of motion and founding affidavit are attached marked "A" ("the founding papers").*

5. *During a press conference on 31 October 2016 ("the 31 October press conference"), the charges were withdrawn by the NDPP. Though Mr Abrahams attempted to obfuscate his errors, which will be discussed in more detail below, by lengthy and irrelevant legal ramblings, Mr Abrahams was forced, in effect, to admit that the National Prosecuting Authority ("the NPA") never had sufficient evidence to prefer charges against the accused persons. This is despite the NDPP's vehement assertions, a mere 20 days before, that the NPA had a solid case against the accused persons."*[7]

The complaint

28. For ease of reference and to avoid any misinterpretation I set out verbatim the complaint raised by the complainant as against Abrahams:

"6. In light of the circumstances surrounding the preferring and withdrawal of the charges, Mr Shaun Abrahams has misconducted himself and is not a fit and proper person to hold the

[7] Letter of the complainants dated 1 November 2016

office of the NDPP, in that he lacks the required conscientiousness and integrity to be entrusted with the responsibilities of the office of the NDPP. He has also brought the administration of justice and his high office into dispute.

7. *Mr Abrahams has plainly displayed his lack of conscientiousness and integrity, and has committed serious misconduct. In addition to the submissions made in respect of Mr Abrahams' conduct in the founding papers, the following is noteworthy:*

   7.1 *at a press conference held on 11 October 2016 ("the 11 October press conference"), Mr Abrahams violated the rights of the accused persons and the Minister in particular and abused his position in an attempt to use the media to influence public opinion against the accused persons and the Minister in particular (see paragraph 72 of the founding affidavit);*

   7.2 *Mr Abrahams stridently defended and justified the charges at the 11 October press conference including stating that any suggestion that the charges are groundless and constitute political mischief is "as you will come to learn, that can be nothing further from the truth" (see paragraph 73 of the founding affidavit). This was not only a vehement assertion of the validity of the charges, but, in effect, a personal assurance by Mr Abrahams as the NDPP. He reiterated that the charges were solid and fully sustainable a day later, in response to a question from a journalist, mentioning that "the NPA do not take matters to court if they don't believe there are reasonable prospects of a prosecution ... I implore you to wait until the trial in respect of the matter, when the evidence is presented. Mr Abrahams now clearly believes that no such delay is necessary. So much for the earlier exhortation;*

   7.3 *Mr Abrahams has since, at the 31 October press conference, admitted that he had never applied his mind to the charges prior to 11 October 2016 and that he had seen no documents to support them – and that he did not seek to call for or interrogate any documents in support of them. Assuming that Mr Abrahams' statement in this respect is true (which our clients do not concede), then, at best Mr Abrahams:*

      7.3.1 *was reckless in the extreme;*

      7.3.2 *showed a spectacular dearth of conscientiousness; and*

      7.3.3 *in asserting facts as unequivocally true while he was aware that he had no knowledge of those facts or the documents to support them, was plainly dishonest;*

7.4 *there was every indication in the 11 October press conference that the decision to prefer charges was that of the NPA, and the NDPP clearly lent the imprimatur of his office to the charges. Only Mr Abrahams spoke during that press conference. If Mr Abrahams' version that he had nought to do with the charges, and did not know the facts or the evidence, is correct, then Mr Abrahams' presentation and defence of the charges was misleading at best and potentially disingenuous;*

7.5 *the NDPP has the power, and in appropriate circumstances the duty, to review, supervise, control, correct or vary charges even before they are formally brought against any of the accused. The paradigm case where such a review should have been undertaken is the present matter, and before convening the 11 October press conference. The matter:*

7.5.1 *is of enormous public importance;*

7.5.2 *entails an investigation riddled with allegations of bad faith and ulterior purpose (by a broad range of stakeholders);*

7.5.3 *concerns a very high ranking member of the National Executive;*

7.5.4 *has national and international ramifications of the highest order; and*

7.5.5 *is not characterised by urgency and involves facts dating back to 2010, where there was no evidence of imminent irreparable harm in the future;*

7.6 *Mr Abrahams, however, consciously or recklessly ignored all of these signal features and proceeded to take a course of action, in the most public fashion, which he must have known would throw the South African economy into a tailspin;*

7.7 *had Mr Abrahams applied his mind to the facts and law pertaining to the charges, as any rational NDPP would have done before 11 October 2016, he would have realised that there was no basis, in law or in fact, for the charges and should not have persisted with them. His failure to do so, at best, shows a stupefying, disabling and disqualifying lack of competence; at worst, his failure betrays ulterior purpose and a lack of integrity;*

