CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 333/17 and CCT 13/18

Case CCT 333/17

In the matter between:

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

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MXOLISI SANDILE OLIVER NXASANA	Third Respondent
SHAUN KEVIN ABRAHAMS	Fourth Respondent
DIRECTOR GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
CHIEF EXECUTIVE OFFICER OF THE NATIONAL PROSECUTING AUTHORITY	Sixth Respondent
NATIONAL PROSECUTING AUTHORITY	Seventh Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Eighth Respondent

and

HELEN SUZMAN FOUNDATION	Amicus Curiae

Case CCT 13/18

In the matter between:

MXOLISI SANDILE OLIVER NXASANA	Applicant

and

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

and

HELEN SUZMAN FOUNDATION	Amicus Curiae

Neutral citation: *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23

Coram:	Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J.
Judgments:	Madlanga J (majority): [1] to [94] Jafta J (minority): [95] to [129]
Heard on:	28 February 2018
Decided on:	13 August 2018

ORDER

Application for confirmation of the order of the Gauteng Division of the High Court, Pretoria and related appeals against the order of the same court:

1. The appeal of Mr Mxolisi Sandile Oliver Nxasana is upheld with no order as to costs and Mr Nxasana's explanatory affidavit is admitted.
2. The costs order by the High Court of South Africa, Gauteng Division, Pretoria (High Court) against Mr Nxasana is set aside.
3. The appeal of Advocate Shaun Kevin Abrahams and the National Prosecuting Authority is dismissed with costs, including the costs of two counsel.
4. The declaration by the High Court that the settlement agreement dated 14 May 2015 concluded by former President Jacob Gedleyihlekisa Zuma, the Minister of Justice and Correctional Services and Mr Nxasana in terms of which Mr Nxasana's incumbency as the National Director of Public Prosecutions (NDPP) was terminated is constitutionally invalid is confirmed.
5. The declaration by the High Court that the termination of the appointment of Mr Nxasana as NDPP is constitutionally invalid is confirmed.

6. The declaration by the High Court that the decision to authorise payment to Mr Nxasana of an amount of R17 357 233 in terms of the settlement agreement is invalid is confirmed.

7. The declaration by the High Court that the appointment of Advocate Abrahams as NDPP is invalid is confirmed.

8. The declaration by the High Court that section 12(4) of the National Prosecuting Authority Act 32 of 1998 is constitutionally invalid is confirmed.

9. The declaration by the High Court that section 12(6) of the National Prosecuting Authority Act is constitutionally invalid is confirmed only to the extent that the section permits the suspension by the President of an NDPP and Deputy NDPP for an indefinite period and without pay.

10. The declaration of constitutional invalidity contained in paragraph 9 is suspended for 18 months to afford Parliament an opportunity to correct the constitutional defect.

11. During the period of suspension—

    (a) a section 12(6)(aA) will be inserted after section 12(6)(a) and it will read:

        "The period from the time the President suspends the National Director or a Deputy National Director to the time she or he decides whether or not to remove the National Director or Deputy National Director shall not exceed six months."

    (b) section 12(6)(e) will read (with insertions and deletions reflected within square brackets):

        "The National Director or Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, [~~no salary or such salary as may be determined by the President~~] [her or his full salary]."

12. Should Parliament fail to correct the defect referred to in paragraph 9 within the period of suspension, the interim relief contained in paragraph 11 will become final.
13. Decisions taken, and acts performed, by Advocate Abrahams in his official capacity will not be invalid by reason only of the declaration of invalidity contained in paragraph 7.
14. Mr Nxasana is ordered to repay forthwith to the state the sum of R10 240 767.47.
15. The President is directed to appoint an NDPP within 90 days of the date of this order.
16. The President, the Minister of Justice and Correctional Services and the National Prosecuting Authority are ordered to pay all costs in this Court that are additional to the costs referred to in paragraph 3, such costs to include the costs of two counsel.

JUDGMENT

MADLANGA J (Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, and Theron J concurring):

Introduction

[1] The applicants, Corruption Watch NPC (Corruption Watch), Freedom Under Law NPC (FUL) and Council for the Advancement of the South African Constitution (CASAC), seek confirmation of orders of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court). What the High Court declared constitutionally invalid are—

(a) a settlement agreement concluded by former President Jacob Gedleyihlekisa Zuma, the Minister of Justice and Correctional Services

(Minister) and the former National Director of Public Prosecutions (NDPP), Mr Mxolisi Sandile Oliver Nxasana who is the third respondent in the confirmation application in terms of which Mr Nxasana's incumbency as the NDPP was terminated;

(b) the actual termination of Mr Nxasana's incumbency as the NDPP;

(c) a decision to authorise payment to Mr Nxasana of an amount of R17 357 233 (R17.3 million) in terms of the settlement agreement;

(d) the appointment of Advocate Shaun Kevin Abrahams as the NDPP in the position vacated by Mr Nxasana;

(e) section 12(4) of the National Prosecuting Authority Act[1] (NPA Act); and

(f) section 12(6) of the NPA Act to the extent that it permits the President to suspend the NDPP unilaterally, indefinitely and without pay.

[2] The High Court's order is two-legged and quite extensive. To do justice to its content, I think it best to render it in full in a footnote.[2]

[1] 32 of 1998.

[2] *Corruption Watch (RF) NPC v President of the Republic of South Africa* [2017] ZAGPPHC 743; [2018] 1 All SA 471 (GP); 2018 (1) SACR 317 (GP) (High Court judgment) at paras 128-9. The first leg of the order granted in respect of an application brought by Corruption Watch and FUL jointly reads:

> "In the result we make the following order on the application of Corruption Watch and Freedom Under Law:
>
> 1. The settlement agreement between the President, the Minister of Justice and Mr Nxasana dated 14 May 2015, is reviewed, declared invalid and set aside.
>
> 2. The termination of the appointment of Mr Nxasana as National Director of Public Prosecutions is declared unconstitutional and invalid.
>
> 3. The decision to authorise payment to Mr Nxasana of an amount of R17 357 233, in terms of the settlement is reviewed, declared invalid and set aside.
>
> 4. The appointment of Adv Abrahams as National Director of Public Prosecutions is reviewed, declared invalid and set aside.
>
> 5. Decisions taken and acts performed by Adv Abrahams in his capacity as the National Director of Public Prosecutions are not invalid merely because of the invalidity of his appointment.
>
> 6. Mr Nxasana is ordered forthwith to repay to the State all the money he received in terms of the settlement.
>
> 7. It is declared that, in terms of section 96(2)(b) of the Constitution, the incumbent President may not appoint, suspend or remove the National Director of Public Prosecutions or someone in an Acting capacity as such.

[3] The confirmation application was consolidated with an appeal by Mr Nxasana against the High Court's refusal to grant him condonation for the late filing of what he called "an explanatory affidavit". As appears from the declarations of constitutional invalidity just referred to and the quoted order, Advocate Abrahams and the National

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> 8. It is declared that, as long as the incumbent President is in office, the Deputy President is responsible for decisions relating to the appointment, suspension or removal of the National Director of Public Prosecutions or, in terms of section 11(2)(b) of the National Prosecuting Authority Act, someone in an Acting capacity as such.
>
> 9. The orders of invalidity in paragraphs 2 and 4 above are suspended for a period of 60 days or until such time as the Deputy President has appointed a National Director of Public Prosecutions in terms of paragraph 8 above, whichever is the shorter period.
>
> 10. The costs of this application must be paid jointly and severally by the President, the Minister of Justice, Adv Abrahams and the National Prosecuting Authority."

Here is the second leg which was granted in respect of an application launched by CASAC:

> "In the result we make the following order on the application of Council for the Advancement of the South African Constitution:
>
> 1. It is declared that section 12(4) of the National Prosecuting Authority Act 32 of 1998 is unconstitutional and invalid.
>
> 2. It is declared that section 12(6) of the National Prosecuting Authority Act is unconstitutional and invalid to the extent that it permits the President to suspend the National Director of Public Prosecutions unilaterally, indefinitely and without pay.
>
> 3. The order of invalidity in paragraph 2 is suspended for 18 months.
>
> 4. During the period of suspension:
>
> 4.1 An additional subsection shall be inserted after section 12(6)(a) that reads:
>
> '(aA) The period from the time the President suspends the National Director or a Deputy National Director to the time he or she decides whether or not to remove the National Director or Deputy National Director shall not exceed six months.'; and
>
> 4.2 Section 12(6)(e) shall read:
>
> 'The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, his or her full salary [~~no salary or such salary as may be determined by the President~~].'
>
> 5. Should Parliament fail to enact legislation remedying the defect identified in paragraph 2, the interim order in paragraph 4 shall become final.
>
> 6. The President, the Minister of Justice and the National Prosecuting Authority shall pay the applicant's costs, including the costs of two counsel.
>
> 7. The orders of invalidity made above relating to the National Prosecuting Authority Act are referred to the Constitutional Court in terms of section 165(5) of the Constitution for confirmation."

The High Court heard and determined the two applications simultaneously.

Prosecuting Authority (NPA) were unsuccessful before the High Court. Of particular note in this regard, the appointment of Advocate Abrahams as the NDPP was declared constitutionally invalid and Advocate Abrahams and the NPA were ordered to pay the applicants' costs, including the costs of two counsel. Advocate Abrahams and the NPA too brought an appeal before this Court against the adverse orders. They also oppose the confirmation proceedings insofar as they relate to Advocate Abrahams. Their appeal was heard simultaneously with the confirmation application and Mr Nxasana's appeal.

[4] Plainly the matter is properly before us and nothing more need be said in that regard.[3] The questions are whether the orders of constitutional invalidity must be confirmed and the appeals upheld.

[5] The applicants have cited a number of respondents.[4] Some have entered the fray, others not.[5] The Helen Suzman Foundation applied to be admitted as a friend of the court (*amicus curiae*). It is admitted as there is no reason not to grant that application.

