STATE ATTORNEY
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78

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:	**OPPOSING AFFIDAVIT ON BEHALF OF 2ND AND 5TH RESPONDENTS**
ON ROLL :	**NOT YET ALLOCATED**

FILED BY:

2ND AND 5TH
RESPONDENTS' ATTORNEY
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TO:

THE REGISTRAR OF THE HIGH COURT
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AND
TO:

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AND
TO: **3RD RESPONDENT'S ATTORNEY**
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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: *87643/16*

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

and

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

ANSWERING AFFIDAVIT OF SECOND AND FIFTH RESPONDENTS

I, the undersigned,

SHAUN KEVIN ABRAHAMS

do hereby make oath and state as follows:

1. I am the National Director of Public Prosecutions of the Republic of South Africa ("**NDPP**"). I was appointed by the First Respondent ("**President**") on 18 June 2015, in terms of section 179(1) of the Constitution of the Republic of South Africa Act, 108 of 1996 ("**Constitution**"), read with sections 10 and 12 of the National Prosecuting Authority Act, 32 of 1998 ("**NPA Act**").

2. Save where otherwise stated, or the context indicates otherwise, the contents of this affidavit are within my personal knowledge and belief and are both true and correct.

INTRODUCTION

3. This is a review application brought arising from the following circumstances:

   3.1. on 1 November 2016 the Applicants' attorneys addressed a letter (the "**letter of demand**"), to the President requesting that he suspend the third respondent ("**Pretorius**"), the fourth respondent ("**Mzinyathi**") and myself (referred to jointly as the "**other Respondents and me" or "us**"), in terms of section 12(6)(a) of the NPA Act, pending inquiries into our fitness to hold office (annexure **FA12**);

3.2. on 14 November 2016 the President wrote to us, affording us an opportunity to make representations in respect of the Applicants' aforementioned demand by 28 November 2016;

3.3. We duly made the representations.

3.4. on 3 March 2017, the President advised the Applicants' attorneys that he had decided not to suspend us, or institute an inquiry in terms of section 12(6) of the NPA Act;

3.5. six months later, on 1 September 2017, the Applicants brought this review application.

4. The Applicants' letter of demand arose out of charges preferred against then-Minister of Finance, Mr. Pravin Gordhan, ("**Gordhan**") (who was at relevant times Commissioner of SARS); the former Acting Commissioner of the South African Revenue Services ("**SARS**"), Mr. Ivan Pillay ("**Pillay**"); and the former Commissioner of SARS, Mr. Oupa Magashula ("**Magashula**"), and the subsequent withdrawal of the charges. (I refer herein to these individuals together as "**GP&M**".)

5. The basis of the charges was the payment by SARS of some R1.2 million to fund a pension penalty owed by Pillay, upon his putative retirement, to the Government Employees Pension Fund ("**GEPF**"). It was alleged that there was no legal authorisation for this. It was noted that there had been repeated warnings from senior officers in SARS' Human Resources department that this enrichment of Pillay was irregular. Magashula, bent

upon relieving Pillay of the penalty, ignored these cautions, instructing that it be borne instead by SARS.

6. It appears to be common cause that there is only a single circumstance in which a state employer may lawfully pick up a state employee's GEPF early-departure penalty on his behalf. That would be in terms of the Employee Initiated Severance Package ("**EISP**"). Employees are eligible for such a pay-out only where their early retirement is pursuant to "transformation" or "restructuring" of the entity by which they are employed. But this was not the reason for Pillay's "retirement"; he told the Minister in so many words that he needed to obtain access to his pension to finance the education of his children.

7. In the assessment of Pretorius and Mzinyathi, the transaction was simulated, in the sense that the "early retirement" was in fact something different altogether. Both Gordhan and Magashula (the latter who served as Commissioner of SARS from 2009 until 12 July 2013), were fully aware that Pillay did not genuinely intend to retire. To assist him in obtaining access to his funds while avoiding the statutory penalty, an impression was fostered that Pillay would serve SARS in a *different capacity* after obtaining access to his pension. But Pillay was reappointed to the very same position. Pretorius came to the conclusion that this was a classic simulated transaction (*in fraudem legis*).

8. Pretorius, the Acting Special Director of Public Prosecutions, in consultation with Mzinyathi, the DPP: North Gauteng, having taken advice

from other senior prosecutors, concluded that there were reasonable prospects of success in obtaining a conviction. SARS, through its Commissioner, was the complainant. (I pause to note that the Applicants make reference to "charges" having been laid against the Minister and the SARS officers. Charges are, in fact, only preferred in Court. Nonetheless, to minimize confusion, I have in this affidavit followed Applicants' usage of the term "charges" in its loose sense.)

9. As it turned out, the Minister and GP&M never did appear in court to face charges. Following the receipt of representations, I exercised my discretion under s 179(5)(d) of the Constitution, read with section 22(2)(c) of the NPA Act, and withdrew the charges.

10. Despite the fact that the charges were thus withdrawn, and that the aforementioned never appeared in court, the Applicants insist that myself, Pretorius and Mzinyathi misconducted ourselves and were grossly incompetent.

11. In order to succeed in their review application, the Applicants must hence clear two formidable hurdles.

    11.1. First, they must demonstrate that the decision to prosecute GP&M was irrational in its own right. That is a tall order - in the face of extensive authority to the effect that prosecutors enjoy a broad discretion, that their decisions do not constitute administrative action, and that all that is required to institute a prosecution is a reasonable prospect of obtaining a conviction.

11.2. Second, the Applicants must show that the President himself acted irrationally in not going along with the Applicants' dire assessment of the prosecutors' conduct in preferring the demand. In this respect too, the Applicants have a steep hill to climb. They must overcome the ample authority – acknowledged by the Court in the urgent phase of this matter – that separation of powers concerns make a court very slow to second-guess executive decisions of the President on questions that are constitutionally allocated to him.

BACKGROUND: THE ALLEGATIONS IN THE APPLICANTS' LETTER OF DEMAND

12. The allegations in the Applicants' letter of demand include:

12.1. In respect of myself, inter *alia*, that:

12.1.1. I admitted that the NPA never had sufficient evidence to prefer charges against GP&M. (It is noted that the letter of demand refers to GP&M as "the accused persons". I point out that they were summoned to appear in Court. As noted above, only upon such appearance would charges have been put to them. Only then would they have become *accused persons*, properly speaking;

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

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

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

12.1.5. I committed serious misconduct;

12.1.6. 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";

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

12.1.8. 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";

12.1.9. I "did not withdraw the charges as a conscientious NDPP of requisite integrity and objectivity would";

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

12.1.11. "this shows Mr Abrahams [I] 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 [I] intentionally and unlawfully sought to prop up insupportable charges after the fact as to rescue them from review";

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

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

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

13.2. 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;

13.3. 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;

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

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

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

14. In this affidavit, I show that, contrary to these contentions, there was indeed a proper basis for the charges. Pretorius and his team examined a host of documents, memorandum and e-mails indicating that there was no lawful basis for the special benefit accorded to Pillay. They observed too that red flags had been raised repeatedly by officials in the SARS human resources department. In my view, it was proper to infer from the objective evidence that then served before the prosecutors an intent to act unlawfully.

15. As foreshadowed above, after affording all interested parties an opportunity to make representations, and considering such representations, I took a decision to review and set aside the charges on

30 October 2016. I concluded that it would be difficult to prove the requisite *mens rea* beyond a reasonable doubt. That was on the strength of information that was not before the prosecutions team when Pretorius took the decision to prosecute.

16. I announced my decision at a press conference on 31 October 2016. It seems that the essence of the Applicants' complaint is not so much that I decided to withdraw the charges, but the manner in which I made that decision known. My assessment was that, in light of the wide publicity the charges had attracted, coupled with the fact that the charges had been initially announced at a media conference, it was appropriate that the discontinuation of the prosecution be similarly made known to the public and the media.

17. Applicants would have it that I committed some form of misconduct by referring at the 11 October 2016 press conference to so-called "rogue unit" allegations. But the Applicants have wrenched my words out of context. They omit to note that my words were not gratuitous, but in response to allegations made by the Minister in a Bloomberg television interview[1], implying that the "rogue unit" investigation was "political mischief", part of a nefarious NPA conspiracy. In my assessment it was both appropriate

[1] There does not appear to exist a written verbatim transcript of the Minister's remarks. However, a recording of his pronouncements is available on the web at https://www.bloomberg.com/news/videos/2016-10-04/south-africa-s-gordhan-sees-probe-as-political-mischief. If the Court so requires, a certified transcript of the statement will be made available.

and necessary that I set the record straight in that regard. Gordhan's words, as reported, reflected poorly upon the NPA as an institution.

18. Further, the Applicants disingenuously suggest that the withdrawal of the charges somehow vindicated their position, and constituted an admission that the institution of the charges was a mistake. There was at the very least *prima facie* evidence of unlawful conduct - to the benefit of Pillay, and to the prejudice of SARS.

19. This was an instance of the statutory mechanism working precisely as envisaged by the NPA Act. The initiation of the charges elicited representations, which in turn prompted further investigation, and uncovered material suggesting that it might be difficult to prove that these individuals acted with a criminal intention. This was not a matter of second-guessing my subordinates, but of performing my duties of review as is contemplated in section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act.

THE MATTERS PURSUED ON REVIEW BUT NOT RAISED IN THE APPLICANTS' LETTER OF DEMAND

20. Before turning to the substance of this matter, I need to point to a fundamental error going to the heart of the review application. One searches the Applicants' letter of demand in vain for mention of:

20.1. The withdrawal of fraud and perjury charges against Ms Nomgcobo Jiba ("Jiba");

20.2. My statements in Parliament;

20.3. My attendance at Luthuli House of a meeting concerning student protests;

20.4. My interview with journalist Mandy Wiener, held on 1 November 2016;

20.5. The "Spy Tapes" matter that had been decided by the High Court at the time this application was instituted.

21. It goes without saying that, to the extent that these items did not serve before the President, they cannot be relevant to the rationality or otherwise of his decision. Application will be made at the hearing of this matter to strike out the irrelevant and vexatious matter. Nevertheless, it has been necessary for the Respondents to plead over on these new items. These matters have inflated these papers and occasioned unnecessary costs. Respondents will request the Court to have that in mind when it comes to consider the issue of costs.

22. In any event, when the President considered the letter of demand, together with the representations made by the other Respondents and myself, he properly found that there was no *prima facie* case of misconduct, or that we were not fit and proper to occupy our offices.

23. Even if regard is had to the allegations of misconduct beyond the scope of the letter of demand, one finds that these too rely heavily on speculation fortified by a skewed interpretation of events.

24. The President's decision, the subject of the review, is a rational and lawful one, as will be demonstrated below.

THE URGENT APPLICATION

25. This is not the first time the Applicants have approached this Court arising out of the facts summarised above. In *Helen Suzman Foundation and Another v the President of the Republic of South Africa and Others*, case no. *87643/16*, (Gauteng Division, Pretoria), they sought to review and set aside the President's purported decision to decline to invoke section 12(6) of the NPA Act, or, in the alternative, to refuse to take such a decision. The application was heard on 24 November 2016, and was struck from the roll with costs.

26. There is a marked difference between the case advanced by the Applicants in this application and that advanced in the urgent application. In the latter, the Applicants prematurely sought to review the President's alleged failure or refusal to suspend the other Respondents and me, or hold enquiries into our fitness to hold office, when it was evident that the President had not yet taken a decision one way or another in response to their letter of demand.

27. In the present application, the Applicants attack a decision that the President subsequently did make, not to invoke s. 12(6) of the NPA Act against myself, Pretorius and Mzinyathi. In addition, the Applicants have attempted to correct some of the more egregious errors in the urgent application. Notably, they have dropped the allegations that the charges were animated by ulterior purpose or motive.

28. Although the Applicants brought the urgent application while the President was still considering the matter, what bears emphasis is that this application is replete with allegations which did not form the basis of the Applicants' letter of demand.

29. Although the application was struck from the roll for lack of urgency, the Full Bench made a number of relevant and important findings in its judgment, which was handed down *ex tempore*, per the Honourable Judge President Mlambo.

30. The Court found as follows:

"*...the Applicants' case is largely reliant on media reports.*"

31. Concerning whether the Applicants had a legitimate reason to bring the application when they did, the Court found as follows:

> "... Our view is that the Applicants' minds were made when they sent the letter to the President that the President had no option to accede to their demand foreshadowed in that letter. Their minds were clearly closed to any other response other than one complying with their demand. Evidence of this state of mind is found in the speed within which the current application was launched."

32. Lastly and most significantly, concerning the nature of the relief sought the Court found as follows:

> "...Furthermore, 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 arms doctrine and which would have the implication of 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."

33. Although these observations were made in disposing of the urgent relief sought by the Applicants, it will be argued that the underlying principle applies no less where final relief is sought. Reference will be made at the hearing to the authority that courts will generally defer to the exercise of executive authority such as that herein challenged.

EQUALITY BEFORE THE LAW

34. The Applicants' inarticulate premise is that GP&M who were the subject of the 11 October charges, must enjoy special treatment by virtue of their high office. That is entirely inconsistent with one of the most fundamental principles of the rule of law, which must always be foremost in a prosecutor's mind: Equality before the law. It is, of course, true that broader social and political consequences must be taken into account by a prosecutor under the heading of "*public interest factors*". It would be outrageous to suggest, however, that the latter confer a kind of impunity upon high public officials.

35. The implication of the Applicants' submissions regarding the adverse economic impact of the decision to prefer charges also amounts to an argument that those holding high government positions must be treated with kid gloves, lest their prosecutions trigger financial catastrophe. In any event, a court should give no weight to speculation about the effect of the prosecutorial decisions upon the aggregate capitalisation of the Johannesburg Stock Exchange ("JSE"). Stock prices are notoriously volatile, responsive to any number of social, economic, and political developments, both domestically and internationally. Paper losses are often quickly recouped, as they were *in casu*.

36. Equality before the law is enshrined in section 9(1) of the Constitution, whereunder all are equal before the law and have the right to equal protection and benefit of the law. Section 32(1)*(a)* of the NPA Act provides:

> "A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law."

37. It is relevant in this regard that section 22(4)(f) of the NPA Act requires the National Director to bring the United Nations Guidelines on the Role of the Prosecutor to the attention of the Directors of Public Prosecutions, Special Directors and prosecutors and to promote their respect for and compliance with the principles contained therein, within the framework of our own national legislation.

38. The principle that like cases must be treated alike implies that there must be general rules that must be impartially applied, "*that is to say, that prosecutors apply statutes without discrimination, or fear or favour, to all those whose cases falling within the scope of the rules.*"

ALLEGED ABUSE OF POWER, RECKLESSNESS AND BEING BEHOLDEN TO OTHERS

39. For the reasons set out *infra*, based on the circumstances which led to the charges being brought, the decision to prosecute was eminently justified, when tested against the relatively low threshold of a *prima facie* case coupled with reasonable prospects of a successful prosecution.

40. I take umbrage at the allegation that I was implacably committed to pursuing the prosecution, and relented only in the face of external pressure. I encountered resistance to withdrawing the charges from then Lieutenant-General Berning Ntlemeza ("**Ntlemeza**"), who at the time was the Head of the Directorate for Priorities Crimes Investigations ("**the Hawks**"). I wrote to him on 17 October 2016 (in a letter annexed hereto as "**SKA1**"), advising that Magashula and Pillay had made representations, in which they requested me to review the decision to prosecute.

41. He responded in a letter:[2] (It will be noted that the signature line incorrectly reflects 31 October 2016; the NPA date stamp was affixed only on 31 October 2016):

> "It is our considered view that your decision is not made in good faith on evidence that we have gathered as an investigative agency in this matter. Rather it seems to us that you make this decision based on the noise made by politicians, civil society lobby groups, and the media sympathetic to the accused.
>
> ...
>
> It is our considered view that we have a strong case against the accused, despite all contrary views of the so-called opinion makers and legal experts in the media. If the accused have any defences to the charges or any issues with regard to their prosecution the place to ventilate that is an open court through a criminal trial and be cross examined to expose the truth.
>
> ...
>
> We mention all these issues of which you are aware to highlight one issue: that it would be improper for you as NDPP to stall or withdraw the prosecution of the accused persons in this matter."

42. On 31 October 2016, in a letter addressed to him,[3] I informed Ntlemeza that I had reviewed the decisions to prosecute GP&M, having concluded that it would be difficult to prove intent beyond reasonable doubt. I indicated further that I would thereafter be responding more fully to him, as indeed I did on 8 November 2016.

43. On 8 November 2016, I wrote further:[4]

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[2] R: 432-435
[3] R: 436-437
[4] R: 438-439

> "Your view adopted in para 9 of your letter, dated 30 October 2016, is rather regrettable in that you alleged that my decision to withdraw the charges against Messrs Magashula, Pillay and Gordhan was 'based on the noise made by politicians, civil society lobby groups, and the media sympathetic to the accused'. In this regard you are completely incorrect and ill-informed. My decision was based purely on the merits of the matter after having reviewed the matter and having directed further investigations along with the applicable legal provisions."