7.8 *the Priority Crimes Litigation Unit, which ostensibly investigated and preferred the charges, was not even legislatively mandated to deal with cases of fraud and theft and the charges are not within such Unit's specific expertise. The fact that this Unit handled the case, instead for instance of the Specialised Commercial Crimes Unit which would ordinarily deal with charges such as these, is irregular and confounding; and*

7.9 *in fact, after the shortcomings of the charges, and the lack of evidence in support of those charges, were pointed out to him in our clients' letter of 14 October 2016 (which is annexed to the founding papers), Mr Abrahams did not withdraw the charges as a conscientious NDPP of requisite integrity and objectivity would, but instead ordered further investigations after the fact (see the supplementary affidavit attached as "B"). These investigations were not competent and were, in any event, impermissibly aimed at finding new evidence which could sustain the then unsustainable charges. The NDPP's review should have been based on the contents of the docket as it stood at the time the charges were laid. Instead, Mr Abrahams clearly recognised the fatal deficiencies of the charges and the investigations appear to have been embarked on so as to rescue the charges from inevitably being set aside. Ultimately, even those desperate attempts were futile, since the charges were ill-conceived and stillborn from the outset. At best, this shows Mr Abrahams fundamentally misunderstood the laws applicable to his powers as NDPP, which in itself demonstrates a wanton lack of conscientiousness; at worst, this shows Mr Abrahams intentionally and unlawfully sought to prop up insupportable charges after the fact so as to rescue them from review.*

8 *It is important to recall that Mr Abrahams, as the NDPP, is no mere civil servant. He is entrusted with the independent exercise of immense public power; the type of public power which can be used to curtail the liberty of every person and entity in the Republic. This is a power that the NDPP is enjoined, constitutionally, to exercise without fear or favour. When the NDPP abuses this power, or even when he is perceived to be abusing this power, it fundamentally undermines the public confidence in the integrity of the institution. Accordingly, Mr Abrahams' conduct in the above matter, even if his conduct was a bona fide blunder (which our clients deny), has brought the NPA into disrepute, continues on a daily basis to erode public confidence in law enforcement institutions, and casts a long shadow of doubt over Mr Abrahams' future conduct. Mr Abrahams is tasked with making dozens of critical, and potentially irreversible, decisions on a daily basis, which reinforce the potential for irreparable harm. Indeed, Mr Abrahams has alluded to potential future important investigations in the 31 October press conference.*

9. *Mr Abrahams is not a fit and proper person to continue to occupy his high office and should be suspended and disciplined urgently."*[8]

[8] Letter of the complainants dated 1 November 2016

29. For ease of reference and to avoid any misinterpretation, we set out verbatim the complaint raised by the complainant as against Mzinyathi and Pretorius:

> *"10. It is plain that the prosecution of the charges was pursued either for ulterior purposes or in a breathtakingly reckless fashion, without proper investigation or any regard to the evidence and proper legal analysis. After the charges came to be publically criticised, and despite seeking the limelight for himself in announcing the charges at the press conference on 11 October, Mr Abrahams has shifted all responsibility to Dr JP Pretorius, SC and Sibongile Mzinyathi (collectively, "the Prosecutors") (with Dr Pretorius allegedly taking the decision in consultation with Mr Mzinyathi).*
>
> *11. The Prosecutors clearly failed in their fundamental constitutional and statutory duty to ensure that charges were properly grounded and to take an impartial, independent and objective view of all the facts, including taking account of the questionable investigative work performed by the Directorate of Priority Crime Investigation in this matter.*
>
> *12. In addition to what is stated above in relation to Mr Abrahams (which applies with equal force here), had the Prosecutors applied their mind to the facts and law relevant to the charges, as a rational and conscientious prosecutor of integrity would have done before the decision to prefer the charges was taken, they would have realised that there was no basis, in law or in fact, for the charges and would never have taken the decision to prefer charges.*
>
> *13. According to the 31 October press conference, the Prosecutors failed to take account, inter alia, of the most basic legal requirement for a successful prosecution of fraud or theft: the fraudulent or furtive intention. This is inexcusable. The Prosecutors' failures, at best, show a startling lack of competence; and at worst, betray ulterior motive and a lack of integrity. The seniority of the Prosecutors augments the case for ulterior purposes.*
>
> *14. The Prosecutors were obliged to take great care, in the interests of the integrity of the NPA, the execution of their official duties and the interests of the Republic, before theatrically broadcasting the scandalous allegations against the accused persons to the world. This was especially the case in the present circumstances, having regard to the factors set forth in 7.5 above. It would also have been especially incumbent upon them to do so in light of Mr Abrahams' proclaimed modus operandi in this matter (which is not conceded), namely, that he trusted his Prosecutors to do the work properly and would not apply his mind to the charges prior to his press conference on 11 October 2016 or see the documents to support them.*

15. Similarly to Mr Abrahams, as explained at 8 above, the Prosecutors bungling of this matter has severely undermined public confidence in the integrity of the NPA. It is thus imperative to restoring public confidence in (sic) institution that they be suspended and disciplined as a matter of utmost urgency.