Background

[6] The events that are at the centre of these proceedings are in the public domain. The judgment of the High Court notes that it was common cause before that Court that

[3] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[4] Respectively, the first to ninth respondents are the President of the Republic of South Africa, the Minister of Justice, Mr Nxasana, Advocate Shaun Abrahams, the Director General: Department of Justice and Constitutional Development, the Chief Executive Officer: National Prosecuting Authority, the National Prosecuting Authority and the Deputy President of the Republic of South Africa.

[5] The respondents listed above in n 4 participated before the High Court. Before this Court the respondents that have participated throughout are Mr Nxasana, Advocate Abrahams, the Director General: Department of Justice and Constitutional Development, the Chief Executive Officer: National Prosecuting Authority and the National Prosecuting Authority. When the proceedings were launched before this Court, former President Zuma was the incumbent President. Before the oral hearing, he resigned and President Cyril Ramaphosa became President. Thirteen days before the hearing and after President Ramaphosa had taken over, the President's participation in the proceedings was terminated.

since September 2007 the recent history at the NPA "has been one of paralysing instability".[6] That judgment gives details of that history.[7] I do not propose doing the same. I will commence with the narrative from when Mr Nxasana, one of the people affected by the High Court's orders, was appointed to the position of NDPP.[8] His appointment – which followed the short lived incumbency of Mr Menzi Simelane – took effect from 1 October 2013. Mr Simelane's appointment had come after that of Mr Vusi Pikoli who – following a suspension, a commission of inquiry into his fitness to hold office, some litigation and the conclusion of a settlement agreement – had also vacated office in terms of that agreement without finishing his term of office.

[7] In July 2014 – within about only nine months of his appointment – a process calculated to remove Mr Nxasana from office commenced. The then President, Mr Jacob Zuma, informed Mr Nxasana of his intention to institute an inquiry into his fitness to hold office.[9] This was followed by a notice that the former President was considering suspending Mr Nxasana pending finalisation of the inquiry. The former President said that suspension was necessary in order to maintain the integrity and good administration of the NPA. The notice also specified that the inquiry sought to establish whether certain issues were "consonant with the conscientiousness and integrity of an incumbent in the office of National Director of Public Prosecutions as required by the [NPA] Act". These issues were: Mr Nxasana's previous criminal conviction for "violent conduct"; allegedly unbecoming and divisive comments which had the effect of bringing the NPA into disrepute made by Mr Nxasana and reported in the media; and alleged non-disclosure of facts and circumstances of prosecutions which Mr Nxasana had faced previously. The former President called upon

[6] High Court judgment above n 2 at para 19.

[7] Id at paras 18-46.

[8] In this narrative I borrow copiously from, and am indebted to, the High Court's summary of the facts.

[9] In terms of section 12(6)(a)(iv) of the NPA Act the President may remove an NDPP from office if the NDPP is no longer a fit and proper person to hold office.

Mr Nxasana to give reasons "in this regard". Apparently this was an invitation for representations on why Mr Nxasana should not be suspended.[10]

[8] In a letter requesting an extension of the deadline for the submission of representations, Mr Nxasana also requested particularity on the three issues itemised above to which the intended inquiry related. By the morning of the deadline, former President Zuma had not responded to either request. Mr Nxasana was forced to make preliminary representations so as to meet the deadline. His intention was to supplement them upon receipt of the requested particulars. When he followed-up on the particularity, the former President said it was not proper to discuss these issues as they were the subject of the inquiry. Mr Nxasana approached the High Court seeking an order: compelling former President Zuma to provide the required particularity; and interdicting the former President from suspending him until he had furnished him with this particularity. That application was not pursued to finality. The former President changed tack. In late 2014 he proposed that the dispute between him and Mr Nxasana be mediated. Mr Nxasana acceded to this proposal.

[9] It appears from a letter written on 10 December 2014 by attorneys acting for Mr Nxasana that former President Zuma had engaged Mr Nxasana to get him to agree to vacate office. In the letter Mr Nxasana made it plain that he did not want to vacate office as there was no basis for him to. He stated that he would, however, consider stepping down only if he was fully compensated for the remainder of the contract period.

[10] In early 2015 the former President set up the long-threatened commission that was to enquire into Mr Nxasana's fitness to hold office. After some preliminary work, the commission set 11 May 2015 as the commencement date for the hearing. Parallel with this inquiry process, Mr Hulley – the former President's legal adviser – made a

[10] Indeed, this is how Mr Nxasana understood what was required of him. This appears from a letter in which Mr Nxasana requested an extension of the deadline for giving the reasons and a letter that contained the reasons or representations themselves. This was put beyond question by the content of later correspondence from the former President.

promise that Mr Nxasana would be paid a settlement amount from public coffers. Over time that amount increased progressively. An earlier offer contained in a draft settlement agreement was R10 million. Mr Nxasana did not accept it. Former President Zuma was undeterred. Thereafter Mr Hulley sent Mr Nxasana another draft settlement agreement with the amount left blank for Mr Nxasana to fill it in himself. Nothing of moment came of this.

[11] In the end the commission hearing never commenced as settlement was eventually reached. Mr Nxasana signed the settlement agreement on 9 May 2015. The Minister and former President did so on 14 May 2015. In terms of this agreement Mr Nxasana would relinquish his position as NDPP and receive a sum of R17.3 million as a settlement payment. In the event, Mr Nxasana was paid an amount of R10 240 767.47 as the rest was retained by the state for income tax.

[12] It must be noted that, right from the onset and throughout the entire negotiation process that culminated in the settlement agreement, Mr Nxasana unequivocally stated that he did not wish to resign and that he considered himself to be fit for office. Instead his preference was for former President Zuma's allegations that he was no longer fit for office to be tested in a formal inquiry as proposed by the former President. Throughout, he protested the existence of a factual or legal basis for him to vacate office. Also, he disavowed any invocation by him of section 12(8) of the NPA Act to voluntarily vacate office.[11] It is so, of course, that he did indicate that he would resign only if he was paid the full salary for the remainder of his term of office.

[13] On 18 June 2015 former President Zuma appointed Advocate Shaun Abrahams who – to this day – is the incumbent NDPP.

[14] Corruption Watch and FUL approached the High Court seeking the review and setting aside of the settlement agreement, an order that Mr Nxasana repay the R17.3 million settlement payout and the review and setting aside of the appointment

[11] This section – which I deal with more fully later – provides for the voluntary vacation of office by the NDPP.

of Advocate Abrahams. In a separate application which was later consolidated with the application by Corruption Watch and FUL, CASAC sought an order declaring section 12(4) and (6)[12] of the NPA Act unconstitutional.[13]

[15] The High Court granted both applications, hence the present confirmation proceedings.

Issues

[16] The issues are whether—

(a) the settlement agreement and, therefore, Mr Nxasana's vacation of the office of NDPP are constitutionally valid;
(b) Mr Nxasana should be required to repay the R17.3 million settlement payout;
(c) the appointment of Advocate Abrahams as NDPP is constitutionally invalid;
(d) section 12(4) and (6) of the NPA Act is constitutionally invalid; and
(e) the High Court erred in refusing to grant Mr Nxasana condonation for the late filing of his affidavit.

[17] I proceed to deal with these issues, but not necessarily in this order.

The validity of the settlement agreement and Mr Nxasana's vacation of office

[18] The importance of the office of NDPP in the administration of justice is underscored and amplified by no less an instrument than the Constitution itself. Section 179(4) of the Constitution requires that there be national legislation which guarantees the independence of the prosecuting authority. In terms of section 179(1) the prosecuting authority consists of the NDPP who is its head, Directors of Public

[12] The section is quoted at n 44 below.

[13] The relief sought by the applicants in both applications was more extensive than what I have captured here. That is apparent from the two-legged High Court order quoted above n 2.

Prosecutions and prosecutors.[14] Section 179(4) provides that national legislation must ensure that the NPA exercises its functions without fear, favour or prejudice. That legislation is the NPA Act. Predictably, section 32(1)(a) of the NPA Act requires members of the prosecuting authority to carry out their duties without fear, favour or prejudice, and subject only to the Constitution and the law.

[19] This Court has said of the NPA's independence "[t]here is . . . a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts".[15] The reason why this guarantee of independence exists is not far to seek. The NPA plays a pivotal role in the administration of criminal justice. With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds. Equally, functionaries within that prosecuting authority may – as CASAC submitted – "be pressured . . . into pursuing prosecutions to advance a political agenda". All this is antithetical to the rule of law, a founding value of the Republic.[16] Also, malleability, corruption and

[14] Section 179 of the Constitution provides:

> "(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
>
> (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
>
> (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
>
> . . .
>
> (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

[15] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 146.

[16] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

dysfunctionality are at odds with the constitutional injunction of prosecuting without fear, favour or prejudice. They are thus at variance with the constitutional requirement of the independence of the NPA.

[20] At the centre of any functioning constitutional democracy is a well-functioning criminal justice system. In *Democratic Alliance* Yacoob ADCJ observed that the office of the NDPP "is located at the core of delivering criminal justice".[17] If you subvert the criminal justice system, you subvert the rule of law and constitutional democracy itself. Unsurprisingly, the NPA Act proscribes improper interference with the performance of prosecutorial duties. Section 32(1)(b) provides:

> "Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."

[21] Improper interference may take any number of forms. Without purporting to be exhaustive, it may come as downright intimidation. It may consist in improper promises or inducements. It may take the form of corruptly influencing the decision-making or functioning of the NPA. All these forms and others are proscribed by an Act that gets its authority to guarantee prosecutorial independence directly from the Constitution.

[22] Another guarantee of the NDPP's independence is provision for security of tenure. In section 12(1) the NPA Act provides that the NDPP shall hold office for a 10-year non-renewable term of office.[18] It is now well established in terms of this Court's jurisprudence that security of tenure is an integral feature of the constitutional requirement of independence. In *Justice Alliance* this Court held that "international

[17] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 26.

