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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 60970/17

In the matter between:

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

and

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

FILING SHEET

DOCUMENT: **ANSWERING AFFIDAVIT ON BEHALF OF 1ST RESPONDENT**

ON ROLL : **NOT YET ALLOCATED**

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THE REGISTRAR OF THE HIGH COURT
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AND
TO:

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PRETORIA 0001
STAATSPROKUREUR

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

CASE NUMBER: 60970/17

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

and

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

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and state that:

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1. I am the President of the Republic of South Africa duly appointed in terms of section 86 read with section 87 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). I am the first respondent in this application.

2. The facts contained herein fall within my personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, both true and correct.

3. I have read the founding and the supplementary affidavits supporting the application.

4. I have noticed that most of the issues that the applicant raises in respect of my alleged conduct or omission, are of a legal nature. Accordingly, where I make submissions of a legal nature, I do so on the advice of my legal representatives.

5. Having lost the urgent application launched on the same grounds as this review, the applicants initiated these proceedings in the normal cause. As I will demonstrate later, this review application is also ill-conceived as it shows a lack of understanding of the relevant legislation on the basis of which I can institute an enquiry under section 12 (6) (a) of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"). The law in the demand that I suspend the Prosecutors

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from office simply on the basis that they announced charges, which they later withdrew.

6. Accordingly, I deny as misconceived each and every allegation made by the applicants, which is inconsistent with the legal and factual position that I set out in this answering affidavit.

THE RELIEF SOUGHT

7. In this particular review the applicants seek the following:

7.1 to review and set aside my alleged *failures* to institute an enquiry as against the second to fourth respondents and to provisionally suspend them pending the enquiry;

7.2 to direct me to institute an enquiry under section 12 (6) (a) of the NPA Act as against the second to fourth respondents and to provisionally suspend them pending the enquiry;

7.3 a punitive costs order, if this application is opposed.

8. The applicants also seek that my *failures* be declared unlawful and accordingly reviewed or set aside.

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APPLICATION IS ILL-CONCEIVED

9. The application clearly misconceives the legal framework that governs the National Prosecuting Authority. It equally misunderstands the role and duties of the President of the Republic in respect of the NPA and its officials. In particular, the applicant seem to labour under the incorrect belief that mere allegations of misconduct against the prosecutors constitute sufficient grounds or jurisdictional requirements to institute an enquiry in terms of section 12 (6) of the NPA Act. This belief is mistaken and wrong in law.

10. I am advised and submit that prima facie evidence is more than just allegations that the implicated officials are not fit and proper. I shall return to this issue later in this affidavit.

Relevant background

11. In a letter dated 7 November 2016, being annexure FA12 to the founding affidavit, I advised the applicants that I required more time to decide whether to exercise the power vested in me in terms of section 12 of the NPA Act.

12. In that letter I also requested from the applicants an extension to 21 November 2016 in order for me to be given a "*proper opportunity to*

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address what no doubt is a serious matter with the effected(sic) parties in anticipation of any action [I] may contemplate, after having considered such in its entirety". On 7 November 2016 the applicants indicated that they will be launching urgent proceedings within the next day to secure the suspension of the second to fourth respondents, and to have enquiries instituted into their fitness for office and that they will take my *failure* to comply with their demands as a *failure* to take a decision. They said these things in annexure "FA13" of the founding affidavit.

13. The applicants proceeded to launch the urgent application, notwithstanding the extension of time I sought. This Honourable Court correctly dismissed the urgent application for lack of urgency, because there were no grounds for urgency.

14. I addressed letters to the second to fourth respondents on 14 November 2016, affording them an opportunity to explain why I should not place them on suspension pending the outcome of the enquiry into their fitness to hold office by 28 November 2016. Copies of these letters are annexed to this affidavit as "AA1 – AA3". I did so in order to provide the second to fourth respondents' sufficient time to provide me with the reasons as requested, and as the demands of fair processes required of me.

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15. I am advised that any exercise of my powers in terms of section 12(6) of the NPA Act, constitutes administrative action and the second to fourth respondents have a right to be heard prior to me exercising any power in terms of section 12(6) of the NPA Act. This is a constitutional right which second to fourth respondents have. There will be no basis to abrogate that right.

16. I have since received the reasons from the second to fourth respondents explaining why they should not be suspended. I attached hereto as Annexures **"AA4, AA5 and AA6"** respectively, copies of such responses.

The applicants misconstrue the relevant legislation

17. The Constitution does not confer on me an obligation to suspend or enquire into the fitness of the second to fourth respondents to hold office. The Constitution requires that national legislation be promulgated which must ensure that the prosecuting authority exercises its function without fear or favour. It is the NPA Act which gives me the powers to suspend and enquire into the second to fourth respondents' fitness to hold office.

18. The Constitution and the NPA Act do not impose a duty on me but confers on me a power which I may exercise only when circumstances

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justify the exercise of these powers. Therefore, I deny the allegation that my alleged *failure* to appoint an enquiry or to suspend the second to fourth respondents amounts to a *failure* to fulfil a constitutional obligation.

19. The applicants appear to conflate a constitutional power and a constitutional duty. The powers of the President under section 12(6)(a) of the NPA Act is subject to jurisdictional facts which must be present for that power to be exercised lawfully and rationally.

Prosecutorial Independence

20. The NPA is guaranteed its independence by the Constitution of the Republic of South Africa. In this regard, the demand that I should provisionally suspend and subject the National Director of Public Prosecutions should not be taken lightly. It is a demand I must approach with extreme caution and utmost circumspection. Section 179 of the Constitution provides for a single Prosecuting Authority, which is structured in terms of national legislation. Section 179 (4) specifically provides that such national legislation must ensure that the NPA exercises its functions without fear, favour or prejudice. That national legislation is the NPA Act, section 32 (1) (a) of which reflects precisely this provision of Section 179 (4) of the Constitution, ensuring that the NPA functions with good faith and without fear, favour or

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prejudice and subject only to the Constitution. This much has been endorsed by our courts in a number of decided cases.

21. It would be reckless, improper and unconstitutional to suspend prosecutors simply on the grounds that they made a decision which is later found to be wrong. I submit that this would offend the constitutionally guaranteed independence of the NPA. In this regard, the following legal framework is of paramount importance:

21.1 Under our constitutional order there are four areas to cause the suspension of an NDPP. They are misconduct, continued ill-health, incapacity and where he/she is no longer fit and proper to hold that office;

21.2 The law provides for an involved process, which includes the establishment of an independent enquiry to determine whether an NDPP is guilty of any misconduct or suffers any one of the incapacities;

21.3 The law also requires the concurrence of Parliament, and if no such resolution is passed by Parliament recommending the removal of the NDPP, then the NDPP will not be removed;

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21.4 The law also provides for the timeframe (14 days) within which the recommendation for the removal of the NDPP must be tabled in Parliament, after which Parliament must pass a resolution within 30 days;

21.5 Section 12 (5) of the NPA Act expressly prohibits a suspension or removal from office of an NDPP or Deputy National Director unless and except in accordance with the provisions of section 12 (6), (7) and (8) of the NPA Act;

21.6 Section 12 (7) of the NPA Act deals specifically with the removal of the NDPP or a Deputy National Director if each of the respective houses of Parliament in the same session ask for such removal on any of the grounds stated in the NPA Act;

21.7 Section 12 (8) deals with the removal of an NDPP or a Deputy National Director at his or her request on account of his or her continued ill-health or for any other reason which the President deems sufficient.