16. It is thus plain that the Prosecutors misconducted themselves and lack the conscientiousness (including competence) and integrity to continue to serve their official functions."[9]

30. The Presidency responded on 7 November 2016 to the complainants. In this response the Presidency requested additional time in order to request representations from the implicated officials. The request for additional time was declined by the complainants.

The Urgent Application

31. The complainants then launched an application on 9 November 2016 under case number 87643/2016 on an urgent basis in the High Court of South Africa, Gauteng Division, Pretoria ("**the urgent application**").

32. In the urgent application the complainants sought:

32.1 to review and set aside the President's alleged failure to institute an enquiry against the implicated officials and to provisionally suspend them pending an enquiry; and

[9] Letter of the complainants dated 1 November 2016

32.2 to direct the President to institute an enquiry against the implicated officials and to provisionally suspend them pending the enquiry.

33. In support of the urgent application the complainants contend that:

> *"2. The enquiries and the suspensions are necessary in light of a variety of indiscretions on the part of the second to fourth respondents, but particularly in respect of insupportable charges of fraud and theft ("the charges") brought by the National Prosecuting Authority ("NPA") and against incumbent Minister of Finance, Mr Pravin Gordhan MP ("Min. Gordhan"), as well as Mr Visvanathan "Ivan" Pillay ("Mr Pillay") and Mr George "Oupa" Magashula ("Mr Magashula"; collectively with Min. Gordhan and Mr Pillay, "the accused") on 11 October 2016.*
>
> *3. The decision to issue the summons in respect of the Charges was ostensibly taken by Dr Pretorius, in consultation with Mr Mzinyathi. Mr Abrahams personally announced the charges, indicated unequivocal support and confidence in the charges and lent the imprimatur of the office of the NDPP to the charges. This is despite the fact that the charges were deficient on the most fundamental of grounds. The charges were in fact so deficient that the NPA was forced to withdraw the charges not 20 days later at a press conference on 31 October 2016, admitting that there were no reasonable prospects of success of a prosecution of the charges as there was no evidence that basic elements of each of the crimes could be proved.*
>
> *4. Quite apart from infringing the rights of the accused, the decision to bring the charges against the sitting Minister of Finance in particular had disastrous consequences for the public, wiping R50 billion of (sic) the JSE almost instantly. It also ignited widespread public outcry, which resulted in, among other demonstrations, riots in the streets of Pretoria. This outcry was so severe that it prompted the National Assembly's Portfolio Committee for Justice and Correctional Services to summon Mr Abrahams urgently before them on 4 November 2016 ("the Committee meeting"). At the Committee meeting, the Chairperson and members of that committee noted the widespread public outcry, the damage the decision to bring the charges had done to the public trust in the integrity of the NPA, and the apprehension of bias and ulterior purpose which arose from the bringing of such spurious*

charges against Min. Gordhan in particular.

5. *It is undeniable that the powers endowed to each of the second to fourth respondents are immense and have the potential to have a dramatic impact on the rights of individuals and of the public. In respect of the charges, the second to fourth respondents exercised their powers with disastrous and irreversible consequences to the Republic, only to withdraw the charges twenty days later, on the basis of a fundamental deficiency in the charges. The fundamental errors made by three of the NPAs most senior prosecutors in respect of the charges (and in respect of other matters), provide, at the very least, a prima facie case that the second to fourth respondents do not have the requisite conscientiousness and integrity to hold their respective offices – and that enquiries should therefore be instituted immediately into their fitness for office with their suspension pending the outcome thereof.*
6. *It should be noted that this prima facie case is one that should be answered by the second to fourth respondents in the enquiries. It appears that the President, after originally promising to make the decision in respect of the suspensions and enquiries on 21 November 2016 has since reneged on this undertaking and now intends to delay the initiation of the enquiries and suspensions on the purported basis that a pre-enquiry enquiry must first be performed. It is all too convenient for the respondents that, after promising to make a decision by 21 November 2016, and now being faced with an application to be heard on 22 November 2016, the President pushes his decision out and then bases his main arguments in response on the lack of ripeness on the matter. The contrivance is palpable.*
7. *The fact of the matter is that the President has admitted that this is "no doubt… a serious matter" and undertook to make a decision by 21 November 2016. He should not be allowed to side-step judicial oversight by reneging on his own assessment of a reasonable time to decide so as to argue technical points. Allowing the President to do so would then set a precedent permitting him, and other decision makers, to simply repeatedly push out a decision with additional procedural steps so as to avoid the review of their failures to decide by a court.*
8. *It is undeniable that the matter is one of utmost urgency and importance. Further, bearing in mind the seriousness of the implications against these senior office bearers, the objective nature of the enquiry into their fitness to hold office, the strength of the prima facie case against each of these office bearers, and the importance of the integrity of the office of NPA, it is crucial that enquiries in respect of the second to fourth respondents be initiated, and that they be suspended pending those enquiries immediately.*
9. *The proper time for the second to fourth respondents to make full representations is at an*

enquiry, after being suspended.