[18] Section 12(1) provides:

> "The National Director shall hold office for a non-renewable term of 10 years, but must vacate his or her office on attaining the age of 65 years."

standards acknowledge that guaranteed tenure and conditions of service, adequately secured by law, are amongst the conditions necessary to secure and promote the independence of judges".[19] These necessary conditions must, of course, be true of the independence of the NPA as well. In a unanimous judgment in *McBride* Bosielo AJ said that amongst the factors that are relevant to the independence of offices or institutions which – in terms of constitutional prescripts – must be independent are "the method of appointment, the method of reporting, disciplinary proceedings and the method of removal . . . from office, and security of tenure".[20]

[23] The NPA Act has two other salient features that help shield the NPA from improper interference, namely: the non-renewability of the 10-year term of office of the NDPP;[21] and certain safeguards on the removal of the NDPP from office.[22] Section 12(8) provides for the voluntary vacation of office by an NDPP.[23] This section is of some significance. It must be read in the context of the constitutional

[19] *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (*Justice Alliance*) at para 38.

[20] *McBride v Minister of Police* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) at para 31.

[21] Section 12(1).

[22] Section 12(5).

[23] Section 12(8) provides:

> "(a) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office—
>
> (i) on account of continued ill-health; or
>
> (ii) for any other reason which the President deems sufficient.
>
> (b) The request in terms of paragraph (a)(ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.
>
> (c) If the National Director or a Deputy National Director—
>
> (i) vacates his or her office in terms of paragraph (a)(i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto; or
>
> (ii) vacates his or her office in terms of paragraph (a)(ii), he or she shall be deemed to have been retired in terms of section 16(4) of the Public Service Act, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired."

guarantee that the office of NDPP be independent and, indeed, in the context of all the provisions of the NPA Act that seek to give content to the provisions of section 179(4) of the Constitution.[24] Any act or conduct that purports to be a voluntary vacation of office but which compromises or has the potential to compromise the independence of the NDPP is constitutionally invalid. A question that follows is whether the manner in which Mr Nxasana vacated office is constitutionally compliant.

[24] Crucially, at the hearing before us it was no longer in dispute that Mr Nxasana had not vacated office in terms of section 12(8). The contest concerned the question whether the manner in which he vacated office was lawful. The applicants argued that Mr Nxasana vacated office in a manner that was at odds with the Constitution and the law. Advocate Abrahams and the NPA argued that an NDPP is not precluded from vacating office voluntarily otherwise than under section 12(8). Mr Nxasana, on the other hand, accepted that his vacation of office was not constitutionally compliant.

[25] The facts set out above point to one thing and one thing only: former President Zuma was bent on getting rid of Mr Nxasana by whatever means he could muster. His was an approach that kept on mutating: it was first a stick; then a carrot; a stick once more; and eventually a carrot. There was first the notification that Mr Nxasana would be subjected to an inquiry with a view to establishing whether he was still a fit and proper person to hold office. Concomitantly, there was a threat of suspension pending finalisation of the inquiry, albeit with full pay. This was followed by former President Zuma's proposal that there be mediation. When there was no progress on this, the inquiry was instituted. Whilst the inquiry was in its preliminary stages, the former President pursued a parallel process in which Mr Nxasana was first offered – in a draft settlement agreement – R10 million. As indicated earlier, he did not accept it. What plainly evinces how desperate former President Zuma was to get rid of Mr Nxasana is that this was followed by a draft settlement in which the amount was left blank. Mr Nxasana was being told to pick whatever figure. Indeed,

[24] To recapitulate, this is the section that provides that "[n]ational legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice".

Mr Hulley said that he would "await the *final amount*" from Mr Nxasana. (Emphasis added.)

[26] I am not suggesting that the former President would have accepted any amount Mr Nxasana inserted. All I am saying is that the very idea that former President Zuma was willing, at least, to consider whatever amount Mr Nxasana inserted speaks volumes. To be more direct, it lends credence to the view that he wanted to get rid of Mr Nxasana at all costs. If that were not the case, why else would he have given Mr Nxasana an opportunity to insert an amount of his liking? After all, this all started because former President Zuma overtly made all and sundry believe that he had a basis for holding a view that Mr Nxasana was no longer fit for office. It must have been a matter of relative ease, therefore, to pursue the inquiry instead of offering Mr Nxasana what – by all accounts – was an extremely huge sum of money. In its judgment the High Court notes that before it the parties were agreed that the amount of R17.3 million "far exceeded what Mr Nxasana's financial entitlement would have been had his office been lawfully vacated in terms of section 12(8)(a)(ii) of the NPA Act".[25]

[27] Instead of settling for so huge an amount, why did the former President not simply pursue the inquiry? Did he not believe that the evidence that had motivated him to come up with the idea of an inquiry was sufficiently cogent? If so, why did he not just abandon the inquiry and leave Mr Nxasana in office? After all, he was exercising powers as President and not involved in a personal dispute which he could settle as he pleased. It is difficult to comprehend why he would have settled on so huge an amount, and from public coffers to boot.

[28] The inference is inescapable that he was effectively buying Mr Nxasana out of office. In my book, conduct of that nature compromises the independence of the office of NDPP. It conduces to the removal of "troublesome" or otherwise unwanted NDPPs through buying them out of office by offering them obscenely huge amounts

[25] High Court judgment above n 2 at para 3.

of money. Although I deliberately eschew deciding the question whether an NDPP may vacate office outside of the provisions of section 12(8) of the NPA Act, this much I do want to say: it can never be that vacating office outside of these provisions would ever entitle an NDPP to more benefits than those set out in section 12(8). Section 12(8) is specific on the benefits. It provides that when an NDPP vacates office on the basis of "continued ill-health",[26] "he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto".[27] When an NDPP vacates office for "any other reason which the President deems sufficient",[28] "he or she shall be deemed to have been retired in terms of section 16(4) of the Public Service Act, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired".[29] All these are the usual public service benefits. The problem with benefits that are not capped by the section 12(8) limit is that they give rise to the real possibility of NDPPs being bought out of office. That, as I say, compromises the independence of the office of NDPP. Whatever we are to make of the full import of section 12(8), the manner of voluntary vacation of office should never undermine the constitutional imperative of the independence of the NDPP.

[29] The settlement agreement, Mr Nxasana's vacation of office and the obligation to pay the sum of R17.3 million are one composite whole. In fact, the vacation of office and obligation to pay and subsequent payment were in terms of the settlement agreement. I am led to the conclusion that all are constitutionally invalid for having come about in a manner inconsonant with the constitutionally required independence of the office of NDPP.

[26] Section 12(8)(a)(i).

[27] Section 12(8)(c)(i).

[28] Section 12(8)(a)(ii).

[29] Section 12(8)(c)(ii).

[30] Although I have alluded to this, let me say it explicitly. On the approach I have taken, it is not necessary to deal with the argument by Advocate Abrahams and the NPA that an NDPP may vacate office voluntarily outside the provisions of section 12(8).

Was the appointment of Advocate Abrahams constitutionally invalid?

[31] The appointment of Advocate Abrahams as NDPP was an act consequential upon the constitutionally invalid vacation of office by Mr Nxasana. Consequential acts which follow on constitutionally invalid conduct are commonplace. An interesting question raised by the oft-cited statement of law in *Oudekraal*[30] is the effect of the constitutional invalidity of Mr Nxasana's vacation of office on the consequential act of the appointment of Advocate Abrahams.[31] In that statement Howie P and Nugent JA said that until administrative action is set aside by a court in review proceedings, it continues to exist in fact and has legal consequences that cannot simply be overlooked.[32] This pronouncement has been relied upon by this Court on a number of occasions.[33] Does this mean that – because Mr Nxasana's vacation of office had not yet been set aside when Advocate Abrahams was appointed NDPP – Advocate Abrahams was validly appointed?

[32] What may lead some readers of what I have paraphrased from *Oudekraal* astray is reading it in isolation. Later *Oudekraal* makes it clear that where a

[30] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*).

[31] The fact that *Oudekraal* concerned administrative action should not lead to the conclusion that I am suggesting that former President Zuma's conduct relative to Mr Nxasana's vacation of office was administrative action. As appears above from how I resolved the question of the lawfulness of Mr Nxasana's vacation of office, it is not necessary for me to decide the issue whether the former President's conduct was administrative action. That said, there is no reason in principle why *Oudekraal* should not apply to the conduct of the Executive.

[32] *Oudekraal* above n 30 at para 26.

[33] See *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) at para 88; *Merafong City v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) at para 36; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at para 103; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama*) at para 82; and *Camps Bay Ratepayers' and Residents Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 62.

consequential act could be valid only as a result of the factual existence – not legal validity – of the earlier act, the consequential act would be valid only for so long as the earlier act had not been set aside.[34] In *Seale* Cloete JA for a unanimous Court put this beyond question. He held:

> "Counsel for both Seale and the TYC sought to rely in argument on passages in the decision of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town* which adopted the analysis by Christopher Forsyth of why an act which is invalid may nevertheless have valid consequences and concluded:
>
> > 'Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect *for so long as the initial act is not set aside by a competent court*.'
>
> . . .
>
> [T]he reliance by counsel on the decision in *Oudekraal*, [is] misplaced. As appears from the italicised part of the judgment just quoted, the analysis was accepted by this court as being limited to a consideration of the validity of a second act performed consequent upon a first invalid act, pending a decision whether the first act is to be set aside or permitted to stand. This court did not in *Oudekraal* suggest that the analysis was relevant to that latter decision."[35] (Footnotes omitted.)

[33] The Supreme Court of Appeal then concluded that "it is clear from *Oudekraal* . . . that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent".[36]

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[34] *Oudekraal* above n 30 at para 31.

[35] *Seale v Van Rooyen N.O.; Provincial Government, North West Province v Van Rooyen N.O*. [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at para 13.

[36] Id.

[34] In *Kirland* this Court accepted what was decided in *Seale*. Writing for the majority, Cameron J had this to say:

> "In *Seale* . . . the Court, applying *Oudekraal*, held that acts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set aside. . . . [T]he Court rightly rejected an argument, in misconceived reliance on *Oudekraal*, that the later (second) act could remain valid despite the setting aside of the first."[37]

[35] Now that the manner in which Mr Nxasana vacated office has been declared constitutionally invalid, it follows that the appointment of Advocate Abrahams is constitutionally invalid. The appeal by Advocate Abrahams and the NPA directly countered the application for confirmation of the order declaring the appointment of Advocate Abrahams invalid. As a consequence, that appeal falls to be dismissed.