44. I submit that the above is entirely inconsistent with the Applicants' attempt to portray me as having single-mindedly pursued Gordhan and having been swayed by popular sentiment to subsequently withdraw the charges.

THE STRUCTURE AND FUNCTIONS OF THE NPA

A. The Decentralised Prosecuting Powers

45. An overview of the structure of the NPA is useful in understanding the distinction between the power to institute a prosecution and the subsequent exercise of the power to review and set it aside, which is vested exclusively in the NDPP

46. Section 2 of the NPA Act provides for a single prosecuting authority. Section 3 reiterates that there is a single prosecuting authority consisting of "the Office of the National Director and the offices of the prosecuting authority at the High Courts, established by section 6(1)". Section 4, referred to above, sets out the composition of the prosecuting authority. Section 5 establishes the office of the National Director of Public

Prosecutions and places the National Director at its head. Section 6 establishes offices for the prosecuting authority at the seat of each High Court division.

47. The NDPP is appointed by the President and vested by section 179(2) of the Constitution and Chapter 4 of the NPA Act with the powers, functions and duties to institute criminal proceedings on behalf of the State and to carry out any necessary functions and duties incidental thereto. The NPA has Deputy National Directors of Public Prosecutions ("**DNDPP's**"); several Directors of Public Prosecutions ("**DPPs**") at the seat of each Provincial Division of the High Court and Special Directors of Public Prosecutions ("**SDPPs**") who are all accountable to the NDPP.

48. A number of sections of the NPA Act deal with hierarchical appointments. Section 16 provides for the appointment of prosecutors. Section 20(1) states that the power to institute criminal proceedings contemplated in s 179(2) of the Constitution "vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

49. Section 20 subsections (2)-(5) provide as follows:-

> "(2) Any Deputy National Director shall exercise the powers referred to in subsection (1) subject to the control and directions of the National Director.
>
> (3) Subject to the provisions of the Constitution and this Act, any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of: –
>
> (a) the area of jurisdiction for which he or she has been appointed; and

(b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.

(4) Subject to the provisions of this Act, any Deputy Director shall, subject to the control and directions of the Director concerned, exercise the powers referred to in subsection (1) in respect of: –

(a) the area of jurisdiction for which he or she has been appointed; and

(b) such offences and in such courts, as he or she has been authorised in writing by the National Director or a person designated by the National Director.

(5) Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director."

50. Section 21, consistent with s 179(5) of the Constitution, provides for the National Director, with the concurrence of the Minister and after consultation with other Directors, to determine prosecution policy and issue policy directives which must be observed in the prosecution process. Section 22(1) of the NPA Act provides:-

> "The National Director, as the head of the prosecuting authority, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law."

51. In most high-profile cases, including this particular prosecution, I generally do not allow myself to be the initial decision-maker in this regard. Quite aside from the practical constraints to which I have pointed, that would be undesirable, because it would bar me from reviewing the prosecution, in terms of section 179(5)(d), read with section 22(2)(c) of the NPA Act.

52. The Constitution and the NPA Act guarantee the professional independence of every professional member of the NPA. This is necessary to ensure that every professional member of the NPA is free from any interference in exercising their prosecutorial duties.

53. This principle is confirmed in section 32 of the NPA Act, which provides that

> "(1) (a) A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and *subject only to the Constitution and the law*.
>
> (b) Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."

54. In this regard, every professional member of the NPA is by law required to be free from interference not only sources external to the NPA, but also from internal pressure. It is for these reasons that both the Constitution and other laws recognise the broad discretion that prosecutors have in discharging their prosecutorial functions, whether in respect of preferring charges or discontinuing prosecutions, as well as any powers incidental to such decisions.

55. Flowing from these principles, it is accepted that prosecutorial decisions taken by individual prosecutors within the NPA are, as a matter of logic, practice and the law, to be respected. Only if sound reasons exist, will a senior member review a prosecutorial decision of his or her junior.

56. As I have also stated, it is not unusual that members of a prosecuting team differ on whether a prosecution be pursued or not. Reasonable minds can differ on whether the evidence in the docket is such that there is a reasonable prospect of a successful prosecution. It is the court that makes the ultimate determination, on a conspectus of all the evidence.

57. To the extent relevant to the present matter, it is necessary that I highlight the roles played by Pretorius and Mzinyathi in the NPA, with special emphasis on their roles in the current matter.

58. In terms of section 179(3) of the Constitution, read with the NPA Act, Directors of Public Prosecutions, like Mzinyathi, are responsible for prosecutions in their specific jurisdictions. Our courts have recognised that this duty entails being "answerable, accountable; liable to account". But the NDPP, like other senior prosecutors in the NPA hierarchy, must exercise a measure of deference with regard to the DPP's decisions.

59. With regards to Special Directors, a position in which Pretorius was acting, section 24(3) of the NPA Act provides that

> "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 that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20 (1), they shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned.*" (Own emphasis)

60. The duties referred to in section 20(1) relate to the powers to institute and conduct criminal proceedings. It is not insignificant that the duties of a

Special Director with regard to the institution and conduct of criminal proceedings are required to be exercised in consultation with the Director of the area of the jurisdiction concerned (Mzinyathi being such a director). That is so because, as indicated above, a DPP is 'responsible' for prosecutions in their own jurisdictions. This is why Special Directors consult with the DPP" responsible" for that function in a particular jurisdiction.

61. It follows also that it is generally inappropriate for a NDPP to insert himself into initial decision-making process. That does not mean that the NDPP (or any member of the NPA who occupies a position senior to a DPP for that matter), cannot be proactive. It is rather that the Constitution recognises that there are certain functions that only the NDPP is required to undertake as the head of the NPA *qua* head. The NDPP should not only exercise such powers in the manner envisaged, but should also be seen to have exercised such powers objectively.

62. A glance at the NPA annual reports shows the sheer volume of prosecutions carried out by the NPA in any given year, in all the courts of the Republic. For example, in the 2016/17 financial year, some 884 088 new cases were enrolled in the various courts of the Republic. Each of these cases required that a decision to prosecute be taken by one or more members of the NPA.

63. In instances of a "sensitive or contentious" prosecution, Part 4(B)(3) of the Prosecution Policy Directives provides that:

> "In prosecutions of a sensitive or contentious nature (including cases involving "high profile" accused person, victims or witnesses), prosecutors should timeously *inform* the DPP concerned in writing of the nature and details, and such DPP should similarly *inform* the National Director." (Own emphasis)

64. It is again worth emphasising that the only duty of a prosecutor is to 'inform' the DPP concerned of the 'nature and details' of such prosecution, and the DPP's only duty is to inform the NDPP of the same. It is not incumbent upon the DPP or the NDPP to approve every decision to prosecute or not prosecute. For one thing, that would vitiate the independence of individual prosecutors lower in the hierarchy. For another thing, given the number of prosecutions as reflected, that would be entirely impractical.

65. I have already indicated that, *in casu*, Pretorius and Mzinyathi informed me of their decision to prosecute, as was required of them. I agreed with their decision based upon their briefing to me, having every reason to trust their experience and competence.

66. With regard to the remedy of review available to members of the public who are aggrieved by decisions of prosecutors, Part 6(A)(6) of the Prosecution Policy Directives provides that:

> "As a matter of law and policy, the National Director requires that the remedy of recourse to the DPP be exhausted before representors approach the National Director."

67. This principle conforms to the general principle, widely recognised in administrative law, that an aggrieved party must exhaust internal remedies. It is exactly for this reason that it is not ideal for the NDPP, DPP, or any other senior member of the NPA to insert himself or herself into the

prosecutorial decision-making process in respect of the initial decision to prosecute or to decline to prosecute.

B. The NDPP's Powers of Review

68. I have alluded to the fact that the NPA receives representations from the accused in respect of matters in both the lower and High Courts, as submitted to the Control Prosecutors, Senior Public Prosecutors, Chief Prosecutors, the DPP Offices and/or to Special DPPs. Since my appointment in June 2015, I have reviewed numerous cases, and have not infrequently overruled decisions of Directors of Public Prosecutions and Special Directors to prosecute or to discontinue prosecutions.

69. In this regard, Part 5(5) of the Prosecution Policy Directives provide that:

> "No prosecutor may withdraw any charges without the prior authorisation of the National Director or the DPP concerned, where the prosecution was on instruction of either the National Director or DPP."

70. Were the NDPP required to personally make or authorise every decision to institute or withdraw criminal proceedings, as the Applicants seem to expect, the criminal justice system would grind to a halt. The NDPP's desk would be piled high with requests for authorisation to withdraw prosecutions. Charges are routinely withdrawn, for example, in instances where further evidence comes to light suggesting that the prospects of success are no longer as good as initially appeared. As a matter of policy, NPA resources must not be wasted on hopeless prosecutions; it follows

that junior prosecutors are necessarily vested with a discretion as to whether to pursue a particular matter.

SEPARATION OF POWERS

71. As suggested by the full Court when it struck this matter from the urgent roll, the relief sought by the Applicants impacts upon the doctrine of separation of powers. This is in line with the many decisions in which courts have emphasised the centrality of the separation of powers doctrine. The Chief Justice recently said that the rationality test is "not a uniquely designed master key", and must be applied with "due regard to the imperative of separation of powers," "sensitively and cautiously."

72. The Constitutional Court has also emphasised that considerations of separation of powers "*demand an ever-abiding consciousness of the constitutionally-sanctioned division of labour among the arms [of government] and refrain[ing] from impermissible intrusions.*"

73. It was necessary for the President to apply his mind in a similar fashion when in late 2015, the Democratic Alliance ("the **DA**") invoked section 12(6)(2), in demanding that the President takes steps against Ms Nomgcobo Jiba. Ultimately the Western Cape High Court[5] dismissed the application. Dolamo J's words in his judgment are apposite:

[5] Democratic Alliance v President of the Republic of South Africa and Others 2016 (8) BCLR 1099 (WCC)

> "Unwarranted suspension brought about by untested allegations may disrupt the smooth running of the institution. While the President is empowered by section 12(6)(a) to take swift action *when necessary* to allay concerns about the integrity of the NPA or when the conduct of the DNDPP is called into question, he however, cannot do so without due consideration for all the relevant factors and circumstances. In this respect, he would call for, be guided by and rely on people who have intimate knowledge of the facts and their surrounding circumstances. He will be in a better position to exercise his discretionary powers on receipt of appropriate advice."[6] (Own emphasis).

74. The President did just that, by seeking the advice of two senior counsel in reaching his decision. Unsurprisingly, the Applicants wish to discredit the legal opinion drafted by Advocate Ishmael Semenya SC and Advocate Anthea Platt SC ("the **Opinion**").

75. The Applicants are notably selective in their interpretation of the Opinion. The latter maintains throughout that a *prima facie* case of misconduct or impropriety, lack of integrity, etc. is required in order to trigger the institution of an enquiry. It concludes that the conduct complained of by the Applicants was authorised by law and did not establish a *prima facie case* of misconduct. As is demonstrated below the conclusions articulated in the Opinion were well warranted.

76. The alternative prayer sought in paragraph 3 of the amended Notice of Motion – seeking to strip the President of his powers under s. 12(6) of the NPA Act, and to vest that power in an Acting President as purportedly contemplated in s 90 of the Constitution – would, it will be argued, entail a violation of the separation of powers principle.

[6] Para 88 of judgment.

77. In that regard, I must however, bring to the attention of this Court the decision in the matter of CASAC,[7] in which substantially similar relief as sought by the Applicants herein on this narrow issue, was granted. An application for leave to appeal that decision is pending as of the date of signature hereof.

I. THE BACKGROUND TO THE PROSECUTIONS

78. During September 2016, Sello Maema ("**Maema**"), a Deputy Director of Public Prosecutions in the NPA, who was responsible for assisting the DPCI investigation regarding the so-called "rogue unit", briefed the NPA management on the alleged involvement of Gordhan in the unlawful authorisation of the following:

78.1. Firstly, the payment by the SARS of Pillay's penalty to the Government Employee's Pension Fund ("**GEPF**"), which arose as a result of him taking early retirement. The penalty amount was in excess of R 1.2 million. There is no dispute that this amount was paid by SARS on behalf of Pillay.

[7] Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others (62470/2015) [2017] ZAGPPHC 743 (8 December 2017)

78.2. Secondly, the reappointment of Pillay to his very same position in circumstances where Pillay himself had said he wanted to take early retirement;

78.3. Thirdly, the approval of Pillay's early retirement in circumstances where the intention was to gain access to his pension benefits for purposes of providing educational funding for his children.

79. Maema's briefing revealed that:

79.1. There had been an initial retirement application interposed by Pillay in 2008, which is referred to in the affidavit of Coetzee.[8]

79.2. In 2009, after Gordhan had been appointed as the Minister of Finance, Pillay submitted a memorandum dated 27 November 2009 to Magashula,[9] who was the Commissioner for SARS at the time ("the **first retirement application**").

79.3. In this memorandum, Pillay motivated his first retirement application as follows:

> "PURPOSE
>
> The purpose of this memorandum is to explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the

[8] R: 444
[9] R: 440-441

Minister certain related matters that will flow from my decision to take early retirement.

DISCUSSION

As you know, I have been working in the Public Sector for the past 15 years, 10 which have been spent at SARS. For the most part of this period, especially my tenure with SARS, I was expected to perform at a very high level accompanied by the accountabilities that go with the performance of such a high-level job. This exacted its toll from me in the sense that my health condition is slowly deteriorating. Added to this, my family responsibilities, for a long time, suffered on account of the dedication required by my job. With the aforementioned in mind, although still not easy, I have decided to take early retirement.

However, I am still enthusiastic about SARS and the tremendous contribution it makes towards the establishment of an even better South Africa for all its citizens. With a view thereto, I am willing to serve in SARS in a *different capacity* where the demands of such a job will positively support the reasons why I am in the first instance taking early retirement.

Should you favourably consider my proposal to serve SARS in a *different capacity*, such service will have to be subject to that I be appointed as a contract employee. *This will allow me more flexibility in terms of making a decision to finally part ways with SARS, should I come to such a decision.* The second condition would be that my early retirement is approved in terms of the provisions of section 16(6)(a) and (b) of the Public Service Act, meaning that the Minister, in terms of the provisions of the abovementioned section approve that the penalty imposed on my pension benefits per Rule 14.3.3(b) of the GEPF Rules be paid by SARS to the GEPF. The GEPF has indicated that the penalty amount on my pension benefits that the employer has to pay on my behalf is R1 292 732,68.

RECOMMENDATION

My recommendations are that you please:

· take note that I intend to take early retirement

- consider to approve that I be appointed in a different capacity in SARS on a contract basis; and

- consider to recommend to the Minister that he approves that the penalty on my pension benefits be paid on my behalf to the GEPF by the employer." (Own emphasis).

80. What is clear from the above quoted memorandum is the following:

80.1. Pillay's decision to take early retirement was for personal reasons which had absolutely nothing to do with the business of SARS at the time (and even thereafter);

80.2. Pillay asked to be appointed in a "different capacity" where the demands of such a job would support "the reasons why I am in the first instance taking early retirement."

80.3. Pillay was fully aware that the ordinary consequences of his decision to take early retirement were, amongst others, that he himself would have to pay a penalty to the GEPF for his early retirement. It was for this reason that he wanted SARS to pay the statutory penalty on his behalf.

81. Also, in 2009, Pillay wrote directly to Gordhan who was then the Commissioner, where he made a different request to approve his application for early retirement for different reasons ("the **second retirement application**").

82. In his undated memorandum[10] motivating the first retirement application, Pillay said the following to Gordhan:

> "Dear Pravin,
>
> PURPOSE
>
> The purpose of this memorandum is to explain the reason why I have decided to take early retirement as well as to request you to consider to approve/recommend certain related matters that will flow from my decision to take early retirement.
>
> DISCUSSION
>
> I have reached the stage in my life where it has become a reality that I had to make some very important decisions about the education of my children. The decisions I have taken will require a considerable capital investment, money that can be raised by means of a bank loan, but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interest are the order of the day and indications are that this situation will prevail for the foreseeable future.
>
> In view of this I have decided to inform you that I intend to retire in 2009 when I reach the age of 56 years. As I have already reached the earliest optional retirement age of 55 years in terms of the SARS retirement provisions, the retirement benefits will provide me with a lump sum benefit (which will financially support the decision I have made in terms of the education of my children) as well as a monthly pension. Whilst this may not be ideal in terms of maximum benefits when finally retiring, I am of the opinion that this is the best option available to me as far as my children's education is concerned.
>
> This brings me to the second issue at stake, namely how I view my retirement as raised above. Clearly I am doing this on account of a matter that has nothing to do with my work at SARS. I still feel that I am still capable of doing my work, I still have the enthusiasm and will to do it and I am of the opinion that through my work, I can still contribute to the establishment of an even better South Africa for all its citizens. Taking this into account, I will appreciate it if you will consider to approve that immediately after my early retirement,

[10] R: 442-443

appoint me to my current position but as a contract employee. No legal provision prevents you from making such an appointment.