10. *Bearing the above in mind, the President is empowered and, we submit, duty-bound to initiate the enquiries and the suspensions without any further undue delay. His failure to do so, and his continuing lethargy in fulfilling this duty necessitate the intervention of this court."*[10]

34. The President had stated in the urgent application that letters were sent to the implicated officials requesting written responses by 28 November 2016 as to whether they should be provisionally suspended pending an enquiry regarding the complaints laid by the complainants.

35. The urgent application was ultimately struck from the roll for want of urgency.

THE COMPLAINTS AND THE REPRESENTATIONS

36. We consider each and every complaint; whether such a complaint has been substantiated; look at the representations made by each of the implicated officials and then draw a conclusion on whether a proper case has been made out for the President to trigger the processes contemplated in section 12(6) of the NPA Act.

37. The complainants allege that Abrahams misconducted himself in light of the *circumstances surrounding* the preferring of charges and withdrawal of

[10] Complainants Heads of Argument dated 18 November 2016 in the urgent application

charges which is contended shows that he lacks the required conscientiousness and integrity and brought the administration of justice and his office into disrepute[11].

37.1 The complainants do not specify the circumstances which open Abrahams to an enquiry on the ground of misconduct. In his answering affidavit attached to his representations, Abrahams makes a similar point that the complaint lacks sufficient specificity and requested the complainants to substantiate the complaint[12].

37.2 Absent any clarification or substantiation, it is to be inferred that the holding of the press conference announcing the charges, were the circumstances referred to.

37.3 In the representations by Pretorius and Mzinyathi, they set out the process regarding the preferring of charges and what evidence was before them when the decision was taken[13]. This related to the payment to Pillay after he had taken early retirement but went on to be engaged in the same capacity; there was also a presentation of evidence to the NPA management

[11] 1 November 2016 letter paragraph 6
[12] Answering affidavit of the second to fourth respondents page 291 paragraph 252
[13] Answering affidavit of the second to fourth respondents pages 241 to 282 paragraphs 120 to 205

regarding the retirement of Pillay, amongst others; looked into the issue of criminal intent and public interest concerns; considered the constitutional principle of equality before the law given that Gordhan is a Minister in the national cabinet and that there was *prima facie* evidence to infer criminal intent.

37.4 Section 20 of the NPA Act allows for Prosecutors to exercise their prosecutorial discretion when deciding whether to prosecute or not. Such discretion is exercised on the facts before the prosecutor which facts have to establish a *prima facie* case. The NPA Act does not state that the Prosecutor, in exercising that prosecutorial discretion, has to be correct in respect of every decision to prosecute and every decision not to prosecute.

37.5 In his representations, Abrahams has also set out in detail the process followed in the decision to withdraw the charges.[14] He called for representations; received representations from Magashula and Pillay; considered the Symington memorandum; requested further investigations to verify the representations; and decided to withdraw the charges. This is a power he has in terms of section 22(2) of the NPA Act which authorises the NDPP to

[14] Answering affidavit of the second to fourth respondents pages 282 to 285 paragraphs 206 to 216

review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations.

37.6 Abrahams in his representations stated that the institution of the charges and subsequent withdrawal of the charges pursuant to a review shows that the administration of justice and the office of the NDPP is working correctly as envisaged in the Constitution and the NPA Act.

37.7 The conduct of Abrahams is one authorised by law and cannot in itself trigger an enquiry on the grounds of misconduct within the meaning of section 12(6) of the NPA Act.

37.8 Apart from stating that Abrahams had misconducted himself in light of the surrounding circumstances, he lacked the required conscientiousness and integrity and brought the administration of justice and his office into disrepute, no substantiation is offered for this complaint. The holding of a press conference where a decision is announced, which even if wrong, does not provide *prima facie* evidence of misconduct to warrant the establishment of an enquiry. It is accordingly our opinion that the call for an enquiry or the provisional suspension of Abrahams, on this complaint, is not warranted.

38. The complainants allege further that Abrahams *violated the rights* of the affected persons and the Minister in particular, at the press conference held on 11 October 2016 in an attempt to use the media to influence public opinion against them[15].

38.1 It appears to be common cause that the decision to charge the affected persons, one of whom is a sitting member of the cabinet, would be a matter of great public interest and the announcement of such a decision through a public medium would not constitute prima facie evidence of misconduct.