The validity of section 12(4) and (6) of the NPA Act

[36] The challenge to the constitutional validity of this section is not founded on any factual matrix. Section 12(4) is about the extension of the term of office of an NDPP who is otherwise liable to retire on grounds of age. In these proceedings nobody was affected by the provisions of this section. Section 12(6) provides for the indefinite suspension of an NDPP by the President without pay or with such pay as the President may determine. Mr Nxasana was suspended with full pay. Nobody else was suspended. A preliminary issue that arises is whether we must entertain this abstract challenge.

[37] This Court has entertained abstract challenges in appropriate circumstances. In *Ferreira* in the context of an abstract challenge arising from public interest litigation, O'Regan J held that the relevant factors are—

> "whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and

[37] *Kirland* above n 33 at fn 74.

> prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court."[38]

[38] In *Lawyers for Human Rights* Yacoob J, writing for the majority, quoted this passage with approval[39] and held that even though O'Regan J was in the minority, the passage was not inconsistent with anything said in the majority judgment on standing.[40] Crucially, he then held that the factors set out by O'Regan J in respect of public interest standing where there is a live controversy are of relevance even where there is none. In other words, the factors apply even in the case of abstract public interest challenges. This is how he articulated this:

> "It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."[41]

[39] I am of the view that – in the present circumstances – it is imperative that the abstract challenge be entertained. What stands out is the nature of the unconstitutionality complained of and its susceptibility to occurring without detection. CASAC argued that when the alleged unconstitutionality relates to independence as is the case with the present challenges, abstract challenges are vital. It explained that "the problem is not only the actual exercise of unconstitutional powers, but the subtle ways in which the mere existence of those powers undermines independence". An NDPP may refrain from acting independently because she or he fears indefinite

[38] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 234.

[39] *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 16.

[40] Id at para 17.

[41] Id at para 18.

unpaid suspension and the factual matrix for the challenge not to be abstract may never arise. As CASAC further argued, rather than give the factual matrix an opportunity to eventuate, it is better to pre-emptively challenge the relevant statutory provision.

[40] It is, therefore, not surprising that the *Glenister II*[42] and *Helen Suzman Foundation*[43] challenges were determined in the absence of any factual predicate. In sum, this is a fitting case to entertain an abstract challenge.

[41] I next proceed to deal with the challenges to the two subsections one after the other.[44]

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[42] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*).

[43] *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) (*Helen Suzman Foundation*).

[44] Section 12(4) and (6) provides:

> "(4) If the President is of the opinion that it is in the public interest to retain a National Director or a Deputy National Director in his or her office beyond the age of 65 years, and—
>
> (a) the National Director or Deputy National Director wishes to continue to serve in such office; and
>
> (b) the mental and physical health of the person concerned enable him or her so to continue,
>
> the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a National Director's term of office shall not exceed 10 years.
>
> . . .
>
> (6) (a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—
>
> (i) for misconduct;
>
> (ii) on account of continued ill-health;
>
> (iii) on account of incapacity to carry out his or her duties of office efficiently; or
>
> (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.
>
> (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

[42] Section 12(4) empowers the President to extend the term of office of an NDPP or a Deputy NDPP which must ordinarily come to an end at age 65 beyond that age, but not for a period which exceeds, or periods which in the aggregate exceed, two years provided that an NDPP's term of office shall not exceed 10 years. The President's power to extend an NDPP's term of office undermines the independence of the office. Here is how this was explained in *Justice Alliance*:

> "In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in section 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it."[45] (Footnotes omitted.)

[43] In similar vein, Mogoeng CJ held in *Helen Suzman Foundation*:

> "Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard

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> Parliament is not then in session, within 14 days after the commencement of its next ensuing session.
>
> (c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.
>
> (d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.
>
> (e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President."

[45] *Justice Alliance* above n 19 at para 75.

> to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to 'behave' herself in anticipation of renewal."[46]

[44] There is no basis for this reasoning not to apply to section 12(4). The High Court's declaration of constitutional invalidity must be confirmed.

[45] Coming to section 12(6), two aspects that make the President's power to suspend particularly egregious are the facts that she or he may suspend with or without pay and for an indefinite period. Of importance, suspending without pay is the default position: the section says that for the duration of the suspension, an NDPP or Deputy NDPP "shall receive no salary or such salary as may be determined by the President". There is no guidance whatsoever on how and on what bases the President may exercise the discretion to (a) allow receipt of a salary and (b) determine its quantum. This tool is susceptible to abuse. It may be invoked to cow and render compliant an NDPP or Deputy NDPP. The prospect of not earning an income may fill many with dread and apprehension. The possibility of this enduring indefinitely exacerbates the situation. This is not a tool that should be availed to the Executive. It has the potential to undermine the independence and integrity of the offices of NDPP and Deputy NDPP and, indeed, of the NPA itself.

[46] In *Helen Suzman Foundation* this Court held:

> "Suspension without pay defies the exceedingly important presumption of innocence until proven guilty or the *audi alteram partem* rule and unfairly undermines the National Head's ability to challenge the validity of the suspension by the withholding of salary and benefits. It irrefutably presumes wrongdoing. An inquiry may then become a dishonest process of going through the motions. Presumably the Minister's mind would already have been made up that the National Head is guilty of what she is accused of. Personal and familial suffering that could be caused by the exercise of

[46] *Helen Suzman Foundation* above n 43 at para 81.

> that draconian power also cries out against its retention. It is also the employer's duty to expedite the inquiry to avoid lengthy suspensions on pay."[47]

[47] There is the question of "unilateral suspension"[48] on which the challenge is also pegged. I read Mogoeng CJ for the majority in *Helen Suzman Foundation* to say there is nothing inherently wrong with a unilateral suspension. What he has a problem with are the possibility of suspension without pay and benefits and the use of the words "as the Minister deems fit" in section 17DA(2)(a) of the South African Police Service Act.[49] In *McBride*, on the other hand, Bosielo AJ, writing for a unanimous Court, says:

> "To my mind, the cumulative effect of the impugned sections has the potential to diminish the confidence the public should have in IPID [the Independent Police Investigative Directorate]. As the amicus curiae emphasised in its submissions, both the independence and the appearance of an independent IPID are central to this matter. The manner in which the Minister dealt with Mr McBride demonstrates, without doubt, how invasive the Minister's powers are. *What exacerbates the situation is that he acted unilaterally.* This destroys the very confidence which the public should have that IPID will be able, without undue political interference, to investigate complaints against the police fearlessly and without favour or bias. IPID must therefore not only be independent, but must be seen to be so. Without enjoying the confidence of the public, IPID will not be able to function efficiently, as the public might be disinclined or reluctant to report their cases to it."[50] (Emphasis added.)

[48] I do not think this is a proper case in which I need grapple with the import of the content of the two judgments on "unilateral suspension". There is enough to invalidate section 12(6) based on the above reasoning. In that regard, I conclude that

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[47] *Helen Suzman Foundation* above n 43 at para 85.

[48] Ordinarily, suspensions are unilateral acts. In the context of a functionary who is constitutionally required to be independent the question may arise whether the power to suspend may be exercised by the member of the Executive on whom that power vests without the involvement of Parliament; with the involvement of Parliament the exercise of the power would be bilateral.

[49] 68 of 1995.

[50] *McBride* above n 20 at para 43.

section 12(6) is constitutionally invalid for empowering the President to suspend an NDPP and Deputy NDPP without pay and for an indefinite duration.

Mr Nxasana's appeal

[49] This appeal concerns the High Court's refusal of condonation of the late filing of an affidavit Mr Nxasana labelled as an "explanatory affidavit". He was the third respondent in the application brought by Corruption Watch and FUL and the fourth in CASAC's. He filed the explanatory affidavit out of turn; that is, he did not file it when answering affidavits by respondents were due. In fact, it was so out of time that he filed it after all affidavits had been filed even in the CASAC application which had been launched later. Mr Nxasana accepts that – even though he styles the affidavit as an explanatory affidavit – it is in fact an answering affidavit in both applications. The affidavit was filed under cover of a notice that was headed "notice to abide". In addition to saying Mr Nxasana would abide the decision of the Court, the notice said that the affidavit would be used to explain "the position of the third respondent". Reference to the third respondent was to Mr Nxasana.

[50] The former President opposed the application for condonation.

[51] The fundament of Mr Nxasana's grievance in the appeal is that the High Court made certain adverse findings against him without considering his version and thus contrary to the *audi alteram partem* (loosely, hear both sides) rule. He argues that in the circumstances, the High Court's order is not just and equitable within the meaning of section 172(1)(b) of the Constitution.[51]

[51] Section 172(1) provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[52] He "notes" that he was never served with any of the papers in the CASAC application until April 2017 and that in the application by Corruption Watch and FUL he received only the founding papers. By April 2017 all affidavits in both applications had been filed. He filed the explanatory affidavit on 11 April 2017. He explains filing out of time in these terms:

> "I accept that my waiting until the conclusion of the rule 30/30A proceedings was not in strict compliance with the Rules. However, I submit that it was a pragmatic approach given the delay inevitably caused by the President's failure to comply with rule 53 and my desire to only provide a single affidavit to Court."

[53] The High Court refused condonation for two reasons. The first was that the explanation for the delay was not persuasive. I agree. The second was that "it is generally accepted that when evidence is presented so late in proceedings, there is the danger of it having been tailored to fit a particular position".[52] On this, the question that arises is: how real was this danger in the instant matter?

[54] Before dealing with this second reason, let me touch on Mr Nxasana's apparent complaint that he did not always receive proper service of the papers. Mr Nxasana says that service of the application papers on him was haphazard at best. I do not want to make much of this. He seems to have been aware of what was going on. This is especially so with regard to the application by Corruption Watch and FUL. He assisted these applicants closely with the compilation of the rule 53 record. That being the case, if he was ever intent on acting expeditiously, he could have taken the initiative and insisted on being served with the papers. After all, he is an experienced attorney.