The third matter is slightly more technical and complicated and it concerns my early retirement benefits payable by the GEPF. Although the Rules of the GEPF provides that a member of the GEPF can elect to retire from the age of 55 years and onwards, there is a penalty payable in terms of the benefits ... As I intend to take early retirement at age 56 years ... my pension benefits will be reduced by 14.4%. It was realized that the provisions of this particular GEPF Rule prevented many employees from an early retirement and in many instances those were employees Departments would have liked to take early retirement. In an effort to address the situation, Section 16(6) of the Public Service Act ... was amended to provide that where early retirement is applied for, Ministers can approve that employers (Departments/SARS) pay the penalties imposed on early retirees in terms of the GEPF Rules.

In view of this it will be appreciated if you, when I take early retirement, would recommend to the Minister that SARS pay to the GEPF my early retirement GEPF penalties. It is estimated that the penalties will amount to R 1 064 257."

83. In the above-quoted memorandum Pillay:

83.1. acknowledges that what he wants "has nothing to do with my work at SARS", and that there is a penalty payable, such that his benefits would be reduced by 14.4%;

83.2. asserts incorrectly that s. 16(6) of the Public Service Act was amended to enable government employers to pay penalties on behalf of their early retirees. In fact, the penalty is imposed by the Rules of the GEPF.

83.3. his intent is to fund the education of his children.

84. This initial application was not pursued.

85. The fact that Pillay was fully aware of the financial implications of his decision to take early retirement is confirmed by the so-called Symington memorandum.[11] In this memorandum, which is dated 17 March 2009 (before the date of Pillay's above quoted memorandum dated 27 November 2009) Symington said the following:

> "*The financial soundness of his decision* to apply for early retirement *is dependent on whether the Minister approves the SARS payment of the benefit penalty* to the GEPF as well as whether SARS contracts with him for a period of post-retirement employment. This is so because of the relatively young age at which he will be retiring vis-a-vis his projected life expectancy. *If the Minister does not approve his request or if SARS does not contract with him after his retirement, the financial risk of his decision will increase substantially and my advice then would be for him to review his application for early retirement and to possibly withdraw it.*
>
> ...
>
> ... However, if the minister is unable to approve his request relating to the penalty or if SARS is not in a position to contract with him after retirement, *then his decision to apply for early retirement should probably all together be withdrawn.*" (Own emphasis).

86. The following is also apparent from the Symington memorandum:

86.1. Gordhan was the Commissioner for SARS until May 2009 and the Symington memorandum must have been addressed to him. There is nothing to suggest that Gordhan did not receive the Symington memorandum.

[11] R: 513-514

86.2. Symington did *not* say that it would be lawful for the Minister and Magashula to burden the taxpayer with Pillay's penalty in excess of R 1.2 million. As it turned out, SARS ended up financing a big portion of Pillay's children's education as stated in the affidavits to which I refer below.

87. At the time when the prosecutors decided to charge GP&M they did not have the Symington memorandum to hand. It was provided to me when the Applicants wrote to me on 14 October 2016, attaching it as an annexure.

KEY DOCUMENTS IN THE DOCKET

A. The SARS Commissioner's Letter Supporting Pillay's Application

88. The prosecutors considered a letter dated 12 August 2010 from Magashula (at the time the Commissioner for SARS), addressed to Gordhan. Magashula motivated the early retirement of Pillay with full retirement benefits as follows:

> "1. PURPOSE
>
> The purpose of this memorandum is to request approval from the Minister for the early retirement of Deputy Commissioner Ivan Pillay with full retirement benefits from the GEPF as contemplated in Rule 14.3.3(b) of the Government Employees Pension Law, 1996, read with section 19 of the SARS Act and section 16(2A)(a) of the Public Service Act, 1994...
>
> In addition, approval is requested to retain Mr. Pillay as Deputy Commissioner of SARS on a 3 year contract with effect from 1 September 2010.

2. BACKGROUND

...

Ivan has always excelled at his job and made a significant contribution towards the establishment of SARS as the highly respected organisation it is today.

For personal reasons, he has requested to take early retirement with effect from 1 September 2010. He is currently 56 years old.

Given Ivan's critical skills, experience and leadership, he has agreed to remain in the employ of SARS as Deputy Commissioner after his retirement on a 3 year contract to assist with the on-going leadership transition.

3. MOTIVATION FOR RETIREMENT WITH FULL BENEFITS

In the light of Ivan's exemplary service and sacrifice in the service of the people of South Africa, it is requested that he be granted early retirement with full retirement benefits as provided for in section 19 of the SARS Act, 1997, read with section 16(2A)(a) of the Public Service Act, 1994.

Over the past 5 years the GEPF has approved over 3 thousand requests from various government departments for staff members to retire before the age of 60 with full benefits. The statistics are attached to this memorandum as received from the GEPF (Appendix A).

In addition, the former and current Minister of Finance have approved at least five such requests over the past 2 years (see Appendix B).

4. MOTIVATION FOR REAPPOINTMENT ON A 3 YEAR CONTRACT

Ivan's wealth of knowledge and experience within SARS and his leadership position as Deputy Commissioner is an invaluable asset to the organisation. This is particularly important given the on-going leadership transition within the organisation following the departure of the Minister and the recent restructuring of the top leadership of the organisation as part of the revised Operating Model.

Ivan's continued guidance, leadership knowledge over the next 3 years will provide critical continuity as well as playing an important mentoring role in developing the next generation of SARS leaders.

In addition, it should be noted that there is precedent for the termination of employment and immediate rehiring of the same person under different conditions of employment within the public sector.

In this regard, advice was sought from the Acting Director-General of the Department of Public Service and Administration ... regarding the proposed early retirement of Mr. Pillay and his retention on a 3 year contract. He confirmed that there is no restriction on the appointment to the public service or to the same department of a person who has left on an Employee Initiated Severance Package (EISP) and that he was aware of previous such cases.

5. FINANCIAL IMPLICATIONS

The financial implications of early retirement with downscaled benefits for Ivan will be considerable as his lump sum benefit will decrease by R243605 to R121443 and his monthly pension by R47402 to R48563.

The financial implications for SARS, should approval be granted to allow Ivan to take early retirement with full retirement benefits, will be an amount of R1 258 345.99 which SARS will be liable to pay the GEPF in terms of the provisions of section 17(4) of the GEPF Law, 1996."

89. The above quoted memorandum concludes with a recommendation that Gordhan as then Minister approves Pillay's early retirement without downscaling his retirement benefits, and that Gordhan also approves the reappointment of Pillay as Deputy Commissioner of SARS on a 3 year contract with effect from 1 August 2010 with the same remuneration that he was earning prior to his putative retirement.

90. The recommendations were approved by Gordhan on 13 October 2010. It is worth noting that the then-Deputy Minister of Finance, Mr. Nhlanhla

Nene, did not approve the recommendation despite the fact that the memorandum made provision for his signature.

B. Coetzee's Affidavit

91. The prosecutors had regard to an affidavit by Nico Coetzee,[12] of the human resources department of SARS. (There are other documents attached to this affidavit, to which I refer separately below.)

92. Coetzee says that, in 2008, he was instructed to prepare a ministerial memorandum to be signed by Gordhan (who was Commissioner of SARS at the time), to recommend to the then Minister of Finance (Trevor Manuel) that he approve Pillay's early retirement:

> "I awaited the approval by the Minister of the request by Mr. Pillay. In October 2009 while waiting for the approval of the memorandum, I received a revised memorandum from the office of the Commissioner, Mr Oupa Magashula. The memorandum contained different reasons from my original memorandum as to why the Minister should approve Mr. Ivan Pillay's early retirement. The reasons on the revised memorandum were that Mr. Pillay wished to go on early retirement in order to enable him to provide for his children's education and not as I have previously stated that he wished to pursue other interests. I raised concerns to the Commissioner through the e-mails dated the 8th and the 9th October 2009 respectively, that if the Minister should approve Mr. Pillay's application on the grounds of personal interest may create a precedent in terms of which, other employees might come forward with similar request for early retirement."

93. In the e-mails dated 8 and 9 October 2009 referred to in his affidavit, Coetzee said the following to Magashula:

[12] R: 444-447

"Hi Oupa

Luckily for me I have dealt with this matter during June this year but I do not know why the matter was not promoted at the time as I have certainly started the process. I have amended the two submissions (attached) to fit in with Mr. Pillay's latest request. It is not unusual that a retired employee is re-appointed after retirement in a contract capacity. *What may raise some eyebrows in this particular case is that the employee is appointed in the same position he held before his retirement.* Ordinarily such a re-appointment will be to a different and a lower-graded position. It will have to be decided if satisfactory reasons can be given for the re-appointment in the same position. We had two similar applications for early retirement, both which were not approved by the Minister as the Minister could not find sufficient reason to approve early retirement. In terms of section 16(6) of the Public Service Act, the Minister only has consider if SUFFICIENT REASON exists to approve Mr. Pillay's early retirement ..." (Own emphasis).

94. In Coetzee's e-mail of 9 October 2009, he said:

"I am resending this e-mail on account of a slight change I have made to the two attached documents. The changes indicate that the reason why Mr. Pillay is requesting approval for early retirement is to provide for his children's education and not as I have previously stated that he wished to pursue other interests. You will now have to consider to recommend and the Minister consider to approve if this is SUFFICIENT REASON to recommend/approve Mr. Pillay' application for early retirement. *If his application is duly recommended/approved, it could technically be construed that SARS is willing to contribute from its budget an amount of + R340 000 towards the education of his children.* I admit it is a rather cynical viewpoint, but it can be a viewpoint that may be held by other parties as well *and that may put yourself and the Minister in a tight spot, especially because Mr. Pillay was re-appointed in his present position. The argument may be that he was able to continue with his present functions, but his early retirement and reappointment was purely to assist him to be able to provide for his children's education, with a R340 000 "contribution" from SARS.*" (Own emphasis).

C. **Pillay's Contract of Employment**

95. Pursuant to Magashula's recommendation, Gordhan approved Pillay's early retirement and re-appointment. Gordhan also approved that Pillay's penalty to the GEPF be paid by SARS.

96. On 7 February 2011, Magashula and Pillay concluded a five-year contract.[13]

97. Noting that five-year the contract was not approved by Gordhan, the prosecutors determined that there was a *prima facie* case that all payments made in terms thereof were therefore unlawful, and that Magashula and Pillay were aware of this illegality.

98. The aforesaid contract was to have come to an end in 2016. But, on 26 March 2014, Gordhan concluded a fresh contract, just weeks before his appointment to a different ministry. In terms of that contract, Pillay was appointed with effect from 1 April 2014 to 31 December 2018. The prosecutors concluded that there did not appear to be a lawful reason for concluding another contract before the expiry of the contract concluded in February 2011.

D. Affidavit of Chrisna Susanna Visser

99. Pretorius also had regard to the affidavit of a Ms Visser, to whom Coetzee reported in the SARS human resources hierarchy. Her affidavit[14] suggests that there was no business reason for SARS to pay Pillay's penalty. Like

[13] R: 455-467
[14] R: 468-471

Coetzee, Visser raised a red flag about the benefits being accorded to Pillay:

> "
>
> 8
>
> Nic Coetzee and I were both uncomfortable with the request as it was for personal reasons *and we could find no business reasons to pay the penalty on behalf of Mr. Pillay*. We were requested to draft a memorandum to the Minister of Finance for his approval. *Nic Coetzee and I both advised Mr. Oupa Magashula in the Commissioner's boardroom that it is not advisable to continue with the early retirement of Mr. Pillay because it was for personal reasons and not business reasons*. We were also concerned that it could set a precedent whereby others could come and claim the same benefit. *We informed him that no such case was recommended in the past as it was for personal reasons. He instructed us to continue with the memorandum*.
>
> ...
>
> (Own emphasis)

100. Visser's objection was, however, rejected:

> 10
>
> I was presented with the signed approved memorandum by the Minister and I initiated the process of the exit of Mr. Ivan Pillay from the Pension Fund and his re-employment on a contract basis. Part of this process was to sign a contract of employment with Mr. Ivan Pillay. *I drafted a three year contract of employment to be signed by Mr. Oupa Magashula as the Commissioner and Mr. Ivan Pillay as the employee. The contract document was however amended to five years* ... Mr. Oupa Magashula requested that I sign as a witness. I queried the matter of the contract that was amended to five years. Mr. Oupa Magashula indicated that they decided that it will be five years and not three and continued to sign the contract. I signed as witness as I believed it was merely to indicate that it was Oupa Magashula who signed the contract. I advised but the advice was cast aside and not taken.
>
> 11

> In 2014 a new contract of employment ... was requested from my Office via Rita Hayes who was employed by Mr. Ivan Pillay. *I enquired why a new contract was needed as the previous employment contract was still valid however I was just advised that the [sic] Minister Pravin Gordhan and Mr. Ivan Pillay wanted to conclude a new contract.* I then continued to e-mail a draft contract to her office. I was presented with a new contract of employment to implement for Mr. Ivan Pillay." (Own emphasis).

101. Pillay's aforesaid contract was concluded in April 2014 – the last year of Gordhan's tenure as Minister of Finance at that time. In view of the fact that Pillay's contract of employment signed in February 2011 was still valid and of full force and effect until February 2016, there was no lawful reason to conclude a new contract to unduly benefit Pillay with a further contract of employment following what would have been the end of his contract concluded in February 2011.

E. Statement of the Minister

102. In his own statement (not made under oath),[15] Gordhan says the following of Pillay's "retirement" and his approval thereof:

> "15. Mr. Pillay took early retirement and was re-appointed when I was Minister of Finance. I seem to recall that it happened in early 2010.
>
> 16. The then Commissioner of SARS, Mr. Oupa Magashula, addressed a memorandum to me on 12 August 2010, seeking my approval for Mr. Pillay's early retirement and re-employment on a fixed term contract. I was told that Mr. Pillay sought in this way to gain access to his pension fund to finance the education of his children. I understand that Mr. Magashula had established from enquiries made with the Department of Public Service and Administration that the terms of Mr. Pillay's early retirement and re-appointed were lawful and not unusual. I approved Mr. Magashula's

[15] R: 473-477

> proposal because I believed it to be entirely above board and because I thought it appropriate to recognise the invaluable work Mr. Pillay had done in the transformation of SARS since 1995."

103. This creates an impression that he approved Pillay's early retirement package on the basis that Pillay needed money to finance his children's education. This, however, is not what is stated in Magashula's memorandum to him of August 2010. The education of Pillay's children is referred to in Pillay's memorandum to the Minister in 2008 - which is not the one that Gordhan approved in 2010.

104. What Gordhan does not disclose in his unsworn statement is:

104.1. why he had not approved the request by Pillay in 2008;

104.2. the legal basis upon which he approved the request that Pillay's penalty to the GEPF be paid by SARS;

104.3. why he approved the re-appointment of Pillay without the notionally vacated post having been advertised;

104.4. that he was in fact a party to the "*enquiries made with the* Department *of Public Service and Administration*" referred to in paragraph 16 of his statement. In this regard, in an e-mail dated 23 July 2010,[16] addressed to the then Acting Director-General of the Department of Public Service and Administration, Magashula said: *Thank you very much for a*

[16] R: 478

quick discussion yesterday with my Minister [Gordhan] regarding the early retirement of our Deputy Commissioner of SARS. In my discussion this morning with my Minister we agreed that I should ask you for a written response to our discussion and the questions I posed yesterday …

F. **Magashula's E-mail of 23 July 2010 and Response Thereto**

105. In the last-mentioned e-mail, Magashula had not enquired about the payment of Pillay's penalty to the GEPF or the legality of paying it. Instead he asked:

- "Is there a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment, with a scaled down responsibility, salary and other conditions of employment?
- ….
- Related to the first bullet point – do you have any statistics of how many of these early retirement cases without re-engagement have been processed thus far?"

106. The response from the Acting Director-General of the Department of Public Service and Administration is attached hereto as "**SA14**". It is silent on the question whether it was lawful for SARS to pay Pillay's penalty to the GEPF. The response shows that what was asked about in the discussion was the so-called Employee Initiated Severance Package ("EISP").

107. It is to the EISP, and to the other purported bases of Pillay's purported retirement, to which I next turn.

PURPORTED LEGAL BASES FOR PILLAY's DEPARTURE

108. When the prosecutors decided to bring charges, they took into account that there was no authorisation in law for SARS to pay the penalty, effectively financing Pillay's retirement.

109. In addition, the prosecutors were also influenced by the fact that the so-called early retirement was in fact not an early retirement at all. This is so due to the fact that Pillay did not intend to retire and both Gordhan and Magashula were fully aware of this. The fact that Pillay did not genuinely truly intend to "retire" is not concealed in his memorandum dated 27 November 2009.

110. In his aforesaid memorandum, a false impression is created that Pillay was to serve SARS in a "*different capacity*" where the demands of such a job will "*positively support the reasons why I am in the first instance taking early retirement.*" The reason given for early retirement is that "*my health condition is slowly deteriorating*" and "*my family responsibilities, for a long time, suffered on account of the dedication required by my job.*" Despite all of this, Pillay was at the very same time reappointed to the very same position from which he so desperately wanted to "*retire*".