THE COMPLAINTS AND THE PROCESS

22. After receiving complaints from the applicant on 1 November 2017, I initiated the process as laid down in terms of section 12 (6)(a) of the

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NPA Act. Before I initiated the process, I addressed a letter to the complainants seeking more time, but such a request was declined. The nature of the complaints against the implicated officials may be summarised as follows:

22.1 In respect of Mr Abrahams ("Abrahams") the complainants alleged that he misconducted himself in the preferring and withdrawal of charges against Mr Pravin Gordhan, Mr Visvanathan "Ivan" Pillay and Mr Goerge "Oupa" Magashula. In this regard, the complainants contend that such actions showed that Abrahams lacks the requisite integrity and conscientiousness. They also allege that Abrahams brought the administration of justice into disrepute;

22.2 In respect of Pretorius and Mzinyathi the complainants allege that they pursued the prosecution of Gordhan, Pillay and Magashula for ulterior purposes or in a reckless manner and without proper investigations or any regard to the evidence and proper legal analysis.

23. Section 14(3) of the NPA Act provides that the process to follow when removing a director is, *inter alia*, in terms of section 12(6) of the NPA Act. I am not called upon to determine whether the implicated officials are "fit and proper". That is the function of the enquiry established to

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enquire into the misconduct or fitness to hold office by an NDPP or a Deputy National Director.

24. On 14 November 2016 I required of the second to fourth respondents to provide me with reasons as to why I should not suspend them in terms of section 12(6)(a), together with section 14(3), of the NPA Act. I have since received representations from the implicated officials. It is not necessary to repeat all the details of the representations since they are part of the record. I have carefully considered their representations. They may be summarised as follows:

24.1 In his representations, a copy of which is attached as Annexures "AA4", Abrahams sets out in detail the process followed in the decision to withdraw the charges. In this regard, he submits that he called for representations and received them from Pillay and Magashula. He also considered a SARS internal advisory memorandum prepared by Mr Symington. He also requested further investigations in order to verify the representations and then decided to withdraw the charges thereafter;

24.2 In this regard Abrahams was exercising the power he has in terms of section 22 (2) of the NPA Act, which authorises the NDPP to review a decision to prosecute or not to prosecute,

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after consulting the relevant Director and having heard representations;

24.3 Although at the press conference of 11 October 2016 Abrahams had indeed defended the decision to prosecute, which decision was made by Mzinyathi and Pretorius, he was not precluded from reviewing the decision as authorised by section 22 (2) of the NPA Act;

24.4 All the implicated officials provided me with the explanation and legal framework which empowers them to institute prosecutions and subsequently review the decision if there are sufficient grounds to do so;

24.5 In his representations, a copy of which is attached hereto as Annexure "AA5", Pretorius explains in detail that the public interest factor was considered before the decision to prosecute was taken. He also states that the decision was communicated to the senior management of the NPA and that Abrahams had fully supported their decision;

24.6 It is not clear what the legal basis is for the complainants contention or insinuation that Gordhan should have been given special treatment. As far as I understand the Constitution and

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the NPA Act do not permit for any special treatment in the execution of prosecutorial functions;

24.7 Both Pretorius and Mzinyathi have stated that the Symington memorandum was not before them at the time when they made the decision to prosecute. It is this memorandum that shows that intent to commit a crime cannot be established against the accused. The complainants do not provide any further facts to substantiate their allegations against Abrahams, Pretorius and Mzinyathi.

24.8 Having taken legal advice from Senior Counsel, I also came to the decision that the complainants had not furnished me with any facts pointing towards prima facie evidence to justify the establishment of an enquiry or a provisional suspension in terms of section 12 (6) of the NPA Act;

24.9 I am advised and submit that it would be unlawful and improper to establish such an enquiry without a proper basis.

24.10 Accordingly, there is no basis for the relief sought by the applicants in this application and it should be dismissed for this reason alone.

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25. I advised the applicants as early as 7 November 2016 that I am in the process of making a decision and therefore I have not *failed* to take a decision. And as soon as I made my decision, I addressed a letter on 3 March 2017 to the applicants advising them of my decision and the reasons thereof.

26. I aver that I was entitled and in fact required a reasonable opportunity to perform my constitutional mandate in a proper way so that I may exercise my discretion personally, in good faith and without misconstruing my power. This application at its heart seeks to undermine the process required for a rational decision-makign process. The facts show that I took the decision after considering all the relevant factors, representations and obtaining legal opinion.

THE APPLICATION OFFENDS THE SEPARATION OF POWERS

27. I further state that the relief sought impermissibly breaches the separation of powers principle. I say so for the following reasons:

28.1. I am advised and submit that the constitutional power to suspend an NDPP is a power in terms of section 84(2)(e) of the Constitution read with section 12(6) of the NPA Act. This power can only be exercised by the President. It is therefore an executive constitutional power. To ask of courts that they must

substitute my decision and to make that decision themselves, would amount to a breach of the rule of law, namely, separation of powers;

28.2. I am also advised that it cannot behove a non-governmental organisation or a member of the public, to demand that I must exercise a constitutional executive power. Any President who "*misgoverns*" will in a democratic state be "*punished*" by the electorate. It is a very perilous route to permit a culture where members of the public or entities such as the applicants are allowed to govern through the courts. This is what the applicants are seeking to do. The applicants are inviting the Court to run the country through the courts;

28.3. This application seeks to bypass my executive power as contained in section 12 of the NPA Act, by requiring of this Honourable Court, to suspend the second to fourth respondents and to compel me to institute an enquiry. The applicants do not allege that section 12(6) of the NPA Act is unconstitutional or that section 12(6) of the NPA Act has not been complied with;

28.4. It is trite that the principle of separation of powers, on the one hand, recognises the functional independence of branches of

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government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense, it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another;

APPLICATION SEEKS TO FETTER PRESIDENTIAL DISCRETION

29. The application seeks to unlawfully fetter my discretionary power. This is so for the following reasons:

29.1. The applicants contend in paragraph 139 of the founding affidavit that "*[E]ach and every step in the process must be rationally related to the outcome. A failure to take into account relevant material or properly to apply one's mind to the facts and law renders the decision reviewable.*" Yet the applicants seek that I do precisely the opposite, and to make a decision without taking into account relevant material or to properly apply my mind to the facts and the law;

29.2. The law requires in the exercise of a discretion that the decision maker must be independently satisfied and must consider each case individually and to justify every decision, as

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the law requires nothing less. I am therefore bound by law, to exercise my discretionary power, in a rational manner.