[52] High Court judgment above n 2 at para 8.

[55] The explanatory affidavit first deals with the "background". Here Mr Nxasana begins with discussing facts around his appointment as NDPP. Nothing contentious arises from that.

[56] It next deals with acrimony between Mr Nxasana, on the one hand, and Advocate Jiba, the former Acting NDPP, and Advocate Mrwebi, the Special Director: Specialised Commercial Crime Unit, on the other. The acrimony allegedly erupted soon after Mr Nxasana's appointment. These are allegations that were not coming to the fore for the first time. In the explanatory affidavit Mr Nxasana was repeating allegations he had made previously in his founding affidavit in the application to interdict former President Zuma from suspending him. That affidavit was before the High Court in the present proceedings. It had been filed by CASAC before the explanatory affidavit was filed. Mr Nxasana had also made these same allegations as far back as 1 August 2014 in the letter in which he made representations as to why the former President should not suspend him. That letter too had already been filed of record in the present proceedings by the time Mr Nxasana filed the explanatory affidavit.

[57] The explanatory affidavit then deals with various steps that Mr Nxasana says he took to address the instability that existed at the NPA. In a context that had nothing to do with Mr Nxasana's condonation application, the High Court's judgment itself noted that it was common cause before it that since September 2007 the recent history at the NPA "ha[d] been one of paralysing instability".[53] The steps that Mr Nxasana says he took are also nothing we were seeing for the first time in the explanatory affidavit. For example, in the papers filed of record there is earlier mention of: the fact that Mr Nxasana obtained an opinion from senior counsel regarding adverse findings that had been made by the High Court and Supreme Court of Appeal against Advocate Jiba, Advocate Mrwebi and Advocate Mzinyathi;[54] the appointment of retired Justice Yacoob to enquire into the instability at the NPA; a memorandum

[53] High Court judgment above n 2 at para 19.

[54] Those findings were not made in the present proceedings.

prepared by Mr Willie Hofmeyr addressed to the Minister for onward transmission to former President Zuma in which the former President was being requested to provisionally suspend Advocates Jiba, Mrwebi and Mzinyathi; and Mr Nxasana's requests for a meeting with former President Zuma for the former President to intervene and address the instability at the NPA.

[58] The rest of what is dealt with under background is so uncontentious as not to require any discussion.

[59] After the background the explanatory affidavit deals with the circumstances that led to Mr Nxasana's resignation. On this, correspondence that is contemporaneous with those circumstances lends support to what Mr Nxasana is now saying in the explanatory affidavit. To an extent the settlement agreement itself also records why it was concluded; and that too is supportive of Mr Nxasana's version in the explanatory affidavit.

[60] The explanatory affidavit next asserts – and substantiates extensively – that the settlement agreement was not concluded pursuant to a request by him to vacate office. I need not say much on this because the High Court – relying on objective material filed as part of the rule 53 record before the explanatory affidavit was deposed to – found likewise.

[61] I now revert to the High Court's view that "it is generally accepted that when evidence is presented so late in proceedings, there is the danger of it having been tailored to fit a particular position". Based on my analysis of the content of the explanatory affidavit, it seems that the High Court applied the view without a close look at the specific facts of this case. That is, it did not consider how real the danger of the evidence having been tailored in a particular way was in this specific instance. Looking at the content of the explanatory affidavit, I think very little in it was surfacing for the first time when it was filed. And nothing in that is crucial to the determination of the issues. That to me substantially minimises, if not eliminates, the

danger identified by the High Court. Does that entitle us to interfere with the High Court's exercise of discretion in refusing condonation?

[62] The High Court's decision entailed the exercise of a discretion "in the strict sense"[55] or "true sense".[56] As such, there are limited bases for us to interfere. In *National Coalition* this Court held:

> "A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."[57] (Footnotes omitted.)

[63] To my mind, the view that the High Court took on the danger of improperly tailoring evidence amounts to a misdirection on the facts. That view was a central pillar in the High Court's exercise of discretion. The other pillar was the lack of a satisfactory explanation for the delay. Because of the misdirection on the facts, one of the central pillars collapses. I do not see how the edifice can remain standing on only one of the central pillars. We are thus entitled to interfere with the exercise of discretion. Must we then grant condonation and accept Mr Nxasana's explanatory affidavit?

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[55] *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 39.

[56] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at paras 84-5.

[57] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 11. See also *Mathale v Linda* [2015] ZACC 28; 2016 (2) SA 461 (CC); 2016 (2) BCLR 226 (CC) at para 40.

[64] In *Brummer* this Court held that it is the interests of justice that are paramount in considering whether to grant condonation. On how interests of justice are determined it held:

> "The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."[58]

[65] Although the explanation for the delay is weak, Mr Nxasana is strong on the merits of what the explanatory affidavit was – in the main – meant to achieve; that is to counter former President Zuma's version. For me, another factor that should count in Mr Nxasana's favour is that, although he delayed in filing his own affidavit, he expended time and effort towards the compilation of a proper rule 53 record and was thus of great assistance not only to Corruption Watch and FUL but to the Court as well. Also, based on the possible relief that may be granted and the likely bases for it, a lot is at stake in this matter; that tends to tilt the scales towards giving a hearing to all disputants. Lastly, I am not aware of prejudice that was suffered by any party as a result of the late filing of the explanatory affidavit; and none was suggested.

[66] On balance, I am of the view that condonation must be granted and the explanatory affidavit accepted.

[67] Reverting to the declarations of invalidity, what must follow them?

[58] *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3. See also *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) at para 17.

Remedy

General

[68] There is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of section 172(1)(b) of the Constitution we may make *any* order that is just and equitable. The operative word "any" is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. This Court has laid down certain principles in charting the path on the exercise of discretion to determine a just and equitable remedy.

[69] What must be paramount in the relief that a court grants is the vindication of the rule of law.[59] The effect of that is the reversal of the consequences of the constitutionally invalid conduct. Ordinarily, therefore, Mr Nxasana would have to resume office as he did not vacate it validly. This is analogous to the situation of an employee whose dismissal was invalid. About that this is what Zondo J, writing for the majority, said in *Steenkamp*:

> "An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer. In this Court's unanimous judgment in *Equity Aviation*, Nkabinde J articulated the meaning of the word 'reinstate' in the context of an employee who has been dismissed. She said, quite correctly, it means to restore the employee to the position in which he or she was before he or she was dismissed. With that meaning in mind, the question that arises in the context of an employee whose dismissal has been found to be invalid and of no force and effect is: how do you restore an employee to the position from which he or she has never been moved? That a dismissal is invalid and of no force and effect means that it is not recognised as having happened. It is different from a dismissal that is found to be unfair because that dismissal is recognised in law as having occurred.

[59] See *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) (*Mhlope*) at para 130.

> When a dismissal is held to be unfair, one can speak of a reinstatement but not in the case of an invalid dismissal. This, therefore, means that an order of reinstatement is not competent for an invalid dismissal."[60] (Footnotes omitted.)

[70] So, effectively this means Mr Nxasana remains in office as his vacation was invalid. All that would have to happen is for him to physically resume office. A natural consequence of that would be that Advocate Abrahams would have to be removed from office. But must all that – that is the resumption and vacation of office by Mr Nxasana and Advocate Abrahams, respectively – follow inexorably?

[71] The specific circumstances of a given matter may displace what should ordinarily be the position. In *Mhlope* we granted just and equitable relief *that was at odds with extant statutory provisions*. Mogoeng CJ held that the failure of the Electoral Commission to compile a voters' roll in accordance with section 16(3) of the Electoral Act[61] was at "odds with the strictures not just of the law but also of the rule of law".[62] When it came to a choice between scuppering the local government elections which – in terms of the Constitution – had to take place by a certain date[63] and upholding the strictures of the law, the Court opted for allowing the elections to go ahead.

[72] What starkly helps illuminate why section 172(1)(b) of the Constitution empowers us – where justice and equity dictate – to go so far as to make orders that are at odds with extant law is the Canadian Supreme Court's decision in the

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[60] *Steenkamp v Edcon Limited* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC) at paras 189-90.

[61] 73 of 1998.

[62] *Mhlope* above n 60 at para 122.

[63] Section 159 of the Constitution provides:

> "(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.
>
> (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired."

Manitoba Language Rights case.[64] Without suggesting that – for a fact – this case informed the inclusion of section 172(1)(b) in our Constitution, it typifies difficult situations that explain why the framers of our Constitution may have decided to avert those situations by expressly including this expansive remedial power. Very briefly on this case, since 1890 the Manitoba Parliament had enacted statutes in English only. This was contrary to constitutional prescripts that required that statutes be enacted in English and French.

[73] These statutes were held to be invalid, and this holding was made in 1985, some 95 years from the time the Manitoba Parliament started enacting statutes in this manner. Realising that a declaration of invalidity without more would take Manitoba back 95 years in that the declaration would: undo post-1890 amendments to statutes that continued to exist; revive pre-1890 statutes that had since been repealed; and leave without statutory governance situations that were not provided for statutorily before 1890 but which, as at the date of the judgment, plainly required statutory governance, the Canadian Supreme Court decided to deem the invalid statutes temporarily valid for the period necessary for translation to French, re-enactment, printing and publication. The Court held that not to do so would result in the Province of Manitoba "being without a valid and effectual legal system for the present and future",[65] something that would be at odds with the rule of law. Crucially, without the equivalent of section 172(1)(b), the Court was able to keep in force laws that were unconstitutional.

[74] The relevance of this is that – despite the fact that ordinarily the Canadian Supreme Court had to invalidate all the affected laws without more – it did not do so because justice, equity and indeed the rule of law dictated otherwise.

[75] The fact that in terms of our declaration of invalidity Mr Nxasana is ordinarily entitled to resume office is the default legal position. As such, it is a legal position

[64] *Re Manitoba Language Rights* [1985] 1 SCR 721; 1985 CanLII 33 (SCC).