38.2 It is unclear why the complainants contend that an announcement of the nature where public interest is plain requires public opinion to be influenced against anyone. This is yet another allegation which is made without any substantiation.

38.3 By virtue of the lack of specificity, it is our considered opinion that the call for an enquiry or for the provisional suspension of Abrahams, on this ground also, is not warranted.

39. The complainants allege that Abrahams *stridently defended and justified the charges* at the press conference on 11 October 2016 and that his conduct

[15] 1 November 2016 letter paragraph 7.1

was not only a vehement assertion of the validity of the charges but in effect a *personal assurance.*

39.1 Abrahams has stated that he agreed with the decision that had been made by Pretorius and Mzinyathi to initiate a prosecution as he was briefed by them in that regard. This agreement did not preclude him from reviewing the charges upon receipt of representations[16].

39.2 The representations of the implicated officials stated that the charges had substance on the information before Pretorius and Mzinyathi.

39.3 The complainants do not provide evidence to show that the information before Pretorius and Mzinyathi did not warrant the initiation of charges; or which legislation Abrahams breached when he presented the charges during the 11 October 2016 press conference.

39.4 Apart from stating that he defended and justified the charges (particularly relying on the briefing of so senior officials) which in and of itself would not ground an enquiry or a provisional

[16] Answering Affidavit of the second to fourth respondents paragraphs 301 to 304

suspension, there is no *prima facie* evidence to demonstrate improper conduct on the part of Abrahams. It is accordingly our opinion, that the call for an enquiry or the provisional suspension of Abrahams, on this ground too, is not warranted.

40. The complainants allege that Abrahams' statement on 31 October 2016 was *reckless in the extreme;* showed a *spectacular dearth of conscientiousness;* was *plainly dishonest*; that Abrahams lent the *imprimatur of his office* to the charges; and defence of the charges was *misleading at best and potentially disingenuous.* This relates to the fact that Abrahams had not independently applied his mind to the charges before they were announced.

40.1 In his representations Abrahams contends that this is common practice. Prosecutors throughout the country prefer charges on various individuals without him as an NDPP having to apply his mind to each and every such decision.

40.2 It is for that reason that section 22(2) of the NPA Act, provides for a review mechanism relating to the decision to charge or not to charge. More so, since the decision was made by such high ranking officials with extensive experience, there was no reason to suspect that the decision was made wantonly.

40.3 Even the decision to review, which review then withdraws the charges does not mean that the initial decision was necessarily wrong. Further representations made to an NDPP may, as was the case in this instance, cause the initial decision to be rescinded.

40.4 Apart from Abrahams reviewing and withdrawing the charges which was presented in a press conference on 31 October 2016, which in and of itself would not ground an enquiry or a provisional suspension, there is no *prima facie* evidence of any improper conduct. It is accordingly our opinion that the call for an enquiry or the provisional suspension of Abrahams is not warranted.

41. The complainant alleges that Abrahams should have reviewed the matter before convening the 11 October 2016 press conference in that the matter is of enormous public importance; entails an investigation riddled with *allegations of bad faith and ulterior purpose* (by a *broad range of stakeholders*); concerns a very high ranking member of the national executive; has national and international ramifications of the highest order; and is not characterised by urgency and involves facts dating back to 2010, where there was no evidence of imminent irreparable harm in the future.

Further it is these signal features that Abrahams *consciously or recklessly ignored.*

41.1 The implicated officials have provided the legal framework which empowers them to institute prosecutions and subsequently review that decision. What is clear from the reading of the representations and the answering affidavit is that a prosecutor can opt to consider representations after the institution of the prosecution which is authorised by section 179(5)(d) of the Constitution.

41.2 The implicated officials offered the Minister, Pillay and Magashula an opportunity to present their version prior to the institution of proceedings in a warning statement. This offer was declined. Thus the implicated officials could only receive representations after the institution of charges which is in line with the Constitution and the NPA Act.

41.3 Pretorius in his representations makes it clear that the public interest factor was considered before the decision to prosecute was taken. Which decision was conveyed to the senior management of the NPA and to which Abrahams had

supported. Thus it cannot be stated that Abrahams had to review the decision to prosecute prior to the decision being made.

41.4 The complainants do not state why the Minister should have been given special treatment which is not foreshadowed in the Constitution and the NPA Act; who the broad range of stakeholders are and what those stakeholders had to do in the investigation process or knew of the investigation process.

41.5 The complaints do not refer the President to any legal requirement which calls on an NDPP to review the docket prior to the preferring of charges. In fact, that process would negate the provisions of section 22(2) where an NDPP makes himself or herself *au fait* with the contents of the docket; is part of the decision to charge; and still retains the right to review the decision.