111. I turn to examining each of the claimed bases in turn.

A. The EISP

112. The EISP derives from a determination (the "**EISP determination**"), made by the Minister of Public Service and Administration. A copy of the relevant determination appears in pages 481 to 493 of the Record. Paragraph 1 stipulates that it is "*applicable to all employees appointed in terms of the Public Service Act, 1994, as amended.*"

113. Another reason that the EISP does nothing to assist Pillay's cause is that, in terms of paragraph 3 thereof, its purpose is to:

> "... allow employees affected by transformation and restructuring who wish to exit the public service, to apply for an employee-initiated severance package."

114. It is common cause that Pillay's departure had nothing to do with "transformation" or "restructuring".

B. <u>Sections 16 of the Public Service Act, 1994</u>

115. In his memorandum dated 27 November 2009, Pillay had requested that approval for his "retirement" be granted in terms of section 16(6)(a) and (b) of the Public Service Act, 1994. It provides:

> "(a) An executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17 (2), if sufficient reason exists for the retirement.
>
> (b) If an employee is allowed to so retire, he or she shall notwithstanding anything to the contrary contained in subsection (4) be deemed to have retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the public service in terms of that subsection."

116. The above simply authorises the executive authority, the Minister in this case, to authorise the early retirement of an employee who has not yet reached the age of 60 years. This provision, however, is silent as far as the retirement or pension benefits are concerned.

117. I pause to mention that Section 16(4) would not apply to Pillay, since it governs only those who have attained the age of 60. Pillay was 56 at the time.

118. Magashula invoked the Minister's approval on behalf of Pillay in terms of section 16(2A)(a). This section provides that:

> "(2A)(a) Notwithstanding the provisions of subsections (1) and (2)(a), an officer, other than a member of the services or an educator or a member of the State Security Agency shall have the right to retire from the public service on the date on which he or she attains the age of 55 years, or any date after that date."

119. This section simply creates a right of a Public Service Employee to retire at the age of 55 years or after attaining that age. The executive authority's approval is not required for that purpose, and, once again, no provision is made for the employer to bear any part of the GEPF penalty.

C. <u>The GEPF Rules</u>

120. In his letter to Gordhan, Magashula relied on Rule 14.3.3(b) of the Rules of the GEPF. That can in principle apply to Pillay, because it governs those with at least 10 years pensionable service - which indeed he did have to

his credit. However, this is the very provision that specifies the penalty, and makes no allowance for the cost of the penalty being shifted to SARS.

121. Rule 14.3.1(d), which governs GEPF members who voluntarily retire their pension-retirement date, but after the age of 55 years, also applies notionally to Pillay. But here too he remains subject to the penalty – without any provision for same being borne by SARS.

122. The Applicants also relied on Rule 20 of the GEPF Rules as supporting their contention that the charges were unsustainable. The reliance on Rule 20 does not assist the Applicants.

123. Rule 20 provides that

> "*Without detracting from the generality of section 17 (4) of the Law*, the Government or the employer or the Government and the employer shall, if a member, except for a reason in rule 14.1.1 (a), retires, becomes entitled to a severance package in terms of rule 14.8 or is discharged prior to his or her pension retirement date and at such retirement, entitlement to such severance package or discharge in terms of the rules becomes entitled to the payment of an annuity or gratuity or both an annuity and a gratuity in terms of the rules, *and any of these actions result in an additional financial liability to the Fund*, pay to the Fund the additional financial obligation as decided by the Board acting on the advice of the actuary. Such payment to the Fund, with interest to account for any delay in payment, shall be in accordance with a schedule approved by the Board." (Own emphasis)

124. This Rule applies in instances where a GEPF member's retirement "*result[s] in an additional financial liability to the fund.*" In this instance, the GEPF did not attract *"an additional financial liability."* On the contrary, it was Pillay who, by his voluntary conduct, attracted financial liability to himself. He, not SARS, should lawfully have paid the penalty.

D. Section 17 of the GEPF Law, 1996

125. The Applicants in their contention that the charges were unsustainable[17] relied on, *inter alia*, the provisions of section 17(4) of the GEPF Law, 1996, as providing for the payment or deduction to be paid by SARS or the Government of the Republic of South Africa.

126. Section 17 of the GEPF Law deals with the funding of the GEPF – not with penalties which must be paid by employees who take early retirement. Section 17(4) of the GEPF Law, 1996 deals with a situation where the employer or if any legislation adopted by Parliament places an additional financial obligation on the GEPF. The legislature deemed it to be only fair that, in that event, the employer picks up the tab.

127. But *in casu*, the penalty was imposed upon Pillay by the Rules of the GEPF, not by SARS, or any legislation.

E. The GEPF Guide

128. The Applicants invoke the GEPF Guide in their attempt to defend the benefits accorded to Pillay.

129. The GEPF Guide is merely provided as a tool to explain what would otherwise be complicated concepts to an ordinary member of the GEPF.

[17] R: 497

The Guide is not a source of law. The purpose of the Guide is stated as follows:[18]

> "This booklet tells you the most important things that you, as a member of the Government Employees Pension Fund (GEPF), need to know about your membership and benefits. It explains what benefits GEPF provides if you resign, retire, pass away or are discharged. This booklet also tells you how and when you can claim your benefits, and explains some of the rules that apply to you as a member and to GEPF as your pension fund."

130. In this regard, the Guide provides that[19]

> "**The law and rules that protect you**
> You will be glad to know that there are very strict rules about the kind of benefits we must pay and how we must invest and safeguard your money. *These rules are contained in the Government Employees Pension Law, Proclamation 21 of 1996, and rules issued thereunder.*" (Own emphasis)

131. Any interpretation of the Guide that is so far inconsistent with the GEFP law and Rules cannot be sustained. On any proper interpretation, it is not the case that the GEPF penalty will be borne by the employer simply because "*the employer granted permission for your early retirement.*" It is clear that the employer will fund the penalty only where the basis for the early retirement is for "operational" reasons, or by virtue of "transformation."

[18] At page 4 of the Guide
[19] At page 5 of the Guide

IN FRAUDEM LEGIS

132. When regard is had to the information which the prosecutors had in their possession, there was a rational basis to conclude that there was a *prima facie* case that the early retirement transaction was *in fraudem legis*, viz a simulated transaction. As will be argued at the hearing, Pillay's purported early retirement was simulated in the sense that it was called by a name by which it is not.

133. In this case:

133.1. The GEPF and SARS were led to believe that Pillay took early retirement;

133.2. In fact and in truth, Pillay never retired; he stayed on in the very same position (as Deputy Commissioner) from which, according to his first memorandum, he strongly wished to retire;

133.3. The true purpose of the transaction was to allow Pillay to have access to his pension benefits, to provide for the education of his children, without him being subject to the statutory penalty.

133.4. Magashula without authority, procured for Pillay a five-year term contract commencing in February 2011, with the intended end date being in 2016.

134. It is common practice for a charge of theft to be preferred as an alternative to a charge of fraud. This is so because the offence of theft is not always

a competent verdict for fraud, the facts of the case generally dictate whether another offence could amount to a competent verdict for the offence of fraud. An accused is therefore generally expressly charged with the offence of theft as an alternative to fraud where the facts can support that alternative charge.

135. No doubt, the charge sheet could have been clearer and more complete. But it does not follow from such deficiencies that the charges themselves were without foundation, or the product of a political conspiracy. It is of course always open to the accused to object to the terms of a charge sheet at trial; leave to amend same is frequently granted. Charges can also be amended in terms of s 86 of the Criminal Procedure Act even during the trial, before judgment)

THE DECISION TO PROSECUTE

136. As set out above, and will be elaborated upon at the hearing, prosecutors are vested with a very broad discretion in their prosecutorial decisions. In the words of the full bench of this division, they cannot be expected to perform their functions with courts constantly peering over their shoulders, ever in fear of punitive measures in the event of a lapse in judgment.

137. The major thrust of the Applicants' case is an attack on Pretorius' decision-making process. It seems appropriate to mention that he is one of the most senior prosecutors in the NPA, rendering it more than justified in trusting his assessment. Having received his LLB in 1981 from the University of

Pretoria, he obtained a Masters of Law at the University of London and an LLD at the University of Pretoria. He joined the Department of Justice in 1976, and has been employed in prosecution since then. He was an evidence leader at the Goldstone Commission. He was a member of the Scorpions and a member of the Priority Crimes Litigation Unit "the PCLU"). Since October 2015 he has been the Special Director at the PCLU, in an acting capacity. A Special Director occupies the rank of a Director of Public Prosecutions.

138. Pretorius took the decision in consultation with Mzinyathi to prefer charges, in the wake of after a briefing from Adv Sello Maema ("*Maema*"), in September 2016. There was no reason for Pretorius not to place store in the recommendations of Maema, a long-standing Deputy Director of Public Prosecutions, who has a long and distinguished record.

139. In his representations,[20] Pretorius sets out in detail how, following the Maema presentation, he satisfied himself that a *prima facie* case existed. Particularly striking were statements under oath of two senior officials in the human resources department at SARS, who had repeatedly cautioned that the arrangement under which Pillay was ostensibly to leave office was irregular. Pretorius writes:

> "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." (Para 26).

[20] R: 38-56

140. Pretorius adds:

> "I specifically quizzed the prosecutor, Advocate Sello Maema in regard to the *mens rea* and knowledge of unlawfulness of the accused. I ensured that I obtained memoranda that was sent to the Minister before he approved the final memorandum and in 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." (Para 33.4).

141. Concerning the legal basis of the charges, Pretorius says:

> "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 intent, and thus guilt, of Gordhan. I also questioned Deputy Director Jabulani Mlotshwa separately and he assured me that he has the firm believe [sic] that there was an unlawful scheme that could not be achieved without Gordhan's participation." (Para 27).

142. The Applicants make much of the fact that Pretorius took steps to identify potential weaknesses in the case, by asking his subordinates specifically about these aspects. But that is precisely how one would expect any conscientious prosecutor to go about his business. It was quite appropriate that, in considering whether Gordhan could have been "duped", Pretorius took into account the fact that Gordhan had been at SARS for 10 years, and could be assumed to be especially knowledgeable about the relevant governing structures, regulations and rules. This was not inappropriate in the context of the relatively low threshold of meeting a *prima facie* case.

143. Pretorius was alive to the fact that charges were to be brought against a sitting Minister, and that there was a significant public interest element to the matter. He considered the following:

> "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."[21]

144. Anyone familiar with the prosecution process would know that it would be entirely impractical to require that every possible source of exculpatory evidence be pursued before charges are instituted. The standard for the institution of prosecution is no higher than reasonable prospects of success in the prosecution. On the Applicants' version, the scope of prosecutorial discretion would narrow to vanishing point.

RELEVANT CORRESPONDENCE

145. As we have seen, in a letter dated 24 August 2016, (a copy whereof annexed hereto as "**SKA2**"), Gordhan's attorney demanded that he be informed of any future steps with respect to his client. I responded on 25

[21] Pretorius' representations para 32.

August 2016 (a copy whereof annexed hereto as "**SKA3**") that I would consider his request once the investigation was finalized. In a letter of 29 August 2016,[22] Gordhan's attorney advised that he believed that the matter had now been finalized and stated that he wished to offer representations.

146. To this, Pretorius responded, in a letter of 5 September 2016 (annexed hereto as "**SKA4**"), that it was he that would be making the decision, but that it was premature to make representations at that stage. However, Pretorius advised that, if Gordhan did wish to interpose any comments, he should do so by way of a warning statement. But this offer was never taken up by Gordhan. Against that background, the allegation that anyone *reneged* on an undertaking to Gordhan is not well taken.

147. In contending that Gordhan was entitled to make representations prior to the institution of charges, the Applicants are effectively contending that high government officials must obtain special treatment from the NPA. It is exceedingly rare for such an opportunity to be afforded to those who are subject to NPA investigation. There was no reason to treat Gordhan any differently.

148. In a 14 October 2016 letter,[23] 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

[22] R: 494
[23] R: 495-501

> decisions, and no documents other than the documents annexed to this letter, exist in support of the charges".

149. One of the documents attached to the Applicant's letter was the Symington memorandum. This was the very first time that this memorandum was brought to my attention and that of the prosecutions team.

150. Once again, the inarticulate premise is that a high office holder is entitled to impose special conditions that would not be available to any ordinary citizen subject to prosecution. As foreshadowed above, this is antithetical to the principle of equality before the law as enshrined in section 9 of the Constitution.

151. In the same letter, the Applicants' added:[24]

> "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."

152. Anticipating what is set out below, I pause to comment that, upon review, my conclusion was that the available evidence, as gathered in the course of the assessment of representations, was indeed not sufficient to create reasonable prospect of a successful prosecution insofar as the presence of criminal intention was concerned. The central fallacy of the Applicants' argument is that this conclusion retrospectively renders the institution of the prosecution irrational, or the product of political pressure.

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[24] R: 499

153. While, in light of what is set forth above, the prosecutors believed that there was strong evidence that the 2009/2010 decisions were unlawful, and that there were therefore reasonable prospects of a successful prosecution, it was in light of the above not clear that the State would be in a position to prove beyond a reasonable doubt the element of intent. As noted elsewhere in this affidavit it is trite that intention as an element of a criminal offence falls to be inferred from an overall conspectus of the alleged facts. Reasonable minds can differ, especially before evidence is heard, as to whether the facts, if true would support an inference of intent.

154. In their application to quash the charges, the Applicants annexed a news article, annexed hereto as "**SKA5**", which quoted Gordhan's attorneys as having stated that:

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

155. The conclusion that it would be futile for Gordhan to offer representations is ill-founded. No reasons are offered for Gordhan's lack of confidence in

my amenability to his representations. If the basis for his foreboding was that it was I who made the decision to prosecute in the first instance, that was, as shown herein, an erroneous assumption.

156. The suggestion that I could not be swayed by representations, is equally without merit. There is simply no logical connection between the institution of charges by experienced senior prosecutors, in whom I had every confidence, and my willingness to be persuaded in light of further information, that the threshold for continued prosecution had not been satisfied.

157. I responded to the Applicants' letter on **17 October 2016**,[25] 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 Gordhan should make representations by 18 October 2016.

158. By way of a letter to me dated **18 October 2016**,[26] the Applicants reiterated that I had disabled myself from applying an independent and objective mind.

REPRESENTATIONS RECEIVED BY NDPP

[25] R: 502-503
[26] R: 504-506

159. On 17 October 2016 Magashula and Pillay, through their legal representatives, made oral representations, in which they requested me to review the decision taken by the third Respondent.

160. On 18 October 2016 those representations were reduced to writing.[27] Counsel for Pillay, Advocate Nazeer Cassim SC raised the Symington memo thus:

> "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."

161. On 18 October 2016 Magashula's legal representatives, Advocate PJJ De Jager SC reduced Magashula's representations into writing[28] and stated the following concerning the Symington memorandum in particular:

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

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[27] R: 507-508
[28] R: 509-512

162. As a result of these representations, I authorised further investigation of the matter, in particular because the possible import of the Symington memorandum was that Pillay, Magashula and similarly Gordhan, lacked the necessary criminal intention to commit an unlawful act.

163. To that end, further statements were taken. These included an affidavit from Symington, deposed to by him on 20 October 2016. I annex hereto "**SKA6**", a copy of this affidavit. At the press conference of 31 October 2016, I referred[29] to this affidavit as being one of the documents that influenced my decision to overrule the decision to charge.

164. Gordhan, having declined to make a warning statement, also did not make representations, but Pillay and Magashula did. (Gordhan did subsequently align himself with representations included in the letter of the Applicants of 14 October 2016.)

MY REVIEW

165. After affording all interested parties, including the Applicants in this matter, and the DPCI, SARS, GP&M, an opportunity to make representations, and considering the representations, I took the decision to review and set aside the decision to charge on 30 October 2016.

[29] At para 31.1.2 of the statement

166. This decision was taken on the premise that it would be difficult to prove the requisite intention to act unlawfully, beyond a reasonable doubt, on the strength of new information obtained. This new information was not before the prosecution team when Pretorius and Mzinyathi took the decision to prosecute.

167. I announced my decision at a press conference on 31 October 2016.[30] 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.

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

[30] R 515-540

AD SERIATIM

169. Prior to dealing with the allegations *ad seriatim* I address the tone of the founding affidavit. Much is framed in emotive language and hyperbole. I find *ad hominem* commentary that has no place in court papers. I am a respondent herein by virtue of the office that I occupy at the NPA. I take our oath of office, my statutory obligations and my ethical requirements seriously. I prefer not to descend into the trenches, but instead to address the factual allegations at issue insofar as they might have not been fully addressed above.

AD SERIATIM: FOUNDING AFFIDAVIT

Ad paragraphs 1 and 2

170. The contents of these paragraphs are noted.

Ad paragraph 3

171. I dispute that all the facts alleged by the deponent are within his personal knowledge. The deponent relies on media accounts, rumour and speculation.

172. A motion to strike out will be brought.

Ad paragraph 4

173. The content of this paragraph is noted.

Ad paragraph 5

174. I admit that I announced the charges against the GP&M at the 11 October press conference. The remainder of this paragraph is denied to the extent it is inconsistent with what is set out above.

Ad paragraph 6

175. The decision to prosecute was taken by Pretorius (in consultation with Mzinyathi), and guided by advice he received from subordinates. Pretorius concluded that there was a *prima facie* case against the GP&M. Pretorius was bound to consider such in part regardless of to whom the decision to prosecute pertained.