29.3. This application seeks to demand of me to exercise my discretion in a manner which is not rational but in accordance with what the applicants want without allowing me to consider all the relevant facts and the law before I make a decision which I must be able to justify. This Honourable Court should not be seen to condone that kind of conduct of the applicants. In fact, this Honourable Court should show its displeasure with the conduct of the applicants and to dismiss the application with costs.

NO BASIS FOR A SUBSTITUTION

30. The applicants seek to have this Honourable Court substitute my decision in terms of section 12 of the NPA Act with that of the Court. This approach is incorrect for the following reasons:

30.1. The applicants contend that this Honourable Court should substitute my power on the grounds that the Court is in as good a position as the original decision maker to make the decision; and that the decision is a foregone conclusion and that these two factors must be considered cumulatively. What this

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argument misconceives is the difference between an administrative decision and an executive decision. Courts do substitute administrative decisions in exceptional circumstances but can never substitute executive decisions without offending the rule of law namely separation of powers. I am advised that the only thing a court can do is to set aside an executive decision if such a decision is inconsistent with the Constitution and the law but never replace that decision with its own;

30.2. The applicants contend that the Court is in as good a position as me to make a decision to institute disciplinary proceedings and to suspend the second to fourth respondents as these decisions are largely of a legal nature. This is incorrect. The decision to provisionally suspend or to institute an enquiry is based on the facts of the case and the circumstances surrounding it. It is therefore a factual enquiry and not a legal enquiry. Moreover, courts do not institute disciplinary proceedings. They only decide disputes that can be resolved by the application of law;

30.3. Further the NPA Act has elaborate process for the removal or suspension of an NDPP. This again, is to secure the independence of the fifth respondent;

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30.4. It is untrue that the decision to suspend or to hold an enquiry is a foregone conclusion as alleged by the applicants. I am advised that further argument will be advanced in this regard.

SECTION 12(6) REQUIREMENTS

31. As I have indicated earlier, section 12(6) of the NPA Act, requires certain jurisdictional facts to be present in order to suspend an NDPP. These are that:

31.1. the first ground to suspend/remove an NDPP is the ground of misconduct. The applicants do not seek to make that case that the second to fourth respondents are guilty of any misconduct. In any event, if such a case could be made, it would not be in the province of the Court to decide that matter. Such a decision lies with an enquiry established in terms of section 12(6) of the NPA Act.

31.2. the second ground for suspending or removing an NDPP is on account of continued ill-health. The applicants do not assert this as the basis for any possible suspension or removal from office of the second to fourth respondents. For that reason I make no further submissions in this regard.

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31.3. the third ground for suspending or removing an NDPP is on account of incapacity to carry out his or her duties of office efficiently. This is not a case the applicants seek to rely on. On the contrary, the applicants seem to question the soundness of the decision made by the third and fourth respondents and criticize the second respondent for doing so, without evaluating the correctness of the decision, in a press conference.

31.4. the fourth and last ground on which an NDPP can be suspended or removed from office is that he or she is no longer a fit and proper person to hold the office concerned. "*Fit and proper*", I am advised, have two elements to it. The one relates to formal qualification and the other to integrity. The applicants are not questioning the formal qualifications of the second to fourth respondents the only thing they seek to impugn is the integrity of the second to fourth respondents. Again, this is a question of fact which requires investigation and not mere conclusion such as is asserted by the applicants.

32. It is therefore important to then examine the bases which the applicants offer in impugning the integrity of the second to fourth respondents. I do so purely to show that the applicants have not provided the factual predicate for the conclusions they seek. The representations of the second to fourth respondents reveal a different

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picture, as opposed to the allegations made by the applicants. In this regard, the following points are relevant:

32.1. In respect of the third and fourth respondents their integrity is questioned merely on the basis that the decision to charge Minister Gordhan is manifestly wrong and without substance. This can never ground a basis under section 12(6) of the NPA Act for their suspension or removal from office. It is natural to expect that one or other decisions made by office bearers may prove to be wrong, even, spectacularly wrong, that in and of itself can never be a ground to question the second to fourth respondents' integrity as a basis for them being "*fit and proper*", without more.

32.2. Then in respect of the second respondent, his fitness and propriety to hold office is questioned on the basis of him having "*acted grossly negligently and recklessly*", "*breath-taking incompetence*" and "*ulterior motive*" I am advised that any negligence or recklessness even, if established, does not point to lack of integrity.

32.3. To the extent that the applicants seek to impute ulterior motive, one would expect that the applicants would furnish facts which, when established, would point to ulterior motive. This they do

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not do. At the very least this attack appears to find inspiration from the fact that the second respondent attended a meeting at Luthuli House with, amongst others, myself. That meeting had nothing to do with the charges that were to be proffered against Minister Gordhan. That meeting concerned the student protests and not matters relating to the said prosecutions.

32.4. Although the applicants are obliged to make their case in the founding papers, I invite them to give concrete facts which, if established, would point to any ulterior motive, utter recklessness and incompetence. In the supplementary affidavit, the applicants seek to make some case from the representations to suggest that the prosecution was for an ulterior purpose. However, they fail to establish facts to suggest that I ought to have instituted an enquiry;

CONDONATION

33. I am advised that since this answering affidavit is late, I must seek condonation for such late filing, which I now do for the following reasons:

33.1. There are a number of factors that have caused the late filing of my answering affidavit. As I indicated above, I sought the

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applicants' indulgence to grant me a reasonable extension. Unfortunately, the applicants declined to grant me such extension;

33.2. since the filing of the record and the emergence of the Legal Opinion prepared by the same counsel that represented me when the matter commenced, I have had to seek services of new counsel as I was informed that my counsel felt conflicted in that his legal opinion had become subject of the review;

33.3. Due to the volume of the papers to read, my new legal counsel needed adequate time to peruse the papers..

33.4. The new counsel was also on leave from 05 December 2017 until 14 January 2018.

34. I submit that the has been no prejudice to the applicants in this regard and I ask for condonation of the late filing of this answering affidavit.

AD FOUNDING AFFIDAVIT

35. I now turn to deal with the specific allegations contained in the founding affidavit of **FRANCIS ANTONIE** together with the annexures to the extent that it relates to me only. In so far as its contents are

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inconsistent with the version I have detailed above, such allegations must be regarded as denied.

36. **AD PARAGRAPH 1 to 2**

I admit the content of these paragraphs.

37. **AD PARAGRAPH 3**

I deny that the facts are both true and correct.

38. **AD PARAGRAPH 4**

I note the content of this paragraph.

39. **AD PARAGRAPHS 5 to 10**

I note the allegations contained in these paragraphs. I notice that they do not relate to my functions, but those of the NPA.

40. **AD PARAGRAPHS 11 and 12**

40.1. Having considered the representations of the second to fourth respondents, I deny as incorrect and unfair any suggestion that they are either incompetent or not fit to hold office.