[65] Id at 758.

like any other. It enjoys no place in law that is more special than – say – the provisions of section 16(3) of the Electoral Act that were in issue in *Mhlope*. Despite the continued validity of those provisions we were able – in the exercise of the section 172(1)(b) power – to make an order at variance with them.

[76] I have had the pleasure of reading the judgment by Jafta J (second judgment). I disagree with much that it says. After some preliminary issues, it begins the debate by making an observation that "*Mhlope* is not authority for the proposition that an employee whose dismissal has been declared unlawful cannot resume his or her duties".[66] Of course, that is so. But that is not the end of the matter. The principle laid down by *Mhlope* is that – if justice and equity so require – an existing law may not be adhered to. *Steenkamp* does not purport to say anything at odds with that. It merely declared what the legal position was. Statutory provisions do something similar, if not more; they create law. We were able to depart from one of them in *Mhlope*.

[77] Another basis of distinction by the second judgment is that "[i]t is true that the order that was issued in *Mhlope* suspended the operation of a valid statute. But this was linked to the suspension of the declaration of invalidity."[67] For present purposes, what difference there may be between *Mhlope* and the present matter is not in substance, but in context only. In the present matter as well there is a declaration of invalidity. That is the invalidity of Mr Nxasana's vacation of office. So, there is nothing magical about the fact that we made a declaration of invalidity in *Mhlope*. The ordinary effect of declaring Mr Nxasana's vacation of office invalid is that – in accordance with the *Steenkamp* principle – Mr Nxasana should return to office. As was the case with section 16(3) of the Electoral Act in *Mhlope*, this principle is the extant legal position that must ordinarily carry the day. The question is: why – as seems to be the suggestion of the second judgment – this principle must be immune from the courts' just and equitable remedial jurisdiction under section 172(1)(b) of the

[66] See [103].

[67] See [106].

Constitution? Why must it inexorably take precedence? If in *Mhlope* we were able to hold that "the duty imposed by section 16(3) is . . . suspended for purposes of the August 2016 elections", here as well we should – by parity of reasoning – be able to suspend the applicability of the *Steenkamp* principle.

[78] In paragraphs 106 to 112 the second judgment deals at length with considerations that moved this Court to order suspensions of declarations of invalidity in other matters and concludes that nothing similarly calls for that in the instant matter. I will not deal with all those considerations. Suffice it to say that in those other matters this Court never purported to lay down a closed list of scenarios where suspensions of declarations of invalidity may be ordered. The question is whether – in a given case – justice and equity demand that a suspension be made. Here they do. After all, although Mr Nxasana may have been under pressure from former President Zuma, he did not cover himself in glory; more on this later.

[79] My reasoning in this regard applies equally to the second judgment's discussion of section 12 of the NPA Act.[68] The second judgment underscores the detail that has to be followed for an NDPP to be removed from office. I do not see why – in comparison to section 16(3) of the Electoral Act – section 12 of the NPA Act must have some superior force. The second judgment emphasises the fact that section 12 is "umbilically linked to the Constitution". So is section 16(3) of the Electoral Act which – as we held in *Mhlope* – helps enhance so important a fundamental right as the right to vote; a right that is at the centre of constitutional democracy. Indeed, in our constitutional dispensation universal adult suffrage is one of the founding values.[69] Thus the detail of the procedure that would normally have to be followed in order to remove Mr Nxasana from office makes no difference. The point of substance is that – like section 16(3) of the Electoral Act – section 12 of the NPA Act may be departed from if justice and equity so dictate.

[68] See [113] to [119].

[69] The founding values are quoted in n 16 above.

[80] I do not see the inconsistency adverted to in the second judgment with regard to reliance on section 12 in declaring the vacation of office invalid but then not holding that it is obligatory, in terms of section 12, that Mr Nxasana be allowed to return to office.[70] The very quotation by the second judgment from *Mhlope*[71] also says that the Electoral Commission had not complied with section 16(3). Therefore, section 16(3) was central to the ultimate declaration of constitutional invalidity. And yet the Court then proceeded to suspend the duty imposed by section 16(3). Where then is the distinction that the second judgment seeks to draw in this regard? I do not see it.

[81] In sum, I see no legal impediment to us being able to depart from what is nothing other than another legal position; that is the default legal position that Mr Nxasana should ordinarily resume office. Likewise, I do not understand why we should treat section 12 of the NPA Act differently from how we treated section 16(3) of the Electoral Act. The question is: must we depart from the default position dictated by the *Steenkamp* principle and the process imposed by section 12? What is just and equitable for us to order? That is what I next deal with both with regard to Mr Nxasana and Advocate Abrahams.

The resumption of office by Mr Nxasana or retention of Advocate Abrahams

[82] In the context of the just and equitable remedial jurisdiction provided for in section 8 of the Promotion of Administrative Justice Act,[72] Moseneke DCJ said that "at a broader level [the purpose of a public law remedy is] to entrench the rule of law".[73] In the same context in *Bengwenyama* Froneman J said:

> "I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative

[70] See [116].

[71] See [105].

[72] 3 of 2000. I think the pronouncements in that context are of relevance to the just and equitable jurisdiction provided for in section 172(1)(b) of the Constitution.

[73] *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.

> action. The rule of law must never be relinquished, but the circumstances of each case must be examined"[74]

[83] Where necessary, the aim is to ameliorate the effect of vindicating the rule of law.[75] I say where necessary because in a given case it may be fitting to undo – without any qualification – everything that came about as a result of the constitutionally invalid conduct. But the injustice and inequity arising from this may be of such a nature that the reversal – if there must be any at all – may have to be tempered. That is a judgment call to be made based on the circumstances of each case.

[84] In the present context, relief that upholds the rule of law is one that helps vindicate the integrity of the office of NDPP.

[85] Starting with Mr Nxasana, I have a lot of sympathy for him for the undue, persistent pressure to which he was subjected. That said, based on the objectively available material, quite early on he indicated his preparedness to vacate office if he was paid in full for the remainder of his contract period. He made this demand when he had been in office for just over a year. And yet he wanted a payout for close to nine years, the unexpired period of his term of office. Some of the objectively available material was obtained by Corruption Watch and FUL from Mr Nxasana himself when he was assisting them with collating the rule 53 record. Effectively, although Mr Nxasana strongly protested his fitness for office, he was saying he was willing to be bought out of office if the price was right. As much as I sympathise with him, I do not think that is the reaction expected of the holder of so high and important an office; an office the holder of which – if she or he is truly independent – is required to display utmost fortitude and resilience. Even allowing for human frailties – because Mr Nxasana is human after all – I do not think the holder of the office of

[74] *Bengwenyama* above n 33 at para 85.

[75] Compare id at para 85.

NDPP could not reasonably have been expected to do better. His conduct leads me to the conclusion that a just and equitable remedy is not to allow him to return to office.

[86] I do agree with the second judgment that exercising our just and equitable remedial jurisdiction in a manner that perpetuates non-compliance with an extant legal position must be done only in exceptional circumstances.[76] In *Mhlope* what was exceptional was the fact that, but for not adhering to the strictures of section 16(3) of the Electoral Act, there would have been a constitutional crisis. In *Black Sash* if we had not allowed the constitutionally invalid contract to continue, the vulnerable social grant beneficiaries would have been subjected to untold hardship and suffering. What we held in these two judgments does not create a closed list of what constitutes exceptional circumstances. What is exceptional depends on the circumstances of each case. The question is whether there are exceptional circumstances in the present case. There are, and here is why.

[87] The narrative at the beginning of this judgment shows that for a few years there has been instability in the office of NDPP and, therefore, in the leadership of the NPA. With the court challenge to Mr Nxasana's vacation of office and to the appointment of Advocate Abrahams, that instability persists to this day. The second judgment accepts – correctly – that it would be open to the President to initiate an inquiry into whether the manner in which Mr Nxasana vacated office renders him unfit to hold office. The order proposed by the second judgment thus has the effect of prolonging the instability. Surely, this unending instability is deleterious not only to the office of NDPP, but also to the NPA as an institution. The sooner it is brought to an end the better. In the circumstances, an order that has the potential of prolonging the instability cannot be just and equitable. To all this, we must add the fact that Mr Nxasana is not free of blame in the manner in which he vacated office.

[76] Compare *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) at para 51.

[88] I next deal with Advocate Abrahams. As a point of departure, I must state that not a single party has suggested that he is not a fit and proper person to hold office. As was to be expected, Advocate Abrahams seeks to get a lot of mileage out of this. Must he succeed? I think not. Former President Zuma appointed Advocate Abrahams following his unlawful removal of Mr Nxasana. That removal was an abuse of power. Advocate Abrahams benefitted from this abuse of power. It matters not that he may have been unaware of the abuse of power; the rule of law dictates that the office of NDPP be cleansed of all the ills that have plagued it for the past few years. It would therefore not be just and equitable to retain him as this would not vindicate the rule of law.

Suspension of declarations of invalidity

[89] With the exception of the declaration in respect of section 12(6), I see no need to suspend any of the declarations of invalidity. The extent to which we are confirming the High Court's declaration of the invalidity of section 12(6) means the power to suspend an NDPP or Deputy NDPP will continue in existence. Like the High Court, I think it proper to afford Parliament an opportunity to address the shortcomings we have identified with the section. I consider a period of 18 months' suspension to be sufficient for this purpose.

[90] It would be downright inconsonant with the requirement of the independence of the NDPP, the Deputy NDPP and the NPA itself for the power to suspend to continue in its present form. For that reason, there is a need for relief that is to apply in the interim. I will not reinvent the wheel. I am happy with the interim relief crafted by the High Court. I set it out in the order below.

Repayment of the sum of R10 240 767.47

[91] Mr Nxasana did not resist paying back the money. And nobody has suggested that he should not. Paying back the money is a natural consequence of the declaration

of constitutional invalidity of the manner in which Mr Nxasana vacated office. I can conceive of no reason why repayment should not follow as a matter of course.