176. The emotive ascription, that do not accord with the factual response set out herein, is denied. Prosecutors are not politicians.

Ad paragraph 7

177. I admit that I withdrew the charges, and announced as much at a news conference.

178. The charges were sustainable in law based upon evidence that served before the prosecutors. This is borne out by what has been stated herein.

179. I remain of the view that, had GP&M given warning statements, the information obtained only at the review stage may have been considered earlier, which may have led to the charges not being preferred. This does

not mean that I "*blame the accused*". They were exercising their right to remain silent.

180. Dr Pretorius' decision to prosecute was taken in consultation with Advocate Mzinyathi. I cannot fault the decision to prosecute based on the evidence available at the time.

181. My decision to overrule the decision to prosecute was taken based on the evidence then available, which differed in part from that which had served before Pretorius and Mzinyathi.

182. The remainder of this paragraph is denied, to the extent it is inconsistent with what is set out above.

Ad paragraph 8

183. There was no "about-turn". I exercised my statutorily-vested powers to provide GP&M an opportunity to make representations as part of a review process.

184. I updated the public concerning the status of the "rogue unit" investigation. This was because, at the time, this issue had received widespread attention in the media. Moreover, as foreshadowed above, I deemed it appropriate to address allegations of "political mischief" reflected in the Minister's statement on Bloomberg media as stated above.

185. The remainder of this paragraph is denied.

Ad paragraph 9

186. I deny that I attempted to distance myself from Pretorius' decision to prosecute. From the outset I emphasised that that decision was not mine. I had been taken by Pretorius, in consultation with Mzinyathi. I maintain that it was the correct decision, based on the evidence before them at the time.

187. It is undeniable that Pretorius' and Mzinyathi's decision to prosecute was unpopular. But he was duty bound to act upon that which served before them.

188. Pretorius and I do not exercise our duties with an eye to popularity; nor do we set out to antagonise the accused or the public at large.

189. I deny any violation of rights of the GP&M, or that the decision to prosecute and the decision to review have been destructive of the integrity and reputation of the NPA.

190. The remainder of this paragraph is denied, to the extent inconsistent with that set out above.

Ad paragraph 10

191. I deny the allegation of incompetence, gross abuse of public powers, recklessness, and that the charges were baseless to begin with.

192. Concerning the "*riots in the streets*" with reference to annexure "**FA1**" on page 71, the article is dated 1 November 2016, the day after I announced my decision to withdraw the charges.

193. Concerning page 72 of annexure "FA1", these were opportunistic looters who damaged property, stole stock, assaulted customers and threatened staff of businesses in the area. To suggest that their rampage was sparked by principled discontent with NPA prosecution decisions is absurd.

194. Page 72 of "FA1" deals with what appears to be the true catalyst for the intended *march*, namely the narrative concerning "State of Capture".

195. The suggestion that R 50 billion was wiped out of the stock exchange as a result of the decision to prefer charges is speculative. In any event, I do not take the markets to operate on the basis that a sitting Minister should not be charged with an offence if there is evidence of wrongdoing on his part.

196. Moreover, the markets cannot condone the burdening of the taxpayer with the penalty which Pillay ought to have paid himself by way of reducing his pension benefits.

197. Like the Applicants' other apocalyptic allegations, the reference to market losses on the JSE must be seen in context. Consideration of the total capitalisation of the JSE affords some context. I refer to a table reflecting that the total market capitalisation of the JSE in 10 October 2016[31] was about R1 trillion. This fell to some R950 billion by close of business the next day, 11 October 2016. What the Applicants elide is that by the next week, the market had recovered all of its losses, and was back up at R1

[31] R: 427-428

trillion. But by 11 November 2016, the market had dropped to R920 billion – significantly below where it stood prior to my announcement.

198. Any suggestion that the institution of the charges had an enduring effect upon the economy is belied by these short-term market movements – which saw the entire R50 billion "*loss*" to be swiftly recouped, then lost again for entirely independent reasons. The losses upon which the Applicants place such store are notional, or "*paper*" losses.

Ad paragraph 11

199. The content of this paragraph is denied. Applicants have not said to whom they think we are beholden.

200. The only support for these allegations are unsubstantiated media reports apparently derived from anonymous leaks.

Ad paragraph 12

201. These are bald, speculative allegations, largely reliant upon the media. Even on a generous interpretation, these do not make out a *prima facie* case of misconduct or lack of fitness and propriety to hold office.

202. In the absence of a *prima facie* case against us, the President may neither suspend nor hold enquiries into our fitness and propriety to hold office.

203. As such the content of this paragraph is denied.

Ad paragraph 13

204. I admit that the President decided not to suspend us, nor hold enquiries into our fitness to hold office.

205. The partial quotation of the President's decision is admitted. The Applicants' complaint in its entirety is to be found in the letter of demand.

206. Paragraph 4 of the President's letter states as follows:

> "Having considered the concerns raised by your clients, [sic] Dr Pretorius and Advocate Mzinyathi, the President could not find substantiation for the claim that their conduct was actuated by the ulterior motive or any other improper motive which would give rise to a charge of misconduct or that any one of them is no longer fit and proper to hold office."

207. The remainder of this paragraph, which is inconsistent with what is stated above or with the President's letter, is denied.

Ad Paragraph 14

208. The content of this paragraph is denied. The Applicants' allegations were without merit, based largely on speculation and media statements. The basis for their calls to have us suspended and an enquiry held is based on their lack of understanding of the powers of prosecutors, as well as the circumstances around which the charges were instituted, and later withdrawn. Once it is understood that Pretorius and Mzinyathi were justified, based upon what served before them, in deciding to prefer the charges, the entire basis of the Applicants' complaint against us falls away.

209. I reiterate what is stated above. I and the other NPA respondents made representations based on the letter of complaint. Considering these documents together it is clear that there is no *prima facie* case of misconduct warranting our suspension and enquiries into our fitness to hold office.

Ad Paragraphs 15 – 16

210. The nature of the relief sought is noted. It is denied that the Applicants are entitled to, or have made out a case for, the relief sought.

Ad paragraph 17

211. The content of this paragraph is denied.

Ad paragraphs 18 and 19

212. The contents of these paragraphs are admitted.

Ad paragraphs 20 and 21

213. The standing of the Applicants is not for present purposes contested.

Ad paragraph 22

214. The content of this paragraph is admitted.

Ad paragraphs 23, 24 and 25

215. The contents of these paragraphs are admitted, save to deny that I, or any of the other NPA respondents, had committed any misconduct.

Ad paragraph 26

216. The content of this paragraph is admitted.

Ad paragraph 27

217. The content of this paragraph is noted.

Ad paragraph 28

218. The standing of the Applicants is not for present purposes contested. The implicit factual claims in this paragraph are denied. I also note that the Applicants have now abandoned their previous allegations of "ulterior purposes" and "political" or "financial gain of others", as appeared in the urgent application.

219. The Applicants do not identify the shadowy "third parties" that allegedly influenced the NPA. The Applicants are invited to lay charges in terms of section 40(1) of the NPA, if they genuinely believe that "third parties" unduly influence the NPA.

220. It is irresponsible of the Applicants to spin conspiracy theories, unless they are willing to back them up with evidence.

Ad paragraph 29

221. I deny that there is any basis for our suspension.

Ad paragraph 30

222. The standing of the Applicants is not for purposes of this application denied.

Ad paragraph 31

223. The standing of the Applicants is not for purposes of this application disputed. The factual and legal claims in this paragraph are denied.

224. The Applicants' concerns, if genuine, reflect a lack of understanding of the manner in which prosecutorial decisions are taken at the NPA. Pretorius and Mzinyathi, faced with the material available to them, were justified in deciding to prosecute.

Ad paragraph 32

225. Insofar as the quotation accurately reflects the text being quoted, it is noted.

Ad paragraph 33

226. The content of this paragraph is admitted, save to point out that in doing so, the NPA collaborates with a number of other entities.

Ad paragraph 34

227. The content of this paragraph, which accords with the content of the letter dated 13 December 2016, attached to the Applicants' founding affidavit as annexure "**FA17**", is admitted. I note however that the Applicants add their own "spin".

228. The quotation from the said letter is as follows:

> "Submissions were received by the office of the Presidency from the relevant parties, the purpose of which was to place His Excellency President Zuma in a position to give due and proper consideration to the same in light of the serious allegations levelled, coupled with the request directed to the President to act against the mentioned individuals."

229. The Applicants' selective narrative is consistent with the distorted gloss and prejudice which fuels their application.

Ad paragraph 35

230. The content of this paragraph is admitted, save for the last two sentences, which are denied.

231. It is noted that the Applicants accept that the President's duty shall be exercised where "the necessary jurisdictional facts exist". In this instance, it is clear that there was no case against Pretorius, Mzinyathi and I, and the President duly concluded as such.

232. I have noted above the ample authorities to the effect that a court will be slow to second-guess the President's exercise of his discretionary powers.

Ad paragraph 36

233. The content of this paragraph is admitted.

Ad paragraph 37

234. The content of this paragraph is denied, specifically to the extent that it suggested that, in this case, the Applicants have made out a *prima facie* case for section 12(6) to be triggered.

Ad paragraph 38

235. The content of this paragraph is admitted.

Ad paragraph 39

236. The contents of this paragraph are denied for reasons set forth above. The charges came to light in the course of the investigation into the "rogue unit", but stood on their own feet.

Ad paragraph 40

237. The allegations made against me in this paragraph did not form part of the Applicants' complaints to the President. The Applicants cannot now seek to expand the issues to beyond what was before the President, in their bid to have the President's decision set aside. These allegations are irrelevant, vexatious and/or scandalous, and are prejudicial, and therefore fall to be struck out.

238. In any event, I respond to these allegations as follows:

238.1. I specifically note that the Applicants, in the urgent application, averred that I was a member of an ill-defined "reference group". In my answering affidavit I denied knowledge of such a group. The Applicants

now advance a watered down version of the same ilk, without adducing any evidence in support thereof.

238.2. These allegations are defamatory. I invite the Applicants to adduce evidence of these accusations, which have allegedly been known to them for over a year now.

238.3. I invite the Applicants to also provide details of the meetings alleged in this paragraph or withdraw their allegations.

238.4. In any event, I reiterate what I stated in my answering affidavit in the urgent application: that I know nothing of a group of this nature.

Ad paragraph 41

239. The content of this paragraph is denied, save for the charges having been announced at the 11 October press conference.

Ad paragraph 42

240. The content of this paragraph is noted. Although the Applicants stated that the full transcript would be made available on request, it was not produced after the State Attorney, on 27 October 2017, requested a full copy of both the transcript and accompanying audio recording with a transcriber's certificate.

Ad paragraph 43

241. I stand by what I said at the 11 October press conference. I admit that the "rogue unit" investigation and the charges announced at the 11 October press conference are separate matters, but they are not unrelated as asserted by the Applicants. The basis for the charges relating to the present matter arose during the investigation of the "rogue unit" matter, and bear the same docket number.

242. It is clear that the Applicants still do not understand the purpose of that press conference. The press conference was not called solely to announce the charges. This is evidenced by the manner in which I conducted the press conference.

243. During the press conference, I addressed two issues.

243.1. I first gave an update on the investigation into the "rogue unit" investigations. I specifically stated that the reason I considered it necessary to deal with the "rogue unit" investigation was because it had attracted great media and public interest.

243.2. I mentioned that Gordhan himself had raised the issue of the investigations during an interview with a media house while on a visit to the United States. I regarded it as necessary that I address any implication that the NPA was party to what Gordhan referred to as "political mischief".

244. I thereafter informed the public and the media of the decision of Pretorius, taken in consultation with Mzinyathi, to prefer charges against Gordhan, Messers Pillay and Magashula. I maintained that the decision was not mine, but that of Pretorius (and Mzinyathi).

245. It is puzzling that the Applicants, while tendering the full transcript of the 11 October press conference, still insist that I had anything to do with the decision to institute criminal proceedings against Messers Gordhan, Pillay and Magushula. I invite the Applicants to refer the Court to any part of the transcript wherein I asserted that the decision to charge was mine, or that I had anything to do with it.

Ad paragraph 44

246. As stated above, I dealt with the two issues independently of each other. I provided an update on the "rogue unit".

247. Although the "rogue unit" formed no part of the charges announced on that day, the subject matter is not unrelated. I deemed it appropriate to address a subject as to which there has been much public speculation. I deny that I had any desire to harass or intimidate anyone, or that I abused public power.

248. I again note that the Applicants previously averred that I had "ulterior purpose". That allegation seems to have been abandoned without explanation.

249. The remainder of this paragraph is denied.

Ad paragraph 45

250. The content of this paragraph is denied.

251. The Applicants will have their remedies in the event that charges relating to the "rogue unit" are preferred.

252. The Applicants misconstrue the purpose of the press conference. I sought to update the public on a matter that had received widespread coverage in the media.

253. I deny that I have rendered myself incapable of exercising my powers objectively in relation to the charged persons.

253.1. My decision to review and withdraw the charges confirms as much.

253.2. If the Applicants were genuinely of the view that I was incapable of performing my duties in respect of the then charged persons, they would have sought to have my decision set aside.

253.3. The Applicants' subsequent conduct in respect of my decision is clearly inconsistent with the allegations contained in this paragraph.

Ad paragraphs 46 - 51

254. I deny any impropriety or pre-judgment.

255. As head of the NPA, I deemed it appropriate to address the issue of the "rogue unit".

256. In the event that a decision is ever taken to prefer charges in connection with the "rogue unit", those subject to prosecution will have remedies in law.

257. As to the charges relating to the early retirement of Pillay, I indicated that I had agreed with the decision of Pretorius and Mzinyathi to initiate a prosecution, having been briefed by him in that regard. Nothing I said precluded me from reviewing the charges upon representations they made.

258. It does not serve the Applicants to rely on selected media articles, much of which reflect speculation, rumours and "leaks", garnished with political commentary.

259. I would add, in passing, that much of the "media hype" to which the Applicants refer was generated by the Applicants themselves, together with some of the subjects of the investigation. I refer again to the Bloomberg media report above.

260. There is indeed a difference between unlawfulness and criminality of conduct. Unlawfulness is one of the elements of a criminal conduct.

261. I stated at the 11 October press conference that the decision to prosecute was not mine. I was merely informed of it, as required in "sensitive or high profile" cases. I did not have to agree with the decision.

262. I have already dealt with the Applicants' misunderstanding of the purpose of the 11 October press conference.

263. The remainder of the allegations are denied, to the extent they are inconsistent with the contents of this affidavit and the law.

Ad Paragraph 52

264. I deny then I manifested incompetence, or that I abused my power. The inferences relied upon for these allegations are ill-founded.

265. The 3 000 requests for early retirement with full benefits arose from the 12 August 2010 memorandum sent by Magashula to Gordhan. (FA, page 130). Magashula stated:

> "Over the past 5 years the GEPF has approved over 3000 requests from various government departments for staff members to retire before the age of 60 with full benefits. The statistics are attached to this memorandum as received from the GEPF (Appendix A)."

266. Pretorius and Mzinyathi endeavoured to obtain the appendix referred to, but were informed that no such document existed.

267. Based upon the amount paid on behalf of Pillay, it would have cost SARS some R3 billion. That being said, some employees who received special benefits have been affected by transformation and restructuring of their departments.

268. I note that the Applicants have abandoned their accusations of ulterior motives against me.

269. I deny the remainder of this paragraph, to the extent that they do not accord with the contents of this affidavit.

Ad paragraph 53

270. I deny that the NPA reneged on any undertaking to Gordhan. The relevant facts are set forth above. The undertaking referred to by Mr Gordhan's attorneys related to possible charges in respect of the "rogue unit" matter, and had nothing to do with the charges I announced.

Ad paragraph 54

271. I remarked in self-deprecating jest that I was accountable for everything that happens at the NPA. I said this during a brief power outage during the course of a press conference at the NPA head office. It is mischievous of the Applicants to cite this in their affidavit.

272. My responsibilities do not include making every prosecutorial decision. I have set forth above my responsibilities as head of the NPA, as well as the manner in which decisions of this nature are taken at the NPA.

273. I indeed have the responsibility to review decisions in appropriate circumstances. Notwithstanding that Gordhan declined to make representations in this matter, I exercised my discretion to review the charges on the basis of evidence obtained after the initial decision to institute charges was taken.

274. I deny that I attempted to distance myself from the charges. I maintained throughout the 11 October press conference that the decision to charge was never mine. Once the Applicants understand this, the entire basis of their allegations against me falls away.

275. The remainder of this paragraph is denied.

Ad paragraph 55

276. To characterise my statement that I was prepared to review the charges as "*backpedalling*" betrays a misconception of the statutory scheme as described above.

277. The Applicants should be aware that, had I taken the decision to prosecute, I would not have been empowered to review the charges. I would, of course, have been entitled to reconsider my decision. However, as explained earlier, it is undesirable for the NDPP, who has specific powers reserved in terms of the Constitution in his or her capacity as the head of the NPA, exercises certain functions *qua* head.