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40.2. I also deny that in the circumstances to which the applicants refer it can be contended that they did not act independently, are beholden to others or acted unconstitutionally. The applicants fail to provide facts to support the contention that the second to fourth respondents are beholden to others. The applicants do not share with this Honourable Court which *"others"* do they allege the second to fourth respondents are beholden to.

40.3. I deny as mere conjecture the allegation that the decisions taken by the second to fourth respondents on their own demonstrate any prima facie evidence that they lack fitness to hold office or that such decisions on their own justify the institution of enquiries.

40.4. Save as aforesaid the allegations contained in these paragraphs are denied.

41. **AD PARAGRAPHS 13 to 14**

41.1. I deny that I failed to take a decision. It is also incorrect and misleading to insinuate that I failed to act when the applicants launched their complaints with me. As I stated in the introductory part of this affidavit, I requested the second to

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fourth respondent to provide me with reasons as to why I should not suspend them in terms of section 12 (6) (a) read with 14 (3) of the NPA Act;

41.2. It is on the strength of their representations that I deemed it unnecessary and unjustified to suspend them. In order to ensure that I act rationally and lawfully I also took legal advice on the issue. The contents of this advice are part of the record in these proceedings. That the applicants differ with the advice as they show in the supplementary affidavit is no reason to contend that my actions were unlawful or irrational.

41.3. I submit that if one has regard to the representations and the specific answers to the allegations made by the applicants against the second to fourth respondents, it would have been irrational to exercise my discretion in the manner suggested by the applicants;

41.4. I therefore deny as incorrect the contention that I was presented with *"...a wealth of prima facie evidence warranting enquiries and suspensions of the prosecutors..."*

41.5. I submit that the applicants have not read the representations of the second to fourth respondents with an open mind. If one

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considers such representations, it becomes apparent that it is what the applicants are asking me to do that would have been irrational;

41.6. I deny the conclusions made by the applicants in respect of the decisions of the fifth respondent as the applicants have not sought to provide a factual predicate for these conclusions.

41.7. Save as aforesaid the allegations contained in these paragraphs are denied.

42. **AD PARAGRAPHS 15.1, 15.2, 16 and 17**

42.1. I deny that the applicants are entitled to the relief sought.

42.2. I repeat what I have stated in the introductory part as well as paragraphs 44 below.

43. **AD PARAGRAPH S 18 to 30**

I note the averments contained in these paragraphs.

44. **AD PARAGRAPHS 31 to 37**

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44.1. I deny that my decisions in respect of this matter undermine the value of our constitutional democracy. In fact, it is what the applicants ask me to do that would have undermined the independence of the NPA and therefore unconstitutional;

44.2. It is true that the NPA must act independently and effectively. However, from time to time the NPA will institute and withdraw charges. To suggest that every time the NPA withdraws charges it had instituted will mean that the prosecutors are not fit for office and must be brought before an enquiry is to undermine the constitutionally guaranteed independence of the NPA;

44.3. It is not clear to me how my stating that the allegations were serious constitutes a prima facie evidence that justifies an enquiry. As I stated above I requested representations from the second to fourth respondents, and on the strength of such representations and the legal advice I obtained I deemed it unnecessary to institute an enquiry or to suspend the second to fourth respondents;

44.4. I therefore deny that I failed in my constitutional duty in any way whatsoever.

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J.G.F.

44.5. Save as aforesaid, the allegations contained in these paragraphs are denied.

45. **AD PARAGRAPHS 38 to 95**

Save to repeat that the Luthuli House meeting dealt with the student protests, the rest of the allegations contained in these paragraphs do not relate to the functions of the President. Without admitting their correctness, I note them.

46. **AD PARAGRAPHS 96 to 130**

46.1. I admit that the applicants addressed the said correspondence to me. I deny the veiled suggestions that the duty vested in me in terms of section 12(6) of the NPA Act is not discretionary. In fact, the section is in mandatory terms and therefore I have a discretion based on the facts and circumstances of each case as to whether to provisionally suspend someone pending an enquiry or not. That discretion also extends to whether that suspension should be on full pay or on no pay.

46.2. I deny that all the jurisdictional facts are before me to exercise that power in terms of section 12(6) of the NPA Act. In fact, the representations made to me by the second to fourth

respondents make it clear that suspending the second to fourth respondents is not justified;

46.3. I admit the facts relating to the urgent application, but add that once I received and considered the representations, it became clearer to me and I was also advised that suspending the second to fourth respondents was not justified;

46.4. It is true that after considering the representations I came to the conclusion that I could not find substantiation for the claim that the conduct of the second to fourth respondents was actuated by ulterior motives or any other improper motive;

46.5. In my letter of 3 March 2017, attached to the founding affidavit as Annexure **"FA20"**, I set out all the factors I considered when I made the decision that the was no prima facie evidence suggesting misconduct on the part of the second to fourth respondents. I refer to the representations themselves, which are part of the record of these proceedings;

46.6. In so far as the applicants regard the decisions of the second to fourth respondents as bad, I submit that such an allegation, even if true, does not warrant suspending prosecutors who have a constitutional mandate to exercise their functions

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without prejudice, fear or favour. I deny that there is any justification to contend that the second to fourth respondents are not fit and proper persons to hold office. This is not borne out by the facts as set out in their representations;

46.7. Save as aforesaid, the allegations contained in these paragraphs are denied.

47. **AD PARAGRAPHS 131 to 166**

47.1. I repeat my understanding in respect of the relevant provisions of the Constitution regarding the independence of the NPA and I deny as incorrect the allegations that I have *failed* to exercise my constitutional power.

47.2. I repeat that I deemed it unjustified to either suspend the second to fourth respondents or to initiate an enquiry in terms of section 12 (6) of the NPA Act. I therefore deny that my decision was unlawful or falls to be set aside for any reason whatsoever;

47.3. I am advised that the applicants have misconstrued the requirement of *"fit and proper"*. Legal argument will be advanced in this regard when the matter is heard.

C.B.R. J.G.Z.

47.4. I have also stated that apart from considering the representations made by the second to fourth respondents, I also sought legal advice in this regard. It is therefore incorrect to contend as the applicants do, that my decision is irrational. In making my decision I considered all the relevant factors regarding the alleged conduct of the second to fourth respondents as well as their constitutional functions. I deny as simply vindictive the suggestion that the is "incontrovertible evidence" that the second to fourth respondents misconducted themselves;

47.5. I repeat that there was no justification for the suspension of the second to fourth respondents. I deny that I have failed to exercise my powers or that I have failed to protect the integrity and independence of the NPA. In fact, it is the contentions of the applicants that seek to select which individuals the NPA should accord special treatment. This would indeed undermine the independence of the NPA.

47.6. Save as aforesaid the allegations contained in these paragraphs are denied.

48. **AD PARAGRAPHS 167 TO 176**

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J.G.Z.

48.1. I repeat that there is no basis for the Court to substitute my decisions not to institute enquiries or disciplinary proceedings against the prosecutors. This would offend the separation of powers;

48.2. I repeat that I have not failed to properly exercise my constitutional power. That the applicants are unhappy with my decision is no reason to conclude that my decision was irrational or unlawful in any way;

48.3. I deny as unmeritorious the allegation that I prejudged the matter in any way. I am equally surprised that the applicants now submit that there was no reason for me to request represenitations (para 173 of the founding affidavit).