Appointment of a new NDPP

[92] A new NDPP must be appointed expeditiously. But the President must be afforded a sufficient opportunity to make a suitable choice. I think 90 days is enough for that purpose.

Decisions taken and acts performed by Advocate Abrahams

[93] The setting aside of decisions taken, and acts performed, by Advocate Abrahams in his official capacity before his appointment was declared invalid would result in untold dislocation in the work of the NPA and in the administration of justice itself. It is thus necessary to appropriately preserve these acts and decisions.

Order

[94] The following order is made:

1. The appeal of Mr Mxolisi Sandile Oliver Nxasana is upheld with no order as to costs and Mr Nxasana's explanatory affidavit is admitted.
2. The costs order by the High Court of South Africa, Gauteng Division, Pretoria (High Court) against Mr Nxasana is set aside.
3. The appeal of Advocate Shaun Kevin Abrahams and the National Prosecuting Authority is dismissed with costs, including the costs of two counsel.
4. The declaration by the High Court that the settlement agreement dated 14 May 2015 concluded by former President Jacob Gedleyihlekisa Zuma, the Minister of Justice and Correctional Services and Mr Nxasana in terms of which Mr Nxasana's incumbency as the National Director of Public Prosecutions (NDPP) was terminated is constitutionally invalid is confirmed.

5. The declaration by the High Court that the termination of the appointment of Mr Nxasana as NDPP is constitutionally invalid is confirmed.

6. The declaration by the High Court that the decision to authorise payment to Mr Nxasana of an amount of R17 357 233 in terms of the settlement agreement is invalid is confirmed.

7. The declaration by the High Court that the appointment of Advocate Abrahams as NDPP is invalid is confirmed.

8. The declaration by the High Court that section 12(4) of the National Prosecuting Authority Act 32 of 1998 is constitutionally invalid is confirmed.

9. The declaration by the High Court that section 12(6) of the National Prosecuting Authority Act is constitutionally invalid is confirmed only to the extent that the section permits the suspension by the President of an NDPP and Deputy NDPP for an indefinite period and without pay.

10. The declaration of constitutional invalidity contained in paragraph 9 is suspended for 18 months to afford Parliament an opportunity to correct the constitutional defect.

11. During the period of suspension—

    (a) a section 12(6)(aA) will be inserted after section 12(6)(a) and it will read:

        "The period from the time the President suspends the National Director or a Deputy National Director to the time she or he decides whether or not to remove the National Director or Deputy National Director shall not exceed six months."

    (b) section 12(6)(e) will read (with insertions and deletions reflected within square brackets):

        "The National Director or Deputy National Director provisionally suspended from office shall receive, for the

duration of such suspension, [~~no salary or such salary as may be determined by the President~~] [her or his full salary]."

12. Should Parliament fail to correct the defect referred to in paragraph 9 within the period of suspension, the interim relief contained in paragraph 11 will become final.
13. Decisions taken, and acts performed, by Advocate Abrahams in his official capacity will not be invalid by reason only of the declaration of invalidity contained in paragraph 7.
14. Mr Nxasana is ordered to repay forthwith to the state the sum of R10 240 767.47.
15. The President is directed to appoint an NDPP within 90 days of the date of this order.
16. The President, the Minister of Justice and Correctional Services and the National Prosecuting Authority are ordered to pay all costs in this Court that are additional to the costs referred to in paragraph 3, such costs to include the costs of two counsel.

JAFTA J (Petse AJ concurring):

[95] I have had the benefit of reading the judgment prepared by my colleague Madlanga J (first judgment). I agree with it except in relation to one issue. This is whether Mr Nxasana is entitled to resume office in light of the declaration that his purported removal was invalid. The first judgment concludes that he may not. I think he may.

[96] With reference to the decision of this Court in *Steenkamp*, the first judgment accepts that the termination of Mr Nxasana's appointment as the NDPP amounted to a

nullity in the eyes of the law.[77] This principle was laid down by this Court in *Steenkamp* where the Court emphasised that a dismissal which is invalid has no force and effect, hence it constitutes a nullity.

[97] While accepting this to be the position in law, the first judgment holds that it does not follow that Mr Nxasana may resume office.[78] I disagree.

[98] *Steenkamp* tells us that an invalid termination of employment or a dismissal has no legal consequences. In that matter Zondo J declared:

> "An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer."[79]

[99] Therefore on the authority of *Steenkamp*, Mr Nxasana must be taken as if he has not been dismissed. Since his dismissal constituted a nullity, there is nothing further that may be done in the law to vindicate his rights arising from the dismissal. *Steenkamp* informs us that, in his case, reinstatement is incompetent because he cannot be reinstated to the post he had not vacated in terms of the law.[80] This means that he may report for duty and resume his work.

[100] To make the position clearer, Zondo J held that it is open to an employee whose dismissal has been declared invalid on the ground of unlawfulness to report for work. And if the employer prevents him or her from entering the workplace, the employee may seek a court interdict against the employer. In this regard, our colleague said:

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[77] *Steenkamp* above n 60.

[78] See [85].

[79] *Steenkamp* above n 60 at para 189.

[80] Id.

> "An employee whose dismissal is invalid does not need an order of reinstatement. If an employee whose dismissal has been declared invalid is prevented by the employer from entering the workplace to perform his or her duties, in an appropriate case a court may interdict the employer from preventing the employee from reporting for duty or from performing his or her duties. The court may also make an order that the employer must allow the employee into the workplace for purposes of performing his or her duties."[81]

[101] It is apparent from the judgment of the High Court that that Court proceeded from a mistaken premise with regard to whether Mr Nxasana could resume office. The High Court assumed that his reinstatement was necessary; hence it withheld such an order on the ground that it was not just and equitable to reinstate him. The High Court stated:

> "Mr Nxasana too must have known that the bargain he was driving was unlawful. First, he was after all the NDPP and the NPA Act was ultimately his charge to administer; he must have been aware of its provisions. Second, his attorney's letter of 10 December 2014 shows that he was fully aware of the specific statutory provisions relative to his financial entitlement; but that he thought that since he was not offering voluntarily to resign, they did not apply to him – the President was at large to agree to his demands. Third, he abided the decision of the Court as to the lawfulness of the settlement agreement, but was not prepared to say when the realisation of potential unlawfulness came to him.
>
> As in the case of the President, the inference that Mr Nxasana knew that he was acting without lawful foundation is strong; but, as in the case of the President, for the reason there articulated, we prefer to conclude that he was reckless as to whether his demand was lawful.
>
> In our view, given then the conduct of these two main protagonists and the considerations to which we have alluded, it is not just and equitable, in the context of vindicating the Constitution and the independence of the prosecutorial authority, to reinstate Mr Nxasana."[82]

[81] Id at para 192.

[82] High Court judgment above n 2at paras 92-4.

[102] It does not appear from the record that the decision of this Court in *Steenkamp* was brought to the attention of the High Court. Being bound by *Steenkamp*, it is doubtful that the High Court could have reached the same conclusion if it was aware of this decision. But more importantly, the order issued by the High Court did not prevent Mr Nxasana from resuming office. Strictly speaking and on the authority of *Steenkamp*, he could have reported for duty after the High Court had delivered its judgment because the order did not preclude him from going back to work. All that was said by the High Court was that it was not just and equitable to reinstate him. But now we know that reinstatement was not competent in his case. Therefore, what was stated by the High Court was irrelevant.

Mhlope

[103] The question that arises is whether the decision of this Court in *Mhlope*[83] alters the legal position in *Steenkamp*. I think not. *Mhlope* is not authority for the proposition that an employee whose dismissal has been declared unlawful cannot resume his or her duties. That case dealt with a wholly different situation.

[104] In *Mhlope* the Electoral Commission had failed to comply with a statutory injunction, emanating from a provision that was held to be valid. The issue that arose for determination was the consequential effect of the order that declared unlawful the Electoral Commission's non-compliance with a valid statute. Declaring the Commission's failure to comply with a statute to be invalid there could put at risk the entire municipal elections which were scheduled to take place in August 2016.

[105] To avoid this Mogoeng CJ opted for suspending the declaration of invalidity. The Chief Justice said:

> "[t]he invalidation of the unlawful conduct, which is essentially the production of the national common voters' roll that does not comply with section 16(3) of the

[83] *Mhlope* above n 59.

> Electoral Act, has to be suspended. That suspension will allow the IEC to proceed with the August 2016 elections and correct the defective voters' roll. The suspension of the declaration of invalidity of the IEC's unlawful conduct has the effect of suspending the duty imposed by section 16(3) on the IEC which, if carried out, there would have been no invalidity. The non-compliance with section 16(3) is in terms of our just and equitable remedial powers condoned and the duty imposed by section 16(3) is itself suspended for purposes of the August 2016 elections."[84]

[106] It is true that the order that was issued in *Mhlope* suspended the operation of a valid statute. But this was linked to the suspension of the declaration of invalidity. This much is clear from the statement cited above. It is usual for this Court to declare an Act of Parliament to be invalid and suspend the declaration for a fixed period so as to avoid serious disruptions in the administration of government. The effect of the suspension is that an invalid Act continues to operate as if it is valid.[85]

[107] However, the need to suspend the operation of the declaration of invalidity arises where its immediate coming into effect would result in serious dislocation or disruption in the administration of government. It is the interests of justice and good government which may justify an order that allows an invalid law or conduct to continue to operate for a fixed period of time.[86]

[108] That this Court has the power to direct that an unconstitutional law will continue to have force and effect is beyond question. But that power may be exercised where there are compelling reasons to allow an invalid law or conduct to continue to operate.[87] In *Ferreira* this Court held:

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[84] Id at para 133.

[85] See *Ramuhovhi v President of the Republic of South Africa* [2017] ZACC 41; 2018 (2) SA 1 (CC); 2018 (2) BCLR 217 (CC); *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC).

[86] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 30.

[87] *Mvumvu v Minister of Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at paras 45-6.