Ad paragraphs 56 and 57

278. The contents of these paragraphs are noted.

279. It is true that the Applicants placed me "on terms" to withdraw the charges. But I was already reviewing them at that time. They were ultimately withdrawn, but prompted the demands of the Applicants. I had informed them that I had prioritized the review, and that I was dealing with it urgently. The Applicants precipitously brought an urgent application to set aside the charges, under case number 83058/16, for which they were rightly punished by the court with a costs order.

Ad paragraphs 58-59

280. I find it difficult to understand why the Applicants would object to efforts to elicit representations and enquire into the background of the charges, as part of the review exercise. It was these enquiries that ultimately prompted me to withdraw the charges – not on the basis that they were improperly instituted in the first instance, but because material that were not initially to hand. I raised questions as to whether it would be possible to prove knowledge of wrongfulness beyond a reasonable doubt.

Ad paragraph 60

281. I deny that there was no evidence warranting the institution or the continuation of the prosecution. If the suggestion is that I should have withdrawn the charges earlier, before the completion of the follow-up investigation, that claim falls to be rejected. I have dealt with this issue above.

282. The implication appears to be that Gordhan was entitled to special treatment. The refusal of Gordhan to make representations indeed slowed the process.

283. The allegation that my mind was closed is unfair. Indeed, my subsequent decision to withdraw the charges demonstrates that I was open to being persuaded by that which served before me.

284. The fact that the Applicants have not taken issue with my decision to overrule the decision to charge exposes the opportunistic manner in which they have pursued this issue.

Ad paragraphs 61 – 61.2.2

285. The contents of this paragraph are admitted insofar as they accurately paraphrase the document quoted.

Ad paragraphs 62 - 64

286. I have explained the steps taken before the prosecution was instituted. Anyone familiar with the prosecution process would know that it would be impractical to follow up every potential avenue of exculpatory evidence before charges are preferred.

287. It is, in any event, settled law that there is no duty on the prosecutor to investigate and accept every defence that a prospective accused might have, before charges are preferred.

288. The Applicants should know also that that the standard for the institution of prosecution is no higher than reasonable prospects of success in the prosecution. On the Applicants' version, the scope of prosecutorial discretion would narrow to vanishing point.

289. The Applicants previously alleged that the charges were "pursued for an ulterior purpose". There is again no explanation as to why the Applicants' view has now changed.

290. The Applicants also assert that call for further documents and/or evidence after the decision to charge was announced reinforces their view of the unlawfulness of the decision to charge. This is untenable. New facts are

presented to prosecutors every day, even in respect of matters already at trial. This does not render the initial decisions to institute criminal proceedings unlawful.

291. The contents of these paragraphs which do not accord with what is stated above are denied.

Ad paragraph 65

292. The content of this paragraph is admitted.

Ad paragraph 66

293. I admit that I held the said press conference to announce my decision.

294. In regard to the full transcript, I refer to what I have stated above.

Ad paragraph 67

295. It is true that I made it clear that I did not institute the prosecution. The adverse implications in this paragraph are denied.

296. The Applicants fail to appreciate that a decision to prosecute could only be reviewed, in the proper sense, if I did not take the initial decision. Oddly, the Applicants accept that I reviewed the decision and are (one assumes) pleased that the charges were withdrawn. Yet, on their own account, the withdrawal of the charges was unlawful.

297. The content of this paragraph is denied, to the extent it does not accord with what is stated above.

Ad paragraph 68

298. The content of this paragraph is denied. I stand by what I stated at the 31 October press conference. I refer to that which is set forth above in this regard.

Ad paragraph 69

299. The content of this paragraph is admitted insofar as it accords with what is stated above, and is denied to the extent that it does not.

300. I admit that I received the Symington memorandum, for the first time, when the Applicants attached it to a letter sent to me on 14 October 2016.

301. I maintain that I had not seen this letter. I have been advised by Pretorius and Mzinyathi that they also had never seen this memorandum. The Applicants are invited to adduce evidence to the contrary.

302. It was proper that I should make further investigations, including obtaining confirmation from Symington himself. I assume that it is not the Applicants' case that I should have taken the Symington memorandum at face value. Section 179(5)(d) has strict requirements which, as the Supreme Court of Appeal has confirmed, must be complied with. Failure to do so would have rendered the decision to overrule the decision to prosecute unlawful.

Ad paragraph 70

303. I deny that the charges were unsupportable from the outset. In fact, the conduct of the Applicants clearly shows that they knew the Symington memorandum was significant. If that was not the case, there would have been no reason for the Applicants to provide that memorandum at the first opportunity they had to communicate with me after the charges had been announced. I have already dealt with the rest of the documents the Applicants provided in that correspondence and, as demonstrated earlier, those documents did not sway me.

304. I was satisfied based upon the briefing that there was evidence sufficient to establish a *prima facie* case. I was not required to be personally *au fait* with all such evidence. Pretorius and Mzinyathi informed me of the nature of the prosecution. Hence my announcement of their decision.

305. The charges were fully justified at the outset. I have dealt with why I think so. It was the new evidence on the issue of intention that caused me to withdraw the charges on review.

306. I must also point out that the duty to institute criminal prosecutions is reserved for the NPA, except for very few instances not relevant for the current proceedings. It matters not that the Applicants would not have preferred the charges. Their evaluation of the evidence is irrelevant. What matters is that Pretorius and Mzinyathi were, based on the material before them, justified in preferring the charges.

307. I did not issue a subpoena.

308. The remainder of the allegations in this paragraph are denied.

Ad paragraph 71

309. The content of this paragraph is admitted.

Ad paragraphs 72 - 72.1

310. I deny that what was allegedly "not said" was "remarkable". As set forth above, it is neither desirable, nor the standard practice for the head of the NPA to evaluate the viability of all charges before they are preferred.

Ad paragraph 72.2

311. I relied upon the briefing of trusted senior prosecutors. I had no reason to believe that they were wrong. In fact, they were justified in making the decision based on the material before them.

312. Any decision by me to review the decision to prosecute without following the requirements of section 179(5)(d) would have rendered the decision unlawful.

Ad paragraph 72.3

313. I have already stated why it was not an error to prefer the charges. The Applicants imply that a prosecutor should have taken into account the status of the accused, and media speculation, in his assessment of the charges. That would fly in the face of the constitutional values that the Applicants purport to defend.

314. I have already stated that it matters not what the Applicants' views are on the sufficiency of the evidence. I believe that the preferring of the charges was, under the circumstances, justified.

Ad paragraph 72.4

315. I have addressed this subject matter above.

Ad paragraph 72.5

316. I have addressed this subject above. I deny that NPA reneged on any undertaking.

Ad paragraph 72.6

317. There is no basis or reason to hold anyone to account for charges which, on the information before the prosecutors, met the threshold requirement for the institution of criminal proceedings.

Ad paragraph 73

318. I deny that I misunderstood or misrepresented the law in stating that I could not, *mero motu* intervene in a decision to prosecute taken by Pretorius and Mzinyathi. I have dealt with the powers of review and the manner in which prosecutorial decisions are taken at the NPA. This statement must be seen in that context.

319. The remainder of the contents of this paragraph are admitted, to the extent they correctly reflect what I stated at the 31 October 2016 press conference.

Ad paragraphs 74 - 76

320. The contents of these paragraphs are denied. I have stated that I reasonably acted on the basis of a briefing I received from trusted senior prosecutors, which I had no reason to disbelieve.

Ad paragraph 77

321. The adverse implications in this paragraph are denied. It is true that I relied primarily upon a briefing by the prosecutors, in whom I reposed full confidence. I did not need to evaluate every piece of evidence that the prosecution team relied on at that stage.

322. When it came to the review stage, I directed an investigation, which led to the withdrawal of the charges.

323. It is not necessary for me to engage with the contentions of law advanced by the Applicants in this paragraph. The fact is, as I have already stated above, that the charges were justified based on the information that served before the prosecutors.

Ad paragraph 78

324. I stand by what was stated at the press conference.

Ad paragraphs 79 - 80

325. I do not know what is meant by the claim that I *adopted* the decision to prosecute. I formed the view that there was sufficient evidence to meet the threshold for the institution of a prosecution.

326. I deny ever announcing that the charges were "*not credible, were not supported by evidence and never had been*". I specifically invite the Applicants to refer this Court to any evidence of this misleading assertion.

327. I maintain, as I did then, that Pretorius and Mzinyathi were justified in preferring the charges, considering the material available to them at the time.

328. Further, I have maintained that in light of Symington"s memorandum, I considered that the prospects of proving *mens rea* beyond reasonable doubt were not good. Pretorius and Mzinyathi did not have the benefit of the Symington memorandum before they preferred the charges.

329. With regard to the remainder of the allegations, I reiterate what is stated above.

Ad paragraph 81

330. The Luthuli House meeting did not feature in the Applicants' complaints to the President. The Applicants have known about this issue for more than a year, and have never complained to the President about it.

331. Any complaint that was not before the President, falls to be struck out, or at least should not be considered by this Court.

332. However, to the extent this Court sees fit to entertain these allegations, I admit the contents of this paragraph.

Ad paragraph 82

333. I am aware that my visit to Luthuli House caused disquiet in some quarters. I deny that it is necessarily improper that a NDPP attend such a meeting. It may be justified in special circumstances, such as arose in this instance.

334. In this regard I say:-

334.1. During the afternoon of 10 October 2016, I received a telephone call from Minister Masutha, who invited me to attend an emergency meeting about the violence that had erupted at institutions of higher learning in the course of the *'# Fees Must Fall'* campaign.

334.2. Minister Masutha is a member of the Justice, Crime Prevention and Security Cluster ('**JCPS**'). The President had requested Ministers of the JCPS Cluster to urgently brief him on interventions by their respective departments to bring stability to a volatile situation. I understood that the President was leaving the country later that day. He did not invite me to the meeting. Nor was the President aware that I would be in attendance.

334.3. The Minister of State Security, who was in attendance, deputised as the Minister of Police. The Minister of Social Development, deputised for the Minister of Defence and Military Veterans. Many of the members of the executive were already at the venue, where they had attended earlier engagements. Due to the urgency of the meeting, it was deemed necessary that the meeting take place at the venue in question.

344.4 Minister Masutha was of the view that, given my position, I could contribute more than he could at the meeting, and hence requested my attendance. I was well placed to explain the initiatives undertaken by the NPA in stabilizing the volatile situation around the escalating unrest at institutions of higher learning.

334.4. The NPA Prosecution Policy requires the NPA to cooperate effectively with the police and other investigating agencies to enhance efficacy in the criminal justice processes.

334.5. Section 22(4)(a)(iii) empowers me to advise the Minister of Justice on all matters relating to the administration of criminal justice. Section 22(4)(i) empowers the NDPP to make recommendations to the Minister with regard to the prosecuting authority and the administration of justice as a whole.

344.7 As head of the NPA and by virtue of the provisions of section 22(1) of the NPA Act nothing precluded me from attending an

emergency meeting at the invitation of the Minister with Ministers of the JCPS Cluster and the President.

334.6. At no stage were individual or specific matters implicating any person(s) discussed. Neither was the arrest nor the prosecution of any specific person(s).

334.7. In any event, decisions around these matters are ordinarily made under the jurisdiction of the provincial Directors of Public Prosecutions ('*DPPs*') concerned. To this end, section 20(3) of the NPA Act empowers DPPs to (i) institute and conduct criminal proceedings on behalf of the State; (ii) carry out any necessary functions incidental to instituting and conducting criminal; and (ii) discontinue criminal proceedings in the area of jurisdiction for which he or she has been appointed.

334.8. The issue of the summons against Gordhan was not discussed. I learned that the Minister Masutha had advised the President of the issues regarding the summons days earlier. There was hence no need to discuss the matter relating to Gordhan. The only issue discussed was the violence at institutions of higher learning.

Ad paragraphs 83 and 84

335. I again point that the Mandy Weiner interview did not form part of the Applicants' complaints to the President. The President hence did not have

an opportunity to consider the issue. The Applicants have known about the interview for more than a year, and have never complained to the President about it.

336. I deny that this can therefore be considered by this Court. Any issue now raised by the Applicants, which was not before the President, falls to be struck, or at least should not be considered by this Court.

337. However, to the extent this Court sees fit to entertain this issue, I admit the interview with *Eyewitness' News* Mandy Wiener. I do not intend to respond to offensive allegations and gratuitous insults.

Ad paragraphs 84.1 – 84.10

338. I have emphasised that the conduct that formed the basis of the charges was *prima facie* unlawful. The charges were withdrawn after I had formed the view that the necessary criminal intention might not be provable.

339. I remain convinced that Pretorius was justified in making a decision to charge the GP&M based upon that which served before him.

340. I have explained in detail the circumstances of my visit to Luthuli House.

341. I have explained also the reasons for the withdrawal of the charges upon review in terms of section 179(5)(d) of the Constitution. I submit that my conduct and that of Pretorius and Mzinyathi was in compliance with the powers vested in us.

342. I prefer not to answer personal invective.

343. I have dealt with the effects of the economy above.

Ad paragraph 85

344. I reiterate my submissions in respect of the Luthuli House meeting and the Mandy Wiener interview. The allegations arising out of presentation to Parliament on 4 November 2016 were never referred to the President. It is not competent to seek a review of a decision on the basis of complaints that did not exist before the decision was taken.

345. If the Applicants genuinely considered what was said in Parliament to be supportive of their case, they would have lodged a complaint with the President.

346. The Applicants cannot be heard to attack the President's decision on the basis of material that never served before him.

347. However, in the event that the Court sees fit to consider this issue, I state that I was not summoned to attend Parliament. I was invited to attend to provide a briefing.

Ad paragraph 86

348. The content of this paragraph is admitted insofar as it accords with what was said by the chairperson of the Committee on Justice and Correctional Services.

349. I note that the chairperson cautioned that the Committee would not be party to the manipulation of public opinion.

Ad paragraph 87

350. I prefer not respond to personal attacks. The allegation that I participated in "*a seeming vendetta… with the perceived political rivals of President Zuma and his allies*", is vague, speculative and completely unfounded.

351. I have explained the circumstances of my visit to Luthuli House.

352. I do not intend to burden the record with the details of my objection to the presence of Ms Breytenbach at the meeting of the Parliamentary Committee. This falls beyond the scope of the letter of complaint.

Ad paragraphs 88 – 88.8

353. My briefing to the Parliamentary Committee is a matter of public record.

354. I have noted that the Mandy Wiener interview and my attendance at Parliament on 4 November 2016 fall beyond the scope of the letter of complaint.

Ad paragraphs 89 - 95

355. I note that the Applicants accept that the Jiba matter is "factually unrelated to the Charges". That being so, one wonders why the Applicants find it necessary to now raise that issue.

356. It bears mentioning that the withdrawal of the charges against Jiba now raised was known by the Applicants well before their letter of demand addressed to the President.

357. I reiterate my submissions in respect of the Luthuli House meeting, the Mandy Wiener interview and the 4 November 2016 parliamentary briefing.

358. To the extent necessary, I now respond to the allegations concerning the Jiba matter.

359. I deny that my announcement that the charges against Jiba had been withdrawn renders me unfit and improper for office.

360. As a starting point, the Applicants are well aware that Mr Marshall Mokgathle ("**Mokgathle**"), a senior Deputy Director of Public Prosecutions, (and not I), that took the decision to withdraw the charges of fraud and perjury against Jiba. The decision to withdraw the charges is subject of a review brought by them under *Case No. 89849/2015* which was heard on 30 and 31 October 2017, before the Full Bench. Judgment was reserved.

361. The charges stem from Jiba's exercise of a statutory power in her then capacity as acting NDPP. She authorised racketeering *charges in terms of* the Prevention of Organised Crime Act 121 of 1998, as amended, ("**POCA**") against then - Major General Johan Booysen ("**Booysen**"), a former senior police official.

362. Booysen successfully took Jiba's decision to authorise the POCA prosecutions against him on review in *Booysen v Acting NDPP and Others*[32]. The judgment, *per Gorven J*, made certain adverse findings

[32] 2014 (9) BCLR 1064 (KZD).

against Jiba, which culminated in the charges of fraud and perjury being brought against her.

363. It is important to note that nowhere in his judgment did Gorven J recommend that Jiba be charged with fraud and/or perjury. Nor did Gorven J opine that Jiba had been *mala fides* or acted dishonestly.

364. In the matter of *General Council of the Bar South Africa v Jiba and Others* ("**the GCB matter**")[33] the Court, (in the course of considering whether Jiba was a fit and proper person to remain the roll of advocates) considered the issuance of the POCA certificates issued by Jiba against Booysen, and which formed the subject matter of the Gorven J judgment.

365. Although this was not an appeal against the decision of Gorven J, it is not insignificant that the Full Bench took a different view of the rationality of Jiba's decision to issue the POCA certificates. Legodi J found as follows:

> "*I cannot find any mala fides and/or ulterior motive in the authorisation by Jiba as contemplated in POCA*"[34].

366. I submit that this finding vindicates the decision of Mokgathle to withdraw charges against Jiba. Indeed, it is far-fetched to imagine that any court could find Jiba guilty of fraud in the wake of the decision of the Full Bench in the GCB matter.

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[33] [2017] (2) SA 122 (GP)
[34] At para 67.