41.6 Apart from unsubstantiated allegation that the investigation was riddled with allegations of bad faith and ulterior purpose by a broad range of stakeholders which, if true, would trigger section 12(6) processes, there is no *prima facie* evidence of any bad faith or ulterior purpose. It is our considered opinion that the call for

an enquiry or for the provisional suspension of Abrahams, on this ground as well, is not warranted.

42. The complainants allege that Abrahams' conduct threw the *South African economy into a tailspin.*

42.1 Abrahams has stated in the representations that the allegations and predictions of the complainants in regard to future developments and economic impact are speculative. Prosecutors should not take into account such speculative allegations when deciding whether to prosecute or not[17].

42.2 In the answering affidavit the implicated officials stated that one can only speculate as to how the markets are going to react when the circumstances which led to the charges are made public. The markets cannot condone the burdening of the taxpayer with the penalty which Pillay ought to have paid himself by way of reducing his pension benefits[18].

42.3 The implicated officials have also provided explanations in the answering affidavit as to the fluctuations of the economy. This shows that the economy recouped its "losses" by the following

[17] Abrahams Representations paragraphs 86 to 88
[18] Answering Affidavit of the second to fourth respondents paragraph 23

week and a month later the economy had dropped again. The suggestion that the institution of charges has had an enduring effect upon the South African economy is belied by these short term market movements[19].

42.4 To hold the view that certain persons can affect the economy of a country, and therefore special treatment should be afforded them, would do violence to the constitutional principle that all is equal before the law.

42.5 Apart from stating that Abrahams' conduct threw the South African economy into a tailspin which in and of itself would not ground an enquiry or a provisional suspension, there is no *prima facie* evidence of improper conduct. It is accordingly our considered opinion that the call for an enquiry or for the provisional suspension of Abrahams is not warranted.

43. The complainants further allege that Abrahams' failure to apply his mind to the charges before 11 October 2016 shows a *stupefying, disabling and disqualifying lack of competence; betrays ulterior purpose and a lack of integrity*[20].

[19] Answering Affidavit of the second to fourth respondents paragraphs 55 to 59
[20] 1 November 2016 letter paragraph 7.7

43.1 Again the attack on Abrahams in such strident language is made without any substantiation of what would be stupefying of Abrahams; what conduct would show disqualifying lack of competence and most importantly, what conduct shows failure which betrays ulterior purpose and lack of integrity.

43.2 These broad conclusions are the issues which an enquiry, if established, would have to probe. The complainants have appeared to have made that decision already even without the benefit of the responses offered by the implicated officials.

43.3 There is no doubt that if there was a substantiated allegation, on a *prima facie* basis, which shows that Abrahams has a "stupefying, disabling and disqualifying lack of competence; which betrays ulterior purposes and lack of integrity", that an enquiry in terms of section 12(6) must be established. **What is lacking is any evidence pointing to these conclusions.**

43.4 Little surprise, the implicated officials, in their representations and answering affidavit, contend that the allegation is contained in oblique and indeterminate language and that they cannot deal with it.[21]

[21] Answering Affidavit of the second to fourth respondents paragraph 64

43.5 Apart from the unsubstantiated allegation that Abrahams' failure to apply his mind shows stupefying, disabling and disqualifying lack of competence, betrays ulterior purpose and lack of integrity, there is no *prima facie* evidence of an ulterior purpose or lack of integrity. It is our considered opinion that the call for an enquiry and a provisional suspension of Abrahams is not warranted.

44. The complainants allege that Abrahams' use of the Priority Crimes Litigation Unit instead of the Specialised Commercial Crimes Unit is *irregular and confounding*[22].

44.1 Pretorius in his representations stated that the Priority Crimes Litigation Unit broadly handles matters concerning state security, international crimes and other priority crimes. The mandate specifically states that other priority crimes are determined by the National Director.

44.2 The National Director specifically mandated the Priority Crimes Litigation Unit to deal with this investigation[23]. This position was also confirmed in Abrahams' representations[24].

[22] 1 November 2016 letter paragraph 7.8
[23] Pretorius Representations paragraphs 17 to 19
[24] Abrahams Representations paragraphs 71 to 73

44.3 The complainants have not provided any objective evidence to show that the Priority Crimes Litigation Unit acted ultra vires by conducting this investigation.

44.4 Apart from the lack of particularity regarding the use of the Priority Crimes Litigation Unit which in and of itself would not ground an enquiry, there is no *prima facie* evidence of any improper conduct. It is accordingly our considered opinion that the call for an enquiry or the provisional suspension of Abrahams is not warranted.