> "The provisions of section 98(5) and (6), which permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity."[88]

[109] In the present matter, unlike in *Mhlope*, the declaration of invalidity pertaining to the termination of Mr Nxasana's appointment is not suspended. Its operation is immediate. Nor are the requirements of section 12 of the NPA Act suspended. The reasons that compelled this Court in *Mhlope* to suspend section 16(3) of the Electoral Act do not exist here. In fact, no interests of good government have been put forward which warrant the suspension of section 12 of the NPA Act. It is doubtful that such suspension may be granted without suspending the declaration of invalidity on the termination of the appointment and also condoning the unlawful termination as was done in *Mhlope*.

[110] But more importantly, the suspended operation of the relevant statutory provision in *Mhlope* did not adversely affect the rights of anybody. On the contrary, that suspension enabled millions of voters to exercise their right to vote. The suspension of section 12 of the NPA Act here will hugely prejudice Mr Nxasana by depriving him of the protections that the section affords, in circumstances where there are no reasons compelling suspension of the operation of a valid legislation. Instead, compliance with section 12 will enhance the promotion of the independence of the NPA and the rule of law.

[111] In *Mhlope* the suspension of the relevant statutory provision was justified by the exceptional circumstances of that case which were regarded as crying out "for an exceptional solution or remedy to avoid a constitutional crisis".[89] Similarly, in *Black Sash* the emphasis was placed on the extraordinary circumstances of the case and the catastrophic consequences which could likely have ensued if the

[88] *Ferreira* above n 38 at para 28.

[89] *Mhlope* above n 59 at para 137.

unconstitutional contract was not allowed to continue to operate. Cautioning that the just and equitable remedial power has limits, Froneman J said:

> "It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis. The order we make imposes constitutional obligations on the parties that they did not in advance agree to. But we are not ordering something that they could not themselves have agreed to under our supervision had an application been brought earlier, either by seeking an extension to the contract that would have expired on 31 March 2017 or by entering into a new one."[90]

[112] In the present matter there is nothing exceptional or extraordinary that warrants the exercise of remedial power to prevent Mr Nxasana from returning to office. His return will certainly not cause a constitutional crisis or a national crisis. On the contrary, his return would enable the President to follow the law if he wishes to remove him from office and Parliament would play a vital part in that process. And more importantly, preventing Mr Nxasana from returning to office without pronouncing on the validity of his employment contract would not only be unfair to him but would also create considerable uncertainty on the parties' rights and interests. This would be antithetical to the rule of law which promotes certainty.

Section 12

[113] As the first judgment rightly points out, the purpose of the NPA Act is to protect both the institutional independence of the NPA and the individual independence of its head.[91] The section seeks to achieve this by securing the tenure of office, conditions of service and other benefits.[92] But more importantly, section 12(5)

[90] *Black Sash* above n 76 at para 51.

[91] See [21] to [23].

[92] Section 12 must be read with section 18 of the NPA Act.

provides that the National Director "shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8)". This is a potent guarantee, deliberately chosen by Parliament to protect the NPA's independence as required by section 179(4) of the Constitution.[93]

[114] Therefore, section 12 of the NPA Act is umbilically linked to the Constitution.[94] Suspending its operation will not only subvert its purpose but will also be antithetical to the Constitution. Such suspension would be in conflict with the principle of separation of powers and a number of provisions in the Constitution. These include: section 1(c) which lists the supremacy of the Constitution and the rule of law; section 2 which underscores the supremacy of the Constitution by declaring that conduct inconsistent with it is invalid; section 165(2) that guarantees the independence of courts "subject to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice"; and section 179(4).

[115] Ironically the first judgment impliedly suspends the operation of section 12(5) of the NPA Act in order to uphold the rule of law and secure "the integrity of the office of the NDPP".[95] I disagree. Suspending the operation of section 12(5) would attain quite the opposite. It would mean that Mr Nxasana's removal from office is achieved by means other than the procedure prescribed in section 12. In that procedure Parliament plays a crucial part. Barring a voluntary resignation, there can be no removal of a National Director from office without the involvement and approval of Parliament. A suspension of the operation of section 12 will be subversive of this and will deny Parliament the role it had constitutionally given to itself.

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[93] Section 179(4) reads:

> "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice".

[94] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

[95] See [75].

[116] What is more, this denial will occur in circumstances where the Court would have taken inconsistent positions in relation to the enforcement of section 12. It will be recalled that non-compliance with section 12 was the basis on which the decision that the termination of Mr Nxasana's appointment and the settlement agreement were invalid, rested. The section could not be enforced and at the same time its operation be suspended. This is another factor that distinguishes the present matter from *Mhlope*.

[117] In terms of section 12(6) and (7), a National Director may be removed from office only if one of the grounds listed in subsection (6)(a) has been established, following an inquiry into the matter. In this case no enquiry was held and no pronouncement on the existence of one or more of the listed grounds has been made. This underlines the inappropriateness of holding that Mr Nxasana should not return to office. Allowing him to return to office, does not mean that he is fit to continue in the office. If his involvement in the conclusion of the settlement agreement renders him unfit, it would be open to the President to invoke section 12(6) and establish an enquiry to determine his fitness to hold office. If found unsuitable, Parliament will be involved in his removal.

[118] This approach does not do violence to the will of Parliament and the continuing operation of section 12 of the NPA Act. It is also consonant with the various provisions of the Constitution mentioned earlier. Adhering to the requirements of section 12 will, in addition, be consistent with the jurisprudence of this Court. In *Steenkamp* Zondo J remarked:

> "When a dismissal is held to be unfair, one can speak of a reinstatement but not in the case of an invalid dismissal. This, therefore, means that an order of reinstatement is not competent for an invalid dismissal. An employer against which an order has been made declaring the dismissal of its employees invalid and who does not want to continue or cannot continue the employment relationship with those employees will have to dismiss them again. Otherwise, they remain in its employ and, if they tender

> their services or are prevented by the employer from performing their duties, will be entitled to payment of their remuneration."[96]

[119] The instability in the NPA relied in the first judgment for not following section 12 does not constitute a constitutional or national crises referred to in *Mhlope* and *Black Sash*. Nor was that instability created by compliance with that section. In fact the section may be employed in manner that would not result in the immediate return to office by Mr Nxasana. The President may suspend him before such return if the requirements of the section are met. And if he is to blame for instability, the enquiry envisaged in the section is the best forum to determine this issue. But significantly, the instability is not the reason advanced for preventing his return to office.

[120] Section 16(3) which was considered in *Mhlope* did not provide a remedy for non-compliance. Yet section 12 prescribes in mandatory terms what should be done in order to remove a National Director from office. Therefore there is no need to search for a remedy in section 172(1) of the Constitution.

[121] Of course section 12 need not be followed in the case of Advocate Abrahams. This is because the section guarantees the independence of and secures the tenure of a National Director whose appointment was valid. Since Advocate Abrahams' appointment was invalid, the protections of section 12 are not available to him.

Just and equitable order

[122] I need briefly to address this issue because the conclusion reached in the first judgment is based on it.[97] The concept of a just and equitable order is sourced from section 172(1)(b) of the Constitution.[98] It is an equivalent of section 98 of the interim

[96] *Steenkamp* above n 60 at para 190.

[97] See [71] to [72].

[98] Section 172(1)(b) provides:

> "(1) When deciding a constitutional matter within its power, a court—
>
> . . .
>
> (b) may make any order that is just and equitable, including—

Constitution mentioned in the statement from *Ferreira* quoted in paragraph 108. The power to make a just and equitable order does not mean that a court may do whatever it thinks would be just and fair in a given case, even if the order it intends issuing is unlawful or inconsistent with the Constitution. On the contrary, the just and equitable order must be lawful and consistent with the Constitution. This is because when a court makes such order, it exercises judicial power.

[123] In terms of section 165(2) of the Constitution courts are entrusted to exercise judicial power subject to the Constitution and the law. Moreover, courts are duty bound to apply the law "impartially and without fear, favour or prejudice". A court may not evade the obligation to apply a valid statute by simply suspending its operation and do so only for purposes of a particular order in circumstances where that statute was enforced.

[124] The just and equitable remedial powers enable a court to regulate consequences flowing from the declaration of invalidity. Section 172(1)(b) of the Constitution mandates courts to preserve temporarily the validity of a law or conduct that is inconsistent with the Constitution. This is usually achieved by suspending the declaration of invalidity. A suspension becomes necessary only if the information placed before the court shows that the interests of justice or good government warrant that the invalid law or conduct should continue to operate, pending the correction of the defect by the competent authority.[99]

[125] A just and equitable order must invariably be fair to all persons affected by it. A court that contemplates issuing such order must weigh up the interests of all parties

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(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[99] *Mvumvu* above n 87 at paras 44-6.

to a litigation and where appropriate, the balancing must also take into account the interests of the public.[100]

[126] In the context of employment this Court has outlined the requirements of a just and equitable order in these terms:

> "In the context of our Constitution, 'appropriate relief' must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make 'any order that is just and equitable'. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, '[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate'. Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.
>
> Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration. In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination."[101]

[127] What emerges from this statement is that the interests of all those who may be affected by the just and equitable order must be considered in the process leading up to issuing the order. Furthermore, an order that is unjust to some must be avoided where the interests of the party seeking relief may be met by an alternative order. In this matter, to require Mr Nxasana to pay back the money in circumstances where he

[100] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) and *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 SCA at paras 22-9.

[101] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1; [2000] 12 BLLR 1365 (CC) at paras 42-3.

is not allowed to go back to office, cannot be fair to him. This is especially so in light of the fact that the former President was hell-bent to remove him from office at any price and had put Mr Nxasana under intolerable pressure to leave. As the first judgment points out, the former President used stick and on other occasions carrot in an attempt to get rid of him.

[128] As mentioned, allowing Mr Nxasana to go back to his job would also meet the objects of the Constitution and the rule of law. If his involvement in the impugned settlement agreement brought his fitness to hold office into question, he may be removed in terms of section 12 of the NPA Act.

[129] For all these reasons, I do not support the conclusion that Mr Nxasana ought not to resume office, following the setting aside of the invalid and unlawful termination of his appointment.

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