Ad paragraph 96

367. It is admitted that the Applicants wrote the letter of complaint to the President in respect of the charges against the GP&M. It is denied that they are unfit and improper to occupy their offices. The remainder of this paragraph is noted.

Ad paragraph 97

368. The letter of complaint set the parameters within which the President considered the allegations raised by the Applicants. It is to be deplored that the Applicants burden the record with unrelated documentation falling outside the scope of their complaint to the President.

Ad paragraphs 98 - 99

369. The content of these paragraphs is admitted.

Ad paragraph 100

370. It is admitted that, on 7 November 2016, the President sought an extension until 21 November 2016 to make his decision. The extension afforded him a proper opportunity to address the matter.

Ad paragraph 101

371. The Applicants' views are noted. They are without merit. It is admitted that the Applicants launched an urgent application. The Court found that it was premature. The Applicants were saddled with a costs order.

Ad paragraph 102

372. The scheduling of representations and the deadline to provide such representations is admitted.

Ad paragraph 103

373. It is admitted that the urgent application was heard on 22 November 2016. It was struck from the roll. Our position in this regard is covered in our answering affidavits to the urgent application, which are attached to my representations.

374. It is denied that the President made clear that there was insufficient evidence to justify an enquiry at paragraphs 7 and 8 of his answering affidavit in the urgent application.

375. Paragraphs 7 - 7.4 of the President's answering affidavit set out jurisdictional facts necessary for him to suspend a NDPP.

376. Most notably the President said the following:

> "It is therefore important to then examine the bases which the applicants offer in impugning the integrity of the second to fourth respondents. I do so purely to show that the applicants have not provided the factual predicate for the conclusions they seek. I do not deal with these assertions or their merits as I have not received the responses from the second to fourth respondents." (emphasis added)

377. It is noteworthy that the President confirmed the reason for my visit to Luthuli House was to discuss the student protests[35].

Ad paragraph 104

378. The content of this paragraph is admitted.

Ad paragraph 104.1

379. The content of this paragraph is denied.

Ad paragraphs 104.2 and 104.3

380. The contents of these paragraphs are admitted.

Ad paragraph 105

381. The content of this paragraph is admitted insofar as it accords with annexure "**FA17**".

Ad paragraph 106

382. The first sentence of this paragraph is admitted insofar as it accords with annexure "**FA18**". The second sentence of this paragraph is noted.

Ad paragraphs 107 – 107.3

383. The content of these paragraphs is admitted.

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[35] Annexure "**FA15**", paragraph 8.3.

Ad paragraph 108

384. The content of this paragraph is noted.

Ad paragraph 109

385. The content of this paragraph is admitted insofar as it accords with annexure "**FA21**".

Ad paragraph 110

386. The first sentence of this paragraph is noted. The remainder of this paragraph is admitted insofar as it accords with the letter dated 6 April 2017.[36]

Ad paragraphs 111 – 111.2

387. The contents of these paragraphs are noted.

Ad paragraph 112

388. Pretorius did submit separate representations. As acknowledged, in the Applicants' supplementary founding affidavit ("**SFA**"), this was probably an oversight.

Ad paragraph 113

389. The content of this paragraph is denied. I reiterate what is stated above.

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[36] R: 653-663

Ad paragraphs 113.1 – 113.13

390. The contents of these paragraphs are admitted insofar as they accord with what is stated in my representations, which are set out above. To the extent that these paragraphs are inconsistent with my representations, they are denied.

Ad paragraph 114

391. The content of this paragraph is denied.

Ad paragraphs 114.1 – 114.2

392. I refer to my answers as set out above.

393. I have addressed these allegations, as stated above.

Ad paragraph 115

394. I admit that Mzinyathi's representations state that he read my representations and associates himself with the contents thereof. The remainder of this paragraph is denied to the extent it is at variance with Mzinyathi's representations.

Ad paragraph 116

395. The first sentence of this paragraph is admitted. The remainder is denied.

Ad paragraphs 117 - 118

396. The contents of these paragraphs are denied.

Ad paragraph 119

397. The contents of this paragraph are admitted, save that it is denied that my conduct constituted a "blunder". I refer to my account above.

Ad paragraph 120

398. The contents of this paragraph are denied. I have no doubt that for these senior prosecutors to be barred from exercising their functions would adversely impact the day-to-day functioning of the NPA.

Ad paragraph 121-123

399. I deny that I contradicted myself at the various press conferences, during the Mandy Wiener interview, and at my attendance at Parliament. (I reiterate that the latter two items fall beyond the scope of the letter of complaint.)

400. I deny that I cannot be trusted. The Applicants have not put forth facts to support these allegations. I take umbrage at the Applicants' impugning of my memory. The remainder of these paragraphs is denied.

Ad paragraphs 124 - 130

401. I deny that I shifted responsibility to anyone. Pretorius took the decision to institute the charges, with which I concurred, having been briefed by Pretorius and Mzinyathi.

402. I refer to what is stated above.

Ad paragraphs 131, 133 and 134

403. I admit the contents of these paragraphs insofar as they accurately reflect the terms of the relevant provisions of the Constitution and the NPA Act.

Ad paragraph 132

404. The content of this paragraph is admitted.

Ad paragraphs 135 – 140

405. The contents of these paragraphs are noted. As to the nature of the relief sought by the Applicants, it is denied that they have laid a basis therefore.

Ad paragraphs 141 – 144

406. The contents of these paragraphs are admitted insofar as they accord with the relevant legislative provisions, the case referred to and the Code of Conduct.

Ad paragraph 145

407. The content of this paragraph is admitted.

Ad paragraph 146

408. I do not understand the distinction drawn by the Applicants between subjective and objective determinations.

Ad paragraphs 147 - 148

409. I deny that the President was presented with a *prima facie* case of misconduct or lack of fitness or propriety. The remainder of these paragraphs is likewise denied.

Ad paragraph 149

410. This is a matter for legal argument. I refer to what I have foreshadowed above regarding the standard of rationality.

Ad paragraph 150

411. The underlying rationale and interpretation of s.12(6) of the NPA Act will be the subject of argument.

412. I admit the balance of this paragraph, save the final sentence.

Ad paragraph 151

413. This comment is not apposite in these proceedings

Ad paragraphs 152 - 154

414. The contents of these paragraphs are denied.

Ad paragraph 155

415. Save for the first sentence, the remainder of this paragraph is denied.

Ad paragraph 156

416. The content of this paragraph is noted.

Ad paragraphs 157 - 161

417. The contents of these paragraphs are denied.

Ad paragraph 162

418. The remainder of this paragraph is noted, save for negative implications, and the last two lines, which are denied.

Ad paragraph 163

419. It is denied that notional future charges against Gordhan warrant any of the relief sought by the Applicants.

Ad paragraph 164

420. The content of this paragraph is denied. We have not abused our offices.

Ad paragraph 165

421. The content of this paragraph is admitted insofar as it accords with what the courts have held. Any negative implication is denied.

Ad paragraphs 166 - 167

422. The content of this paragraph is denied.

Ad paragraph 168

423. The first sentence of this paragraph it is admitted. The second sentence is denied.

Ad paragraphs 169 - 170

424. The contents of these paragraphs are for legal argument.

Ad paragraphs 171 - 173

425. The contents of these paragraphs are denied.

Ad paragraph 174

426. I understand that the President made his decision based on the allegations raised in the letter of demand together with representations submitted by Pretorius, Mzinyathi and myself. The President decided that there was no *prima facie* case against us. The remainder of this paragraph is denied.

Ad paragraphs 175 and 176

427. The contents of these paragraphs are denied.

AD SERIATIM RESPONSE TO THE APPLICANTS' SUPPLEMENTARY AFFIDAVIT

Ad paragraphs 1 and 2

428. The contents of this paragraph are noted.

Ad paragraph 3

429. I dispute that all of the facts alleged by the deponent are within his personal knowledge.

Ad paragraphs 4 and 5

430. The contents of these paragraphs are noted.

Ad paragraphs 6 to 9

431. The contents of these paragraphs concerning the correspondence referred to is admitted, insofar as it accords with the content of the correspondence.

432. Save to deny that there are documents that bolster the Applicants' case, or which provide further grounds of review in respect of the President's decision, the rest of the contents of these paragraphs are noted.

Ad paragraph 10

433. It is denied that Pretorius' representations contain a "remarkable admissions"; that there was insufficient evidence to bring the charges; and that the charges were brought in bad faith. The evidence that supported Pretorius' belief that there was a *prima facie* case capable of successful prosecution has been set out above.

434. The Applicants' attack on Pretorius' representations is unfounded.

435. Pretorius was entitled to rely on the prosecutors' conclusion that there was sufficient evidence, amounting to at least *prima facie* case, and that there was a reasonable prospect of securing a conviction.

436. Pretorius did not sit back passively. I have set out above the steps taken by Pretorius prior to preferring the charges.

437. The allegation that the prosecution was brought in bad faith is baseless.

Ad paragraph 11

438. To the extent that the allegations contained in this paragraph accord with what is set out in the Opinion, the contents thereof are noted.

Ad paragraph 12

439. It is denied that the President's counsel erred, or that the President's reliance upon the Opinion fatally taints the President's decision.

Ad paragraph 13

440. It is denied that the judgment of the SCA judgment in the Spy Tapes Case is of any relevance to the present application. I reiterate what is stated above in this regard.

441. The Applicants seek to review the President's decision of 3 March 2017. The judgment of the SCA, and the preceding judgments in the Spy Tapes Case fall beyond the scope of the letter of demand.

442. The remainder of the allegations in this paragraph are denied.

Ad paragraph 14

443. Save to deny that the documents referred to herein reinforce the grounds of review, the content of this paragraph is noted.

Ad paragraph 15

444. Save for denying that the charges were brought without sufficient evidence, or in bad faith, the paragraph is noted. Any negative implication arising from the Applicants' characterisation of Pretorius' representations as "admissions" is denied.

Ad paragraph 16

445. Applicants fail to grasp how criminal prosecutions are pursued, and particularly how the element of intent is analysed by prosecutors.

446. Prosecutors frequently debate matters amongst themselves before decisions are taken. Indeed, it is not uncommon for members of the prosecution team to hold divergent views in respect of the issues at hand.

447. *Mens rea*, being a subjective element of an offence, is almost always proved by inference from the facts.

448. The more closely involved prosecutors are in a particular case, the better informed they are of the circumstances from which criminal intent may be inferred.

449. There was therefore nothing unusual or irregular in Pretorius, prior to authorising the prosecution of the GP&M, questioning his prosecution team about elements of the offence to be charged. Indeed, a heartily scepticism of one's subordinates is a hallmark conclusion of proper oversight.

450. The content of this paragraph is admitted, insofar as it accords with what is stated in Pretorius' representations.

Ad paragraphs 17 to 19

451. It is denied that there is any suggestion in Pretorius' representations that he was not himself satisfied that there was at least inferential evidence of Gordhan's fraudulent intent. The fact that he, asked pointed questions, does not mean that, when he made his decision, he was not satisfied that the element could be proved.

452. The Applicants in paragraph 16 of the Supplementary Founding Affidavit, referring to Pretorius' representations, point out that one of the issues considered was whether Gordhan had been "duped" by Magashula and Pillay. That might have vitiated the element of intent. It was therefore imperative that the issue be discussed with the prosecutors. From this, it is clear that Pretorius did not blindly follow the advice of his subordinates.

453. In my view, the prosecution team was entitled to conclude from the evidence, as it then stood, that it could prove criminal intent by inference. I have already dealt with the facts from which such inferences could be drawn.

454. The Applicants seem to suggest that the test for the proof of the commission of a crime should be different in "high profile" cases. That would be anathema to the principle of the equality before the law. Crimes committed by "high profile" accused are proved in the same way as any

other crimes. I have already referred to the relevant provisions of the Prosecution Policy Directives in respect of prosecutions in "high profile" cases.

455. I have already said that, on the basis of what served before them at the time, Pretorius and Mzinyathi were justified in concluding that there was sufficient evidence to prefer the charges, and why I subsequently concluded that the prospects of success were not good.

Ad paragraphs 20 to 23

456. It is denied that Pretorius had only one piece of evidence. A number of items, taken together, suggested that the offence could be proved. I have set out the facts from which Pretorius and Mzinyathi had concluded that GP&M had a case to answer.

457. A *prima facie* case is all that the prosecution needs to institute a prosecution, coupled with reasonable prospects of success.

458. As stated above, I was satisfied that based upon that which served before Pretorius and Mzinyathi, there were reasonable prospects of success.

459. I deny the remainder of the allegations, insofar as they are inconsistent with what I have stated in this affidavit.

Ad paragraph 24

460. I reiterate what is set out above.

461. The fact that the Applicants believe that, if they themselves were prosecutors they would not have been able to secure a conviction is not the test.

Ad paragraph 25

462. The Applicants misconceive the basis upon which the prosecution team decided that there was a *prima facie* case to prefer the charges.

463. It is unnecessary for me to repeat what I have already stated, save to deny those allegations that are inconsistent with what I have stated.

Ad paragraphs 26 and 27

464. The allegation that Pretorius is incompetent or lacks integrity, and that there is a basis upon which the President should have instituted an enquiry against him, Mzinyathi and myself is baseless.

465. The contents of these paragraphs are denied.

Ad paragraph 28

466. I have already dealt with the manner in which the decision to prosecute was taken.

467. I was not required to myself examine every item of evidence that served before Pretorius and Mzinyathi. In any event, additional evidence that served before me, which is the basis upon which I overruled the decision to prosecute, did not serve before Pretorius and Mzinyathi.

468. I have already dealt with the manner in which prosecutorial decisions are taken. Individual prosecutors are required to exercise their discretion in making such decisions.

469. I deny the remainder of the allegations, insofar as they are inconsistent with what I have stated.

Ad paragraphs 29 to 39

470. I deny that there was no evidence to prefer the charges. I refer to what is set out above.

471. I have also dealt with the issue of the "rogue unit".

472. The rest of the contents of these paragraphs is denied, insofar as they are inconsistent with what I have stated above.

Ad paragraph 40

473. It is denied that there was any basis for the President to invoke s. 12(6) of the NPA Act.

Ad paragraphs 41 and 42

474. Save to reiterate that there is no evidence that Pretorius or any of the other NPA respondents misconducted themselves and no basis for suspension, the contents of these paragraphs are noted.

Ad paragraphs 43 and 44

475. The suggestion that I breached the NPA Code of Conduct is denied.

476. It is denied that my continued presence at the NPA affects the integrity and competence thereof. There is no basis for invoking s 12(6) of the NPA Act.

Ad paragraphs 45 to 49

477. I concur with Pretorius' views. I deny that:

477.1. I lack conscientiousness, integrity and/or competence.

477.2. Any facts presented by the Applicants support the impugned allegation of my fitness and/or propriety to hold office.

Ad paragraph 50

478. The Applicants insist that the judgment in the urgent application is irrelevant to the President's decision. The Applicants at the same time insist on the relevance of statements made recently in the "Spy Tapes" case. Those statements would, by the same token, be irrelevant to the President's decision.

Ad paragraphs 51 to 53

479. Save to deny that the Opinion undermines lawfulness of the President's decision, or fails to deal with relevant material, the contents of these paragraphs are noted.

Ad paragraphs 54 to 56

480. Applicants read the Opinion selectively. It maintains throughout that a *prima facie* case is required in order to trigger the institution of an enquiry.

481. The Applicants' extract from the Opinion ignores that it states that:

> "A demand that an National Director of Public Prosecutions [...] must be provisionally suspended and subjected to an enquiry into fitness for him to hold office is one which must be approached with utmost circumspection and caution. To do otherwise would be inconsistent with the constitutionally protected status of the NPA..." (Para 4)

482. The Opinion clarifies the circumstances whereunder the NDPP could be suspended and an enquiry instituted (Para 8). It refers to substantiated allegations of misconduct, or lack of fitness or propriety to hold office. Counsel reiterates that a *prima facie* case of misconduct or unfitness of impropriety is required for the President to exercise his discretion (Para 17).

483. The opinion notes that, a mere suspicion, or an unsubstantiated allegation, that the NDPP committed misconduct, will not justify s 12(6) of the NPA Act.

484. There is nothing in the Opinion that suggests (contrary to what the Applicants assert in paragraph 56), that a director of the NPA may never be removed for incompetence.

Ad paragraphs 57 and 58

485. A proper reading of the Opinion shows that the "*sufficient authority*" referred to in paragraph 16 thereof flows from the preceding two sentences in that paragraph, that "*the Constitution and the NPA Act enjoins…for their removal from office.*"

486. Contrary to the implication advanced by the Applicants, this has nothing to do with the *Pikoli* judgment, which is discussed in paragraph 15 of the Opinion.

487. The balance of these paragraphs likewise reflects the Applicants' incorrect reading of the Opinion.

Ad paragraph 59

488. The Applicants complain that the Opinion ignores the threat posed by the failure to discipline and remove a NDPP or "*who has misconducted himself*", such that it reveals that he lacks the requisite integrity to hold office.

489. But that is exactly what the Opinion addresses in paragraphs 17, 22 and 23. It says that the President would be entitled to suspend the directors if a *prima facie* case of misconduct is established, it does not say a case must be proven before the provisions of section 12(6) can be triggered.