45. The complainants also allege that Abrahams' request for *further investigations* shows that he is not a conscientious NDPP of requisite integrity; that Abrahams recognised the *fatal deficiencies* and the call for further investigations was to rescue the charges from being set aside; Abrahams fundamentally *misunderstood the laws* applicable to his powers as NDPP; demonstrates a *wanton lack of conscientiousness*; and *intentionally and unlawfully* sought to prop up insupportable charges[25]; that Abrahams' *abuse of power* fundamentally undermines the public confidence in the integrity of the institution; and his conduct was a *bona fide blunder*[26].

[25] 1 November 2016 letter paragraph 7.9
[26] 1 November 2016 letter paragraph 8

45.1 Anybody who is familiar with the criminal justice system would see almost regularly that accused persons would be arrested, charged and their matters postponed to a later date for further investigation. It is not unusual that the prosecutor would send back the investigating officers to collect further evidence to support the charge. So the calling of further investigation, in and of itself, would not constitute any *prima facie* evidence of misconduct.

45.2 Abrahams in his representations stated that once he had called for representations and received the Symington Memorandum, he requested further investigations in the course of the review. The investigations further showed that it would be difficult to prove the requisite intention to act unlawfully beyond a reasonable doubt[27].

45.3 This procedure is not unlawful. The fact that the NDPP can call for representations from various individuals and can consult with the Prosecutor, clearly envisages a situation where further investigation would be required to verify the allegations made in the representations. To hold differently would be to take at face value, any representation received from "accused persons"

[27] Abrahams Representations paragraphs 52 to 56

without fact checking it. This would be a dereliction of duty and would ground a possible charge of misconduct.

45.4 Abrahams has stated that he authorised further investigations because the import of the Symington Memorandum was that the affected persons lacked the necessary intention to commit an unlawful act[28].

45.5 We express doubt on the correctness of the Symington memorandum (an opinion we have not seen), if the opinion is that a criminal intent cannot be inferred from a certain set of facts. As a matter of law, save in instances of a confession, *mens rea* is established by way of inference.

45.6 Abrahams stated that his conduct was not a blunder but that a proper process in law was followed in the instituting of the charges and the subsequent withdrawal of the charges. He also stated that the fact that a prosecution is reviewed and set aside does not render it flawed *ab initio*[29].

45.7 The effect of the review provision is to ensure that prosecutions are re-evaluated after representations are received, which

[28] Answering Affidavit of the second to fourth respondents paragraphs 206 to 212
[29] Abrahams Representations paragraph 68

representations would not be before the prosecutor at the time the decision to prosecute is made.

45.8 This is in line with the provisions of the Constitution and the NPA Act. There is nothing that the complainant's raise specifically to demonstrate that the incorrect procedure was followed or why they allege that the memorandum should have been before Pretorius and Mzinyathi when the decision to prosecute was taken.

45.9 Apart from unsubstantiated allegation that further investigations were conducted, which points to lack of conscientiousness and integrity, abuse of power and that the conduct was a bona fide blunder, there is no *prima facie* evidence of any improper conduct. It is accordingly our considered opinion that the call for an enquiry or the provisional suspension of Abrahams is not warranted.

46. The complainants further allege that Abrahams' conduct in relation to the charges casts a long shadow of doubt over his *future conduct* and that Abrahams' presence and decision making ability on a daily basis has the potential for *irreparable harm.*

46.1 At the date of this opinion, it is now 3 months since the 11 October 2016 press conference. There is no evidence that any irreparable harm has occurred amidst numerous decisions that have since been taken by the NPA or its officials. Again there is no iota of evidence to support this complaint.

46.2 Similarly, Abrahams stated that without being informed by the complainants' of what prosecutions and investigations are being relied upon or the basis on which they allege the implicated officials would jeopardise those investigations, to prop up this allegation, they cannot deal with this issue[30].

46.3 The complainants have unhelpfully stated, in the replying affidavit in the urgent application, that it is not for them to provide the detail of the investigations that are or would be jeopardised. They need merely state that this is the case.

46.4 Thus apart from the bald statement of future conduct which may cause irreparable harm there is no *prima facie* evidence of improper future conduct. It is our considered opinion that the call for an enquiry or the provisional suspension of Abrahams is not warranted.

[30] Answering Affidavit of the second to fourth respondents paragraphs 18 and 19

47. The complainants allege that Pretorius and Mzinyathi's conduct in the prosecution of the charges was pursued either for *ulterior purpo*ses or in a breathtakingly *reckless fashion, without proper investigation* or any regard to the evidence and proper legal analysis.

47.1 One, again seeks evidence pointing, even on a *prima facie* basis, to any ulterior purpose, breathtaking recklessness or absence of proper investigation. These are assertions which are made without any substantiation and a call by the President to provisionally suspend the implicated officials on this ground would constitute unconstitutional threat to the independence of the NPA or the implicated officials.