48.4. I considered the representations and came to a conclusion that nothing warranted suspensions or an enquiry.

48.5. I can only exercise my discretion if I independently on all the facts exercise my mind and take a decision that I can justify. The applicants correctly state that a person is presumed innocent until proven guilty. I therefore had a duty to require responses from the second to fourth respondents before I make any adverse decisions against them. This, the applicants

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contend, would be to understand simple constitutional principles. It is unfathomable that the applicants would now demand of me to not follow the simple constitutional principles;

48.6. I deny that the applicants are entitled to the relief sought or that I acted irrationally and unlawfully.

48.7. Save as aforesaid, the allegations contained in these paragraphs are denied.

AD SUPPLEMENTARY AFFIDAVIT

49. In so far as the supplementary affidavit makes the same allegations to which I have responded above, I repeat the averments I have made and deny that I acted irrationally or unlawfully. I also deny each and every allegation contained in the supplementary affidavit, which is inconsistent with the averments I have made in my answer to the founding affidavit.

50. The supplementary affidavit is dedicated to criticising the legal advice I obtained from Senior Counsel. It concludes that such legal opinion was wrong. I stand by the opinion and the decision I made. I am advised that the fact that the applicants do not agree with the advice I obtained is no reason to suggest that I acted irrationally. I took all the

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precautions the matter deserved before I made my final decision. I considered all the relevant facts before me and sought legal advice on the matter.I deny that my decision is solely based on the opinion.

51. AD PARAGRAPHS 1 to 5

Save to deny that the allegations are true and correct, I admit the allegations contained in these paragraphs.

52. **AD PARAGRAPHS 6 to 10**

52.1. Save to deny that the record "bolsters" the applicants' case, the allegations contained herein are noted;

52.2. I deny that the representations made to me by the second to fourth respondents make "remarkable" admissions of misconduct at all;

53. AD PARAGRAPHS 11 to 50

53.1. I deny as irrelevant that the applicants differ with my counsel on the contents of his legal opinion;

53.2. I am advised that it is premature to rely in any way on a judgment which is still the subject of an appeal;

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53.3. I cannot answer for Dr Pretorius, but I deny that the issues raised in his representations warrant his suspension or the institution of an enquiry into his fitness to hold office;

53.4. It is not my function to deal with the issues relating to the evidence regarding the prosecutions. I leave that to the second to fourth respondents;

53.5. In so far as the averments in these paragraphs seek to support the contention that I acted unlawfully or irrationally, I deny them as incorrect.

54. **AD PARAGRAPHS 51 to 78**

54.1. I deny that the fact that the applicants differ with the legal advice I obtained is a sufficient reason to characterise my decision as irrational. On the contrary, it demonstrates the seriousness and circumspection with which I approached their complaints;

54.2. The rest of the allegations contained in this affidavit constitute legal argument, which will be dealt with when the matter is heard. In any event I deny any suggestion that I was ill-advised. I further deny that I am compromised in any way whatsoever in

C.B.P. S.G.Z.

this regard. The applicants rely on what it calls public perception to make wild allegations against me. For present purposes, I deny such allegations as both incorrect and irrelevant.

55. AD PARAGRAPHS 79 TO 85

55.1. I note that the applicants seek condonation for the late filing of the supplementary affidavit. I only submit that the complex nature of the matter as contended applies to my delay in filing my answering affidavit. This is compounded by the fact that as a result of the emergence of the Legal Opinion, I have had to seek new counsel in the matter in order to avoid using the same counsel that provided me with the opinion which has become the subject of this review;

55.2. I deny as incorrect any suggestion that my decision was irrational and that it warrants a substitution of such a decision with that of this Honourable Court. As I stated earlier, this would offend the separation of powers principle.

WHEREFORE, the first respondent prays that the application be dismissed with costs.

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J.G.Z.

JACOB GEDLEYIHLEKISA ZUMA

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at CAPE TOWN on this the 07 day of FEBRUARY 2018, the regulations contained in Government Notice No 3619 of 21 July 1972 and No 1648 of 19 August 1977 having been complied with.

COL

C.B. RABEBE 0471970

COMMISSIONER OF OATHS

2018 -02- 07

SOUTH AFRICAN POLICE SERVICE

"AA1"

14 November 2016

Dear Adv. Abrahams,

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

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

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

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

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

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

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

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

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

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

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

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

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

C.B.R.

J.G.Z.

"AA2"

14 November 2016

Dear Dr Pretorius,

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

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

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

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

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

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

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

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

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

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J.G.Z.

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

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

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

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

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

"AA3"

14 November 2016

Dear Adv. Mzinyathi,

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

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

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

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

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

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

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

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

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

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

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

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Advocate Sibongile Mzinyathi
Director of Public Prosecutions
Gauteng North
Pretoria
0001

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

C.B.R

T.G

"AA4"

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

28 November 2016

E-mail: ntoeng@presidency.gov.za

Dear President,

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

We respectfully associate ourselves with these sentiments.

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I. THE ALLEGATIONS IN THE COMPLAINT

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

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

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

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

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

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

v. that I committed serious misconduct;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. CHRONOLOGY

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

TABLE

1.	Tuesday, 11 October 2016	Summons served on the Minister, Pillay and Megashula to appear in the Regional Division, Tshwane District on 2 November 2016. (File 1: pg 75-84).
2.	Friday, 14 October 2016	Webber Wentzel writes to the NDPP and Pretorius calling upon NDPP to withdraw charges (File 1: pg 69-118)
3.	Monday, 17 October 2016	Megashula and Pillay make oral representations to the NDPP in terms of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act.

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4.	Monday, 17 October 2016	NDPP responds to letter from Webber Wentzel advising that Pillay and Magashula have made representations which he is considering; Gordhan to make representations by 17h00 on 18 October 2016. (File 1: pg 341)
5.	Tuesday, 18 October 2016	Pillay and Magashula submit written representations (File 1: pg 419 - 423)
6.	Tuesday, 18 October 2016	Webber Wentzel refuses to make further representations on behalf of Minister. They again invite the NDPP to withdraw the charges by 21 October. (File 1: pg 140-142)
7.	Friday, 21 October 2016	NDPP responds to letter from Webber Wentzel of 18.10.16, stating he had been requested by Pillay and Magashula to review the decision in terms of section 179(5)(d); he had directed further investigations to be conducted; he regarded the matter as urgent; and would be in communication with legal representatives of Pillay and Magashula to advise them of the outcome of their representations once in receipt of additional information, and has considered same. He reaffirmed that he is attending to the matter urgently. A copy of that letter is at page 143-144 to the application attached to the complaint.
8.	Sunday, 23 October 2016	Urgent application served by Helen Suzman Foundation and Freedom Under Law seeking order declaring unlawful the decision to charge the Minister. Application set down for 8 November 2016. This is the application attached to the Complaint).
9.	Monday, 31 October 2016	Charges withdrawn by NDPP.

