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His Excellency, Mr JG Zuma
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Your reference

Our reference

Date

V Movshovich / P Dela / D Cron /
D Rafferty / W Timm / T Dye
3012607

1 November 2016

Dear Sir

Impropriety and unfitness for office of the National Director of Public Prosecutions ("NDPP")

1. We act for Freedom Under Law NPC and the Helen Suzman Foundation, non-governmental organisations concerned with, amongst other things, the promotion of the rule of law and the protection of our constitutional project ("**our clients**").
2. We address this letter on behalf of our clients acting in their own and in the public interest.

Background

3. As you must be aware, on 11 October 2016, summons no. 574/16 was served on the Honourable Minister of Finance, Mr Pravin Gordhan, MP ("**the Minister**"), Mr Visvanathan "Ivan" Pillay and Mr George "Oupa" Magashula (collectively, together with the Minister, "**the accused persons**"). In terms of the annexes to the summons ("**the charge sheet**"):
 - 3.1 the accused persons were charged with fraud, alternatively theft, in relation to the alleged payment by the South African Revenue Service ("**SARS**") to the Government Employees' Pension Fund ("**the Fund**") of R1,141,178.11 on behalf of Mr Pillay (count 1 and the alternative to count 1 of the charge sheet);

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- 3.2 Mr Pillay and Mr Magashula were charged with contravention of section 86 of the Public Finance Management Act, 1999 in that they failed to prevent SARS from incurring irregular, fruitless and wasteful and unauthorised expenditure (count 2 of the charge sheet);
- 3.3 Mr Pillay and Mr Magashula were charged with fraud, in that they represented to Human Resources of SARS that SARS was authorised to enter into an employment contract with Mr Pillay (count 3 of the charge sheet); and
- 3.4 the Minister and Mr Pillay were charged with fraud in relation to the re-hiring of Mr Pillay in or around April 2014 (count 4 of the charge sheet),

(collectively, "**the charges**").

4. Our clients launched an urgent application in the Gauteng Division of the High Court, Pretoria to review and set aside the charges which related to the Minister essentially as unlawful ("**the application**"). The notice of motion and founding affidavit are attached marked "**A**" ("**the founding papers**").
5. During a press conference on 31 October 2016 ("**the 31 October press conference**"), the charges were withdrawn by the NDPP. Though Mr Abrahams attempted to obfuscate his errors, which will be discussed in more detail below, by lengthy and irrelevant legal ramblings, Mr Abrahams was forced, in effect, to admit that the National Prosecuting Authority ("**the NPA**") never had sufficient evidence to prefer charges against the accused persons. This is despite the NDPP's vehement assertions, a mere 20 days before, that the NPA had a solid case against the accused persons.

Mr Abrahams

6. In light of the circumstances surrounding the preferring and withdrawal of the charges, Mr Shaun Abrahams has misconducted himself and is not a fit and proper person to hold the office of the NDPP, in that he lacks the required conscientiousness and integrity to be entrusted with the responsibilities of the office of the NDPP. He has also brought the administration of justice and his high office into disrepute.
7. Mr Abrahams has plainly displayed his lack of conscientiousness and integrity, and has committed serious misconduct. In addition to the submissions made in respect of Mr Abrahams' conduct in the founding papers, the following is noteworthy:

- 7.1 at a press conference held on 11 October 2016 ("**the 11 October press conference**"), Mr Abrahams violated the rights of the accused persons and the Minister in particular and abused his position in an attempt to use the media to influence public opinion against the accused persons and the Minister in particular (see paragraph 72 of the founding affidavit);
- 7.2 Mr Abrahams stridently defended and justified the charges at the 11 October press conference including stating that any suggestion that the charges are groundless and constitute political mischief is "*as you will come to learn, that can be nothing further from the truth*" (see paragraph 73 of the founding affidavit). This was not only a vehement assertion of the validity of the charges, but, in effect, a personal assurance by Mr Abrahams as the NDPP. He reiterated that the charges were solid and fully sustainable a day later, in response to a question from a journalist, mentioning that "*the NPA do not take matters to court if they don't believe there are reasonable prospects of a prosecution ... I implore you to wait until the trial in respect of the matter, when the evidence is presented.*" Mr Abrahams now clearly believes that no such delay is necessary. So much for the earlier exhortation;
- 7.3 Mr Abrahams has since, at the 31 October press conference, admitted that he had never applied his mind to the charges prior to 11 October 2016 and that he had seen no documents to support them – and that he did not seek to call for or interrogate any documents in support of them. Assuming that Mr Abrahams' statement in this respect is true (which our clients do not concede), then, at best Mr Abrahams:
- 7.3.1 was reckless in the extreme;
- 7.3.2 showed a spectacular dearth of conscientiousness; and
- 7.3.3 in asserting facts as unequivocally true while he was aware that he had no knowledge of those facts or the documents to support them, was plainly dishonest;
- 7.4 there was every indication in the 11 October press conference that the decision to prefer charges was that of the NPA, and the NDPP clearly lent the imprimatur of his office to the charges. Only Mr Abrahams spoke during that press conference. If Mr Abrahams' version that he had nought to do with the charges, and did not know the

facts or the evidence, is correct, then Mr Abrahams' presentation and defence of the charges was misleading at best and potentially disingenuous;

- 7.5 the NDPP has the power, and in appropriate circumstances the duty, to review, supervise, control, correct or vary charges even before they are formally brought against any of the accused. The paradigm case where such a review should have been undertaken is the present matter, and before convening the 11 October press conference. The matter:
- 7.5.1 is of enormous public importance;
 - 7.5.2 entails an investigation riddled with allegations of bad faith and ulterior purpose (by a broad range of stakeholders);
 - 7.5.3 concerns a very high ranking member of the National Executive;
 - 7.5.4 has national and international ramifications of the highest order; and
 - 7.5.5 is not characterised by urgency and involves facts dating back to 2010, where there was no evidence of imminent irreparable harm in the future;
- 7.6 Mr Abrahams, however, consciously or recklessly ignored all of these signal features and proceeded to take a course of action, in the most public fashion, which he must have known would throw the South African economy into a tailspin;
- 7.7 had Mr Abrahams applied his mind to the facts and law pertaining to the charges, as any rational NDPP would have done before 11 October 2016, he would have realised that there was no basis, in law or in fact, for the charges and should not have persisted with them. His failure to do so, at best, shows a stupefying, disabling and disqualifying lack of competence; at worst, his failure betrays ulterior purpose and a lack of integrity;
- 7.8 the Priority Crimes Litigation Unit, which ostensibly investigated and preferred the charges, was not even legislatively mandated to deal with cases of fraud and theft and the charges are not within such Unit's specific expertise. The fact that this Unit handled the case, instead for instance of the Specialised Commercial Crimes Unit which would ordinarily deal with charges such as these, is irregular and confounding; and

- 7.9 in fact, after the shortcomings of the charges, and the lack of evidence in support of those charges, were pointed out to him in our clients' letter of 14 October 2016 (which is annexed to the founding papers), Mr Abrahams did not withdraw the charges as a conscientious NDPP of requisite integrity and objectivity would, but instead ordered further investigations after the fact (see the supplementary affidavit attached as "B"). These investigations were not competent and were, in any event, impermissibly aimed at finding new evidence which could sustain the then unsustainable charges. The NDPP's review should have been based on the contents of the docket as it stood at the time the charges were laid. Instead, Mr Abrahams clearly recognised the fatal deficiencies of the charges and the investigations appear to have been embarked on so as to rescue the charges from inevitably being set aside. Ultimately, even those desperate attempts were futile, since the charges were ill-conceived and stillborn from the outset. At best, this shows Mr Abrahams fundamentally misunderstood the laws applicable to his powers as NDPP, which in itself demonstrates a wanton lack of conscientiousness; at worst, this shows Mr Abrahams intentionally and unlawfully sought to prop up insupportable charges after the fact so as to rescue them from review.
8. It is important to recall that Mr Abrahams, as the NDPP, is no mere civil servant. He is entrusted with the independent exercise of immense public power; the type of public power which can be used to curtail the liberty of every person and entity in the Republic. This is a power that the NDPP is enjoined, constitutionally, to exercise without fear or favour. When the NDPP abuses this power, or even when he is perceived to be abusing this power, it fundamentally undermines the public confidence in the integrity of the institution. Accordingly, Mr Abrahams' conduct in the above matter, even if his conduct was a *bona fide* blunder (which our clients deny), has brought the NPA into disrepute, continues on a daily basis to erode public confidence in law enforcement institutions, and casts a long shadow of doubt over Mr Abrahams' future conduct. Mr Abrahams is tasked with making dozens of critical, and potentially irreversible, decisions on a daily basis, which reinforce the potential for irreparable harm. Indeed, Mr Abrahams has alluded to potential future important investigations in the 31 October press conference.
9. Mr Abrahams is not a fit and proper person to continue to occupy his high office and should be suspended and disciplined urgently.