47.2 Pretorius stated in his representations that he had no influence on the investigation team when they completed their investigation. He specifically denies having any ulterior purposes and stated that he determined the matter on the facts presented to him. Before making any decision he questioned the Prosecutors and requested additional statements.

47.3 The implicated officials stated that a proper legal analysis of the facts was conducted before the preferring of charges.

47.4 Apart from stating that the prosecution of charges were pursued for ulterior purposes in a reckless fashion and without proper investigation there is no *prima facie* evidence of improper conduct on the part of Pretorius and Mzinyathi. It is our considered opinion that the call for an enquiry and the provisional suspension of Pretorius and Mzinyathi is not warranted.

48. The complainants allege that Pretorius and Mzinyathi failed in their fundamental constitutional and statutory duty to ensure that the charges were properly grounded including taking account of the *questionable investigative work performed.*

48.1 Abrahams, in the answering affidavit, contends that there was indeed a proper basis for the charges and that it was proper to infer from the facts intent to act unlawfully[31].

48.2 Both Pretorius and Mzinyathi provided in detail the process taken before the decision was taken to prosecute and what facts were not before them. Pretorius stated that he had no basis to question the investigative work performed by his unit[32].

[31] Abrahams Representations paragraph 16
[32] Pretorius Representations paragraph 33.2

48.3 The complainants do not state what part of the investigation was questionable and who conducted the questionable investigative work.

48.4 Thus apart from stating that the investigative work was questionable there is no *prima facie* evidence of any improper conduct. It is our considered opinion that the call for an enquiry or for the provisional suspension of Pretorius and Mzinyathi is not warranted.

49. The complainants allege that Pretorius and Mzinyathi *failed to apply their minds* to the facts and law before taking the decision to prosecute; *failed to take into account* the most basic of requirements being *fraudulent* and *furtive intention*; their failures at best show a startling *lack of competence*; and at worst, *betray ulterior motive* and a lack of integrity.

49.1 Both Pretorius and Mzinyathi have stated that the Symington memorandum was not before them when the decision to prosecute was taken. Without this memorandum, there was no evidence to show that intent could not be proved beyond a reasonable doubt.

49.2 The complainants have not provided any facts that show that there were other facts that could have shown the lack of intent.

49.3 Apart from stating that Pretorius and Mzinyathi failed to apply their minds; failed to take into account the most basic of requirements being fraudulent and furtive intention; show a startling lack of competence; and betray ulterior motive and a lack of integrity, there is no *prima facie* evidence of improper conduct. It is our considered opinion that the call for an enquiry or provisional suspension of Pretorius and Mzinyathi is not warranted.

50. The complainants allege that Pretorius and Mzinyathi's *bungling of the matter* severely undermined public confidence in the integrity of the NPA and only their suspension and discipline will restore public confidence in the institution.

50.1 Pretorius stated in his representations that he did not bungle the matter. He stated that he attends to a number of serious matters on a daily basis and serves the office to the best of his ability.

50.2 The complainants have not provided the necessary particularity in how Pretorius and Mzinyathi bungled the matter; and how it affected the public confidence in the integrity of the institution.

50.3 Apart from stating that Pretorius and Mzinyathi bungled the matter there is no *prima facie* evidence of improper conduct. It is our considered opinion that the call for an enquiry or provisional suspension of Pretorius and Mzinyathi is not warranted.

51. The complainant alleges that Pretorius and Mzinyathi *misconducted themselves* which demonstrates the *lack of conscientiousness (including incompetence)* and *integrity* to continue to serve their official functions.

51.1 The complainants have not provided any particularity to indicate a prima facie evidence to trigger the establishment of an enquiry or a provisional suspension in terms of section 12(6) of the NPA Act.

CONCLUSION

52. We were not privy to any representations that were made to the NDPP, these being confidential. We were also not provided with the Symington memorandum.

53. We have sought to see whether the complaints, apart from the conclusionary statements they make, such as ulterior motive, lack of integrity, lack of conscientiousness and such similar evaluative statements, there is no supporting information to warrant the establishment of an enquiry or a provisional suspension within the meaning of section 12(6) of the NPA Act. To do so would in fact threaten the institutional and individual independence which the implicated officials enjoy under the Constitution.

54. The President is not required to determine the correctness or otherwise of the complaints. The President should determine whether there is a *prima facie* basis to warrant the institution of an enquiry in terms of section 12(6) of the NPA Act and if so, whether a provisional suspension is justified.

55. Therefore when considering the complaint and the representations made it is apparent that the jurisdictional requirements to warrant the institution of an enquiry is lacking. The reason for this conclusion is based on the fact that the complaint read with the representations does not provide a *prima facie* basis to institute an enquiry.