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

III. STRUCTURE OF THE NPA

11. The structure of the NPA is set out in paragraphs 75 - 81 of the Answering Affidavit (File 2: pg 227 – 230). Details of my power to review prosecutions are set out in paragraphs 32 – 35 of the Answering Affidavit (File 2: pg 230 - 231).

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IV. UNLAWFUL CONDUCT OF THE MINISTER, PILLAY AND MAGASHULA

15 The Complainants allege that –

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

15.2 the charges were "insupportable";

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

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

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

17 During September 2015, Sello Maema ("Maema"), a Deputy Director of Public Prosecutions in the National Prosecutions Authority ("NPA"), who is responsible for providing guidance for the investigation of the so-called Rogue Unit, briefed the NPA management on the alleged involvement of the Minister in the allegedly unlawful manner in which Pillay's retirement had been handled. I should mention that the latter irregularity came to light during the course of the separate

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

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

SYMINGTON MEMO

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

20 Discussion of the relevant document is to be found at paragraphs 122-145. (File 1: pg 242-252).

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

LEGAL CONSIDERATIONS

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

54. At various times, attempts have been made to defend the transactions by reference to miscellaneous provisions that it is alleged provide warrant for the manner in which Pillay's purported retirement, and the benefits that flowed to him in the course thereof, was handled. Examination of these provisions revealed that in fact none, either alone or read in conjunction, can justify either the R3.2 million effectively paid to Pillay by SARS, or his reappointment to precisely the same position that he had occupied with immediate effect.

The Employee Initiated Severance Package does not apply

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

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

The Public Service Act

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

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

The GEPF Rules

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

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

Section 17(4) of the GEPF Law, 1996

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

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

Rule 20 of the GEPF

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

The Guide

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

THE PROSECUTION

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

Intention

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

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

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

68. It is undeniable that Pretorius' decision to prosecute was unpopular, but he was duty bound by the considerations set out above. My decision to endorse same was also controversial. Fortunately Pretorius and I do not exercise our duties in the hope or expectation of garnering popularity. We simply do our jobs without fear, favour or prejudice, in accordance with our duties to the best of our ability. In this regard I refer to paragraphs 237 – 239 of the Answering Affidavit. (File 1, pg 273).

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

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

Correspondence with attorneys and Representations

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

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

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

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

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

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

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

75. The applicants' added:

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

Further:

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

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

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

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

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

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

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

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

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

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

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"The purpose of this note is to crisply record the grounds whereupon where respectfully submit, Pillay did not have any intention to commit the offences in respect of which he now stands arraigned. In essence, Pillay was guided by the opinion of Vlok Symington ("Symington") a respected legally trained official of SARS at the material time which advised that Pillay's contemplated early retirement from the GEPF, in his application to the Minister of Finance to waive early retirement penalty and is requested to be appointed on contract after his early retirement from the GEPF were technically possible under the rules of the GEPF, read together with the employment policies of SARS." I refer to paragraph 206 of the Answering Affidavit.

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

82. On 13 October 2016 Mageshula's legal representatives, Advocate PJJ De Jager SC also reduced Mageshula's representations to writing (File 1: pg 421-424). He states the following concerning the Symington memorandum in particular:

"It is true that Mr Mageshula promoted and supported Mr Pillay's request for early retirement. He was afforded a memorandum from the Legal and Policy Division (Mr Vlok Symington) and he followed all procedures to the letter. He sent a memorandum on 12 August 2010 to accused NO. 3 who approved. With all due respect, any reasonable employer would under the circumstances have approved. However, even if you doubt the correctness of the Minister's exercise of his discretion, that is still a far cry from any criminal charge, let alone fraud, theft or otherwise." I refer to paragraph 210 of the Answering Affidavit (File 1: pg 203).

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

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

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

Withdrawal of the charges

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

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

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

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

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

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

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

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

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

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

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

h. In the circumstances I decided to withdraw the charges.

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

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

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

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

THE ALLEGATIONS AGAINST US

Misconduct

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

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

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

Ulterior Motive

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

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

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

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

Bringing the NPA into disrepute

96. The Complainants say that even if my conduct was a *bona fide* blunder, I brought the NPA into disrepute (para 3 of complaint). But, as shown above, the conduct

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

Allegation based on my withdrawal of Charges against Ms Jiba

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

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

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

Allegations re Role of Priority Crimes Unit (PCLU)

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

100. In terms of section 24(3) of the NPA Act, a Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director: provided any of the powers, duties and functions referred to in section 20(1) shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned. I refer to paragraph 275 of the Answering Affidavit in this regard.

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

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

Allegation that independence and integrity of the NPA was compromised

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

26 But the Complainants' contention that, whenever the fitness and propriety of a senior office bearer is placed in doubt, the integrity of the entire institution is cast in doubt, is unsustainable. One need only consider the case of Mzinyathi. (I refer in that regard to paragraph 27.4 of the Answering Affidavit). He was accused of serious impropriety, only to have an application to strike him from the roll dismissed. The public may be presumed to be aware that serious allegations against senior office holders are not uncommon; they cannot be presumed to lose all faith in an institution of state whenever allegations against its officers, which may or may not be justified, are raised.

Allegation of incompetence

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

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

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

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

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

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

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

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

Alleged Responsibility for Destruction of Economy

102. The exaggerated accounts of the effect of the initial prosecution are dealt with in paragraphs 53, 58 – 59, 245 and 253 of the Answering Affidavit, where it is noted that dire predictions of the Complainants as to future developments, and economic impact, are entirely speculative. It is noted further that it would be improper for a prosecutor to take such speculative allegations into account when determining whether or not to prosecute.

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

CONCLUSION

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

Yours faithfully,

S KABRAHAMS

C.B.K.

Office of the State Attorney Pretoria

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28 NOVEMBER 2016

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

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

HIS EXCELLENCY
PRESIDENT J G ZUMA
UNION BUILDINGS
GOVERNMENT AVENUE
PRETORIA

BY HAND

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

Dear President

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

1. Writer hereof is acting as attorney on behalf of Dr Pretorius in the above matter.
2. Please find attached hereto Dr Pretorius' reasons as to why he should not be suspended.
3. We trust that you will find the above in order.

Yours faithfully

J MEIER
FOR STATE ATTORNEY PRETORIA

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

E.B.R.

J G Z

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

28 November 2016

E-mail: ntoeng@presidency.gov.za

Dear President,

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

Introduction:

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

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

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

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

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

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

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

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

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GENERAL REMARKS:

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

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

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

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

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

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

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

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

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Approach:

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

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

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

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

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Preliminary procedural issue:

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

Structure:

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

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Mandate to deal with the case:

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

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

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

Factual basis:

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

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

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

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

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

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

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

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

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

Legal basis:

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

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

"14.3.3 Members with 10 years and more pensionable service-

(a) ...