JP Pretorius SC and S Mzinyathi

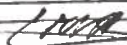
10. It is plain that the prosecution of the charges was pursued either for ulterior purposes or in a breathtakingly reckless fashion, without proper investigation or any regard to the evidence and proper legal analysis. After the charges came to be publically criticised, and despite seeking the limelight for himself in announcing the charges at the press conference on 11 October, Mr Abrahams has shifted all responsibility to Dr JP Pretorius, SC and Sibongile Mzinyathi (collectively, "**the Prosecutors**") (with Dr Pretorius allegedly taking the decision in consultation with Mr Mzinyathi).
11. The Prosecutors clearly failed in their fundamental constitutional and statutory duty to ensure that charges were properly grounded and to take an impartial, independent and objective view of all the facts, including taking account of the questionable investigative work performed by the Directorate of Priority Crime Investigation in this matter.
12. In addition to what is stated above in relation to Mr Abrahams (which applies with equal force here), had the Prosecutors applied their mind to the facts and law relevant to the charges, as a rational and conscientious prosecutor of integrity would have done before the decision to prefer the charges was taken, they would have realised that there was no basis, in law or in fact, for the charges and would never have taken the decision to prefer charges.
13. According to the 31 October press conference, the Prosecutors failed to take account, *inter alia*, of the most basic legal requirement for a successful prosecution of fraud or theft: the fraudulent or furtive intention. This is inexcusable. The Prosecutors' failures, at best, show a startling lack of competence; and at worst, betray ulterior motive and a lack of integrity. The seniority of the Prosecutors augments the case for ulterior purposes.
14. The Prosecutors were obliged to take great care, in the interests of the integrity of the NPA, the execution of their official duties and the interests of the Republic, before theatrically broadcasting the scandalous allegations against the accused persons to the world. This was especially the case in the present circumstances, having regard to the factors set forth in 7.5 above. It would also have been especially incumbent upon them to do so in light of Mr Abrahams' proclaimed *modus operandi* in this matter (which is not conceded), namely, that he trusted his Prosecutors to do the work properly and would not apply his mind to the charges prior to his press conference on 11 October 2016 or see the documents to support them.

15. Similarly to Mr Abrahams, as explained at 8 above, the Prosecutors bungling of this matter has severely undermined public confidence in the integrity of the NPA. It is thus imperative to restoring public confidence in institution that they be suspended and disciplined as a matter of utmost urgency.
16. It is thus plain that the Prosecutors misconducted themselves and lack the conscientiousness (including competence) and integrity to continue to serve their official functions.

Conclusions

17. In light of the above, please confirm, in writing, by no later than 16:00 Monday, 7 November 2016, that you will provisionally suspend Mr Abrahams, JP Pretorius SC and S Mzinyathi from their office, pending enquiries into their fitness to hold office as contemplated in section 12(6)(a), read with, *inter alia*, section 14(3), of the National Prosecuting Authority Act, 1998, and that you will forthwith institute such enquiries.
18. Our clients also invite Mr Abrahams and the Prosecutors (who are copied on this letter) to resign from their offices without delay, so as not to harm our law enforcement institutions any further. This invitation should, however, in no way delay or influence the exercise of your powers under the above legislation.
19. Should you fail to suspend Mr Abrahams and the Prosecutors and institute enquiries into their fitness for office by 7 November 2016, our clients will assume that you have decided not to suspend the NDPP and the Prosecutors and/or initiate such enquiries. Our clients may then, without further notice, seek to exercise their rights in law on an urgent basis.

Yours faithfully



P.P.

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