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(b) *a member who retires on account of a reason mentioned in rules 14.3.1 (d) or (e) and who has at least 10 years pensionable service to his or her credit, shall be paid the benefits referred to in rule (a) above: Provided that such benefits shall be reduced by one third of one per cent for each complete month between the member's actual date of retirement and his or her pension-retirement date. [Rule 14.4.3 amended by GN 1073 of 8 August 2003.]"*

(My emphasis)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33.1. **Ad paragraph 10:**

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

33.2. **Ad paragraph 11:**

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

33.3. **Ad paragraph 12:**

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

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

33.4. **Ad paragraph 13:**

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

33.5. **Ad paragraph 14:**

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

33.6. **Ad paragraph 15:**

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

Personal Information:

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

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

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

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

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

Consequences of suspension:

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

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

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

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

Conclusions

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

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

J P Pretorius

Acting Special Director and Head: PCLU

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National Prosecutions Service
Director of Public Prosecutions
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28 November 2016

His Excellency
President JG Zuma
Union Buildings
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E-mail: ntoeng@presidency.gov.za

Dear President

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

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

2. You may have been informed that in the litigation in the matter between Helen Suzman Foundation and Another versus the President of the Republic of South Africa and Others, case no 37643/16, (Gauteng Division, Pretoria), I was represented by a separate team of legal Counsel.

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

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

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

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

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

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

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

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

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

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

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

Yours faithfully

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

NATIONAL PROSECUTING AUTHORITY
South Africa

OFFICE OF THE NATIONAL DIRECTOR
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28 November 2016

His Excellency
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Dear Mr President

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

1. I write for myself, and on behalf of Dr Pretorius SC ("Pretorius") and Adv Mzinyathi ("Mzinyathi"), in response to your letters of 14 November 2016 (File ref: 333-13e) addressed in the same terms to each of us. (References to *as*, *we* and *our* in this document should be read as encompassing Pretorius, Mzinyathi and myself).

2. You advised in your letter that two civil society organisations, *Freedom Under Law* and the *Helen Suzman Foundation* ("the Complainants"), have requested, by way of a letter dated 1 November 2016 ("the Complaint"), that you provisionally suspend us, pending an enquiry into our fitness to hold office, in terms of section 12(6)(a) read with, *inter alia*, section 14(4) of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act").

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

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

INTRODUCTION

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

5.1 Freedom Under Law and Another v. NPA and Others (case no. 83956/16) in which the Complainants applied to review and set aside the decision to prefer charges against Minister Pravin Gordhan ("the Minister"), Ivan Pillay ("Pillay") and Oupa Magashula ("Magashula"), in connection with alleged wrongdoing arising out of the purported retirement of Pillay from the South African Revenue Service ("SARS"). That application was withdrawn following my decision of 31 October to review and withdraw the aforementioned prosecution. It was withdrawn before opposing affidavits were filed by us. A copy of the Notice of Motion and Founding Affidavit in that case was attached to the Complaint as per paragraph 4 of the Complaint. Since this application has already been furnished to you we do not attach it again.

5.2 Helen Suzman Foundation and Another v the President of the Republic of South Africa and Others, case no. 87643/16, (Gauteng Division, Pretoria) served on 8 November 2016 in which the Complainants sought to review and set aside your purported decision to decline to invoke section 12(2) of the NPA Act, or, in the alternative, to refuse to take such a decision. A full set of the pleadings in this matter, together with the heads of argument accompany these representations in files marked "Files 1 and 2". It was in connection with this application that you elicited the representations set forth herein. The application was heard on 24 November 2016, and was struck from the roll with costs, on the basis that it was not urgent. (I return to consider aspects of this decision below.)

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

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

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case to answer. The Complainants seek to pre-empt the matter by insisting in advance that any charges arising from the SARS rogue unit investigations will *necessarily* be unfounded. As noted in paragraph 238 of the answering affidavit (File 1: p 204), I have at no time issued a *threat* that prosecutions arising out of the Rogue Unit will be forthcoming.

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

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

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

We respectfully associate ourselves with these sentiments.

I. THE ALLEGATIONS IN THE COMPLAINT

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

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

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

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use of the collective description of them as "the accused persons" but use the acronym GP&M;

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

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

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

10.1.5 that I committed serious misconduct;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. CHRONOLOGY

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

	TABLE	
1	Tuesday, 11 October 2016	Summons served on the Ministers Pillay and Mgoduka to appear in the Regional Division, Tshwane District on 2 November 2016. File 1: pg 73-84).
2.	Friday, 14 October 2016	Webber Wentzel writes to me and Pretorius calling upon me to withdraw charges (File 1: pg 109-110)
3	Monday, 17 October 2016	Magashula and Pillay make oral representations to me in terms of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act.
4	Monday, 17 October 2016	I respond to the letter from Webber Wentzel

		advising that Pillay and Magashula have made representations which I was considering; Gordhan to make representations by 17h00 on 18 October 2016. File 1: pg 141
5	Tuesday, 18 October 2016	Pillay and Magashula submit written representations. File 1: pg 119 - 42
6	Tuesday, 18 October 2016	Gordhan declines to make representations. Webber Wentzel invite me to withdraw the charges by 21 October. File 1: pg 140-142
7	Friday, 21 October 2016	I respond to the letter from Webber Wentzel of 18.10.16, stating I had been requested by Pillay and Magashula to review the decision in terms of section 179(5)(d); I had directed further investigations to be conducted; I regarded the matter as urgent and would be in communication with legal representations of Pillay and Magashula to advise them of the outcome of their representations once in receipt of additional information, and has considered same. I reaffirmed that I was attending to the matter urgently. A copy of that letter is at page 143-144 to the application attached to the complaint.
8	Sunday, 23 October 2016	Urgent application served by Helen Suzman Foundation and Freedom Under Law seeking order declaring unlawful the decision to charge the Minister. Application set down for 8 November 2016. This is the application attached to the Complaint.
9	Monday, 31 October 2016	Charges withdrawn by me.
10	Tuesday, 1 November 2016	Webber Wentzel writes to President demanding he suspends Prinsloo, Mzinyathi and I, pending enquiries. President was given until Monday, 7 November 2016 to make decision. This is the complaint of 1 November 2016 also at File 1: pg 125-131
11	Monday, 7 November 2016	President responds to Webber Wentzel requesting extension until 21 November 2016 (File 1: pg 132-133)
12	Monday, 7 November 2016	Webber Wentzel advises they will be launching urgent proceedings to secure suspension and have enquiries instituted. (File 1: pg 134-144)
13	Wednesday, 9 November 2016	HSF and FUL launches urgent application, set down for 22 November 2016 for order directing the President to institute an enquiry and suspend prosecutors. (This is the application in files 2 and 3).
14	Monday, 14 November 2016	President writes to Prinsloo, Mzinyathi and I affording us an opportunity to make

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

III. STRUCTURE OF THE NPA

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

IV. UNLAWFUL CONDUCT OF THE MINISTER, PILLAY AND MAGACHULA

15. The Complainants allege that –

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

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

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

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

SYMINGTON MEMO

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

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memorandum, dated 7 March 2008. (File 1: pg 98-99; paras 128-131, pg 250-251)

20. Discussion of the relevant document is to be found at paragraphs 122-145. (File 1: pg 242-252).

21. At the time when the prosecutors decided to charge GPAM, they did not have the Symington memorandum in their possession (as noted in paragraph 131 of the answering affidavit). It was received by me only when the applicants wrote to me on 14 October 2016, and attached it as an annexure (File 1: pg 98-99). Perusal of the memorandum led me to believe that it was unlikely that a conviction could be obtained – not because the other elements of the offences alleged could not be proven – but specifically because the element of intent would be very difficult to prove beyond a reasonable doubt (File 1: pg 88-116).

LEGAL CONSIDERATIONS

22. Fundamentally, the basis for the charges was that, upon consideration of the available evidence, it became clear that the manner in which Pillay was able to obtain an unlawful benefit at the expense of SARS was through a series of transactions that were *in fraudem legis*. This is discussed in the answering affidavit at paragraphs 102 – 121. (File 1: pg 275)

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

The Employee Initiated Severance Package does not apply

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

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

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The Public Service Act

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

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

The GEPF Rules

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

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

Section 17(4) of the GEPF Law, 1996

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

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

Rule 20 of the GEPF

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

The Guide

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

THE PROSECUTION

34. As noted in paragraph 126 of the Answering Affidavit (File 1: pg 276-277), it is common practice that the charge of theft is always preferred as an alternative to a charge of fraud. The fact that the charges were not a model of clarity does not mean that they were politically motivated or that there was no basis for them. The Accused themselves can always raise lack of clarity as an

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

Intention

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

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

37. It is undeniable that Pretorius' decision to prosecute was unpopular, but he was duty bound by the considerations set out above. My decision to review same was also controversial. Fortunately Pretorius and I do not exercise our duties in the hope or expectation of garnering popularity. We simply do our jobs without fear, favour or prejudice, in accordance with our duties to the best of our ability. In this regard I refer to paragraphs 237 – 239 of the Answering Affidavit. (File 1: pg 270).

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

Correspondence with attorneys and representations

39. This subject matter is discussed in the Answering Affidavit at paragraph 194 (File 1: pg 270-276).

40. The allegation that anyone reneged on an undertaking to the Minister is not correct. I refer in this regard to paragraphs 193 and 308 of the Answering Affidavit (File 1: pg 276 and 302-303 respectively).

41. As noted in the paragraph 194 of the Answering Affidavit (File 1: pg 276), in contending that the Minister was entitled to make representations prior to the institution of charges, the Applicants are effectively contending that high

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

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

> *"Should you not unconditionally withdraw the charges against the Minister or furnish the information sought by 16:00 on 21 October 2016, our clients will assume that no reasons for the decisions, and no documents other than the documents annexed to this letter, exist in support of the charges".* (I refer to paragraph 165 of the Answering Affidavit) (File 1: pg 279).

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

44. The applicants added:

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

Further:

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

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

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

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

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

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

> *"The purpose of this note is to briefly record the grounds whereon we respectfully submit Pillay did not have any intention to commit the offences in respect of which he now stands charged. In essence, Pillay was guided by the opinion of Vick Symington ("Symington") a respected legally trained official of SARS at the material time which advised that Pillay's contemplated early retirement from the GEPF, in his application to the Minister of Finance to waive early retirement penalty and is requested to be appointed on contract after his early retirement from the GEPF were technically possible under the rules of the GEPF read together with the employment policies of SARS."* I refer to paragraph 209 of the Answering Affidavit.

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

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

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

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

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

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

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

Withdrawal of the charges

55. After affording all interested parties including the Complainants in this matter, the DPCI, SARS, Pillay, Magashula and the Minister, an opportunity to make representations, and considering the representations that were made by those who elected to do so, I then took the decision to review and set aside the charges on 30 October 2015. I refer to paragraph 213 of the Answering Affidavit (File 1: pg 284).

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

57. I announced my decision at a press conference on 31 October; a copy of the statement is attached to the Answering Affidavit. (File 1: pg 427-454).

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

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

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

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

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

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

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

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

58.8 In the circumstances I decided to withdraw the charges.

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

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

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

THE ALLEGATIONS AGAINST US

Misconduct

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

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63. The Complainants argue specifically that Pretorius and Mzinyathi, like myself, failed to ensure that the charges were properly grounded and that, had applied their minds to the facts and law, they would not have preferred the charges. It is alleged further that Pretorius and Mzinyathi failed to take account of the *animus* element of fraud or theft. (Paras 11-16 of complaint).

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

Ulterior Motive

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

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

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

Bringing the NPA into disrepute

68. The Complainants say that even if my conduct was a *bona fide* blunder, I brought the NPA into disrepute (para 6 of complaint). But, as shown above, the conduct was not a blunder at all. There were good grounds upon which to charge the Minister, Pillay and Magwabula, especially if one considers the relatively low standard for prosecution. The fact that a prosecution is reviewed in terms of section 179(5)(d) of the Constitution and section 22(1)(c) of the NPA Act does not imply that the prosecution was flawed *ab initio*. The reviewed provisions provide a process for a prosecution to be re-evaluated

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

Allegation based on my withdrawal of Charges against Ms Jiba

69. In the founding affidavit in support of an application to compel the President to take steps against us (case no. 87643/2016) (which as noted was struck from the roll on 24 November 2016), the Complainants argued that my withdrawal of the charges against Ady Jiba, arising out of the decision of Gorven in the Booysen matter, was further evidence on my unfitness for office. (I refer to paragraph 356 of the Answering Affidavit). As noted in the aforementioned paragraph, the deponent in the supporting affidavit in case no. 87643/2016 did not disclose that the High Court in the aforementioned General Council of the Bar matter had exonerated Jiba. (I refer to paragraphs 357 – 363 of the Answering Affidavit)

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

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

Allegations re Role of Priority Crimes Unit (PCLU)

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

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

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

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

Allegation that independence and integrity of the NPA was compromised

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

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

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

Allegation of incompetence

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

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

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

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

81. As reflected in the 2015/16 Annual Report of the NPA, it achieved a total number of 280 245 guilty verdicts, with a remarkable overall conviction rate of 93%. I refer in this regard, and with respect to the figures below, to the NPA Annual Report 2015/2016.

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82. In the high courts, prosecutors maintained a conviction rate of 89.9% with 910 guilty verdicts, exceeding the target by 2.9%. Prosecutors in the regional courts attained a conviction rate of 78.4%, representing the highest conviction rate in this forum in the past decade, with 24 955 guilty verdicts. In the district courts, prosecutors achieved a conviction rate of 94.7%, exceeding the target by 6.7% with 263 377 guilty verdicts.

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

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

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

Alleged Responsibility for Destruction of Economy

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

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

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

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CONCLUSION

39. We humbly submit that for all of these reasons, the Complainants' request that you take steps against us in terms of section 12(5) of the PIPA Act should be refused.

Yours sincerely,

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