490. The Applicants complain that the Opinion does not deal with instances where the President may suspend the directors in order to protect the independence of the NPA. The Applicants suggest that the President

would be entitled to suspend the directors "to protect the independence of the NPA".

491. But in fact, the latter would not be a self-standing ground. The President would be entitled to invoke s 12(6) of the NPA Act if the jurisdictional facts (including the existence of a *prima facie* case) are met. This is the basis upon which the Opinion is founded.

492. The President is entitled to suspend and order an enquiry if the threat to the NPA is a result of one of the grounds listed in s 12(6). The Opinion deals with two grounds by considering the requisite jurisdictional facts at paragraphs 19, and at paragraphs 17, 22 and 23.

Ad paragraphs 60 and 61

493. The Opinion states that the President can exercise his discretion to suspend if a *prima facie* case is made. It is not clear why the Applicants deem this threshold to have been set "*so high that it may never be triggered*". A *prima facie* standard is not a high threshold. That being said, unsubstantiated allegations cannot be sufficient to trigger the provisions of section 12(6), especially considering the constitutional guarantee of independence of the NPA.

494. The Applicants complained that Pretorius and Mzinyathi preferred the charges on the basis of:

494.1. insufficient evidence (see paragraph 15 of the SFA).

494.2. in bad faith (see paragraph 15 of the SFA).

494.3. unsubstantiated assurance (see paragraph 22 of the SFA).

494.4. suspicions (see paragraph 22 of the SFA).

495. It is significant that the test for the institution of criminal prosecution is the same *prima facie* test as applies in the s 12(6) setting. Ironically, when the same test in respect of a suspension and enquiry is applied, the Applicants insist that there was sufficient evidence of misconduct on the part of Pretorius, Mzinyathi and myself. It seems the Applicants are happy to accept that slender, unsupported allegations may trigger the provisions of section 12(6), but demand much more than a *prima facie* case with respect to the institution of the charges against GP&M.

Ad paragraphs 62 and 63

496. The complaint herein is based on the allegation that Pretorius and Mzinyathi were negligent or incompetent in preferring the charges. If it is accepted, as it must be, that Pretorius and Mzinyathi concluded on the basis of the evidence before them that GP&M had a case to answer, then the complaint about non-compliance with the Code is unfounded.

497. By the same logic, the Applicants' attack on the Opinion is unsustainable.

Ad paragraphs 64 and 65

498. The Applicants' contention that the Opinion suggests that there is an elevated threshold for triggering a section 12(6) enquiry, and that the President may, on this version, never institute an enquiry, is misplaced.

499. The Opinion clearly states, that where there is a *prima facie* case, the President should invoke the provisions of section 12(6).

Ad paragraphs 66 to 70

500. It is denied that:

500.1. the Opinion did not engage with the facts as they appear in the record; or that

500.2. the Representations were parroted in the Opinion.

501. The prosecution team was satisfied that there were reasonable prospects of success in respect of the charges, based on evidence available to them at the time. A *prima facie* case can co-exist with the existence of exculpatory evidence.

502. The President's counsel deal with the complaints against me in paragraph 37 of their Opinion. They conclude that the allegations were unsubstantiated and that no specific conduct on my part was cited – save for the holding of the press conference. This conclusion is borne out by objective facts.

503. The Symington Memorandum indeed shed new light on the matter.

504. The Opinion concluded that the conduct complained of did not constitute a *prima facie* case of misconduct. The Opinion also acknowledges (at paragraph 43.3), that if there was any substantiation of the allegations, an enquiry should be established. This clearly contradicts the Applicants' assertion that, on the conclusions in the Opinion, an enquiry may never be instituted.

Ad paragraphs 71 to 75

505. The "Spy Tapes" matter is of no relevance to the decision sought to be reviewed and set aside by the Applicants herein.

506. I reiterate what I stated above in respect of the Luthuli House meeting, the Jiba matter, the Mandy Weiner interview and the allegations about a shadowy "group", previously referred to by the Applicants as a "reference group".

507. However, to the extent that the SCA judgment may be deemed to be of any relevance, I submit that:

507.1. The SCA upheld the judgment of this Court of 29 April 2016, sitting as a full bench, in the same matter;

507.2. The Applicants knew at the time of their letter of demand to the President that the NPA had been refused leave to appeal that judgment;

507.3. Leave to appeal was granted by the SCA only on the day of the hearing in September 2017;

507.4. The judgment of this Court was therefore extant;

507.5. The decision of the then acting NDPP to institute charges against the now President had been reinstated.

508. It was therefore open to the Applicants to invoke the "Spy Tapes" matter in their letter of demand, dated 1 November 2016. They did not, and instead raise it *post facto* in this application.

509. With regard to the substantive findings of the SCA in the "Spy Tapes" matter, I point out the following:

509.1. It is inaccurate to suggest that the NPA's case in that matter had no merit. I deal with this issue in more detail below.

509.2. In fact, the NPA had the view, on the advice of counsel, that, to the extent Mpshe sought to exercise a power of review (as opposed to that of reconsideration), when the Constitution empowered him to exercise both powers, his decision was distinguishable from the *Harris*[37] and *Liebenberg*[38] decisions of the Constitutional Court.

[37] Minister of Education v Harris 2001 (4) SA 1297 (CC)
[38] Liebenberg NO and Others v Bergrivier Municipality 2013 (5) SA 246 (CC)

510. However, in the course of preparations for the hearing at the SCA, it became apparent that, when Mpshe took the decision, he had relied on a different provision of the Constitution than that which empowered him.

511. The DA, which had brought the application to have Mpshe's decision set aside, never took the point. For that reason, the basis upon which the SCA dealt with the matter had not been argued before this Court.

512. It is only during preparations for the hearing at the SCA, scheduled for 14 September 2017, that this new basis of the alleged unlawfulness of Mpshe's decision was brought to my attention by my counsel. It remained the view of counsel, however, that it was arguable that the authorities on this point, the Harris and Liebenberg decisions (holding that where an administrator relies on the wrong provision in making his decision, such decision will be deemed unlawful, even if there is another provision upon which the same decision could have been arrived at), were distinguishable on the facts.

513. I immediately instructed my legal team to file supplementary heads, in which I raised the possible unlawfulness of Mpshe's decision, a line of argument which had not been pursued by the DA.

514. However, at the outset of the hearing at the SCA, it became clear to my legal team that the bench was not receptive to attempts to distinguish the Harris and Liebenberg decisions. It was then that I instructed my legal representatives not to pursue the point any further. Rather, it argued in

good faith, that the Harris and Liebenberg decisions could be distinguished.

515. It is false, therefore, that the NPA, well aware of the vulnerability of its argument, cynically elected to take the matter to a hearing only to drop it at the courthouse steps.

516. The remainder of the allegations made against me are denied.

Ad paragraphs 76 to 77

517. The contents of these paragraphs are denied.

518. Over and above what is stated above, I specifically deny that I am beholden to the President, or that any evidence exists to sustain such an allegation.

519. This is in any event a new ground for review, which did not appear in the letter of demand.

520. If the Applicants are not satisfied with the manner in which the NDPP is appointed, it is open to them to lobby for a constitutional amendment.

Ad paragraph 78

521. It is denied that there is any conflict of interest in the roles played by the Respondents in this matter. I refer to what I have stated above in this regard.

Ad paragraph 79

522. I deny that the delay by the Applicants in filing their Supplementary Founding Affidavit was unavoidable.

523. The manner in which the Applicants dismiss the Opinion is fundamentally at odds with the assertion that it was "not only factually but legally complex".

524. It is denied that the "Spy Tapes" case is pertinent to the relief sought herein. The decision sought to be reviewed and set aside by the Applicants preceded the judgment of the SCA.

Ad paragraphs 82 to 85

525. It is denied that:

525.1. the Opinion made "numerous material and substantial errors of law and fact" or failed to consider "highly pertinent facts";

525.2. Pretorius' representations contain any admissions demonstrating that the prosecutors had insufficient evidence from the outset to prefer the charges.

525.3. the prosecutors were influenced by suspicions arising from an unrelated investigation;

525.4. the "Spy Tapes" decision of the SCA is of relevance to the current proceedings;

525.5. any basis has been advanced to enable this Court to exercise a discretion reserved by law for the President;

525.6. any basis has been advanced to enable this Court to order that an "Acting President" take the decisions assigned to the prosecutor in s 12(6) of the NPA Act. In this regard, I refer to what I have stated above.

CONCLUSION

526. In the premises, the application should be dismissed with costs, including the costs of three counsel.

SHAUN KEVIN ABRAHAMS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on the 15th day of December 2017, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

ANTI-CORRUPTION INVESTIGATIONS
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2017 -12- 15
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
HEAD OFFICE

Commissioner of Oaths
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Dear General

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THE STATE VERSUS OUPA MAGASHULA, VISVANATHAN (IVAN) PILLAY AND PRAVIN GORDHAN

1. Section 179(5)(d) of the Constitution, which is replicated in s22(2)(c) of the NPA Act, empowers the National Director, if requested to do so, to review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within a period specified by the National Director, of the accused persons, the complainant and any other person or party whom the National Director considers relevant.

2. Earlier today Messrs Oupa Magashula and Visvanathan (Ivan) Pillay, through their legal representatives, made representations to me in which they requested me to review the decision by the Acting Special Director of Public Prosecutions.

3. I am currently considering the aforementioned representations.

4. In giving effect to the provisions of section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act, I invite you to make representations to me in terms of the aforementioned provisions by no later than 17h00 on 18 October 2016.

Yours sincerely

ADV SK ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 17 - 10 - 2016

SKA 2

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INCORPORATED

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24 August 2016

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
THE NATIONAL PROSECUTING AUTHORITY OF SA
VGM BUILDING (CNR WEST LAKE & HARTLEY)
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WIEVIND PARK
SILVERTON
PRETORIA

ATTENTION: ADV S ABRAHAMS

Dear Adv Abrahams,

BROOKLYN CAS 427/05/2015 – THE HON. MINISTER PRAVIN GORDHAN

1. We refer to the above matter and confirm that we act on behalf of the Honourable Minister Pravin Gordhan, MP ("the Minister").

2. We refer to our letter of 18 May 2016 and the response thereto from Adv J P Pretorius SC dated 20 May 2016.

3. You will have received media reports to the effect that the Minister is now required to present himself before Brigadier N Xaba on 25 August 2016 for purposes of obtaining a warning statement from the Minister. We enclose the correspondence that was exchanged between ourselves and the National Head of the Directorate for Priority Crime Investigation on 18 May 2016 and responded to on 20 May 2016 for your records. We also enclose the correspondence relating to the request for the Minister to present himself for a warning statement, our response thereto and replies by both parties dated 21 and 24 August 2016 respectively for your records.

4. The Minister requests that when this matter is presented to you for a decision on whether to initiate a prosecution against him or not, he should be afforded the opportunity to make both written and verbal representations to you regarding your aforesaid decision.

5. We look forward to your response as soon as circumstances permit.

Yours faithfully

GILDENHUYS MALATJI INC

Per: *Tebogo Malatji*

W281

(Transmitted electronically and thus not signed)

SKA 3

NATIONAL PROSECUTING AUTHORITY
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25 August 2016

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0001

Email: tmalatji@gmlinc.co.za

Dear Mr Malatji

BROOKLYN CAS 427/05/2015: THE HON. MINISTER PRAVIN GORDHAN

Receipt of your letter, dated 24 August 2016, is acknowledged and the contents thereof noted.

Insofar as it relates to the request in paragraph 4 of your aforementioned letter, consideration will only be given thereto once the investigation has been concluded and the docket submitted to the National Prosecuting Authority for a decision on whether or not to institute a prosecution against any person(s).

Yours sincerely

ADV SK ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 25 - 08 - 2016

SKA 4

Priority Crimes Litigation Unit

NATIONAL PROSECUTING AUTHORITY
South Africa

Your ref: T MALATJI/BC
01744844

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5 September 2016

Gildenhuys Malatji Attorneys
P O Box 619
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0001

Email: tmalatji@gmlinc.co.za

Dear Mr Malatji

BROOKLYN CAS 427/05/2015: THE HON. MINISTER PRAVIN GORDHAN

1. Your letter dated 29 August 2016 with above reference which was addressed to the NDPP has been rerouted to us as the responsible Directorate to deal with it. Receipt of your letter is hereby acknowledged.

2. The aforementioned docket was received by the National Prosecuting Authority ('NPA') during the latter afternoon of 25 August 2016.

3. The docket is presently being perused by the prosecutors within the Priority Crimes Litigation Unit ('PCLU').

4. I am yet to be advised as to whether the investigation conducted by the Directorate for Priority Crimes Investigation ('DPCI') into this matter has been concluded.

5. I will make a decision in consultation with the Director of Public Prosecutions ('DPP'): Pretoria once the investigation has been concluded.

6. Section 179(5)(d) of the Constitution provides the National Director of Public Prosecutions ('NDPP') with the discretion to:

> *"... review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:*
>
> *(i) The accused person.*
> *(ii) The complainant.*
> (iii)*Any other person or party whom the National Director considers to be relevant."*

7. As alluded to in the correspondence dated 25 August 2016, a decision to prosecute or not to prosecute your client or any other person(s) is yet to be made. In this regard, and at this stage, your client does not fall within the category of an 'accused person'. It will hence be premature to invoke the provisions of section 179(5(d) of the Constitution.

8. It would be advisable that your client's comments, views and version are incorporated in a warning statement to be taken into account before a decision is made and such warning statement being part of the police docket in this instance.

9. I trust that you will find same in order.

Yours sincerely

DR JP PRETORIUS
ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS
PRIORITY CRIMES LITIGATION UNIT
DATE: 5/9/2016

SKAC

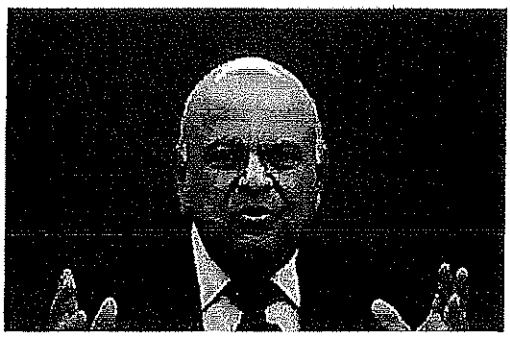
Print this page (#)

"FA22"

'Shaun Abrahams won't give me a fair hearing' - Pravin Gordhan

Oct 14, 2016 | TMG Digital

Finance Minister Pravin Gordhan does not have any confidence in the National Director of Public Prosecutions's ability or willingness to afford him a fair hearing.



South African Finance Minister Pravin Gordhan. File photo.
Photograph by: Siphiwe Sibeko

"

Finance Minister Pravin Gordhan does not have any confidence in the National Director of Public Prosecutions's ability or willingness to afford him a fair hearing. This is according to his lawyer Tebogo Malatji.

"

This is according to his lawyer Tebogo Malatji.

- Corruption buster Willie Hofmeyr aligns himself with Gordhan (http://www.timeslive.co.za/politics/2016/10/14/Corruption-buster-Willie-Hofmeyr-aligns-himself-with-Gordhan)

National Director of Public Prosecutions Shaun Abrahams announced on Tuesday that Gordhan, former SARS commissioner Oupa Magashula and former deputy commissioner of SARS Ivan Pillay will be charged with fraud.

- NPA faces legal challenge over Gordhan charges (http://www.timeslive.co.za/politics/2016/10/14/NPA-faces-legal-challenge-over-Gordhan-charges)

The charges relate to Pillay's early retirement from SARS and of entering into a new employment contract with Pillay for a period of four years from April 1 2014 and terminating on December 31 2018. Gordhan is due to appear in court early next month.

Abrahams told the Parliamentary Portfolio Committee on Justice and Correctional Services on Wednesday that Gordhan is welcome to approach him to make representations regarding the charges that have been preferred against him.

Rejecting this, Gordhan's lawyer said in a statement on Friday: "Minister Gordhan has taken legal advice on the matter and decided not to make representations to the NDPP."

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

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

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

"Third, having now had an opportunity to study the charges against the Minister, it is also clear to us that they manifest a resolute and not well founded determination to prosecute the Minister at all costs. Any representations to the NDPP would accordingly be pointless."

"Minister Pravin Gordhan continues to take legal counsel in regard to ways and means to bring the matter to an expedited finality."

Malatji said eminent lawyer Advocate Wim Trengove SC as well as advocates Hamilton Maenetje SC and Ziyaad Navsa will be assisting the minister's defence team.

~oOo~

SKA 6

AFFIDAVIT

I, the undersigned

Johan Daniel Vlok Symington (ID 6604145007087)

Do hereby make oath and state that:

I am Senior SARS Official in the Legal Counsel Division at SARS Head Office. I am duly authorised to depose to this affidavit.

Unless the context indicates otherwise, the facts contained in this affidavit are within my personal knowledge and are, to the best of my belief, both true and correct.

I hereby respond as follows to the underlined questions submitted to me by the HAWKS:

1. "His qualification and duration of employment at the Legal and Policy Division of SARS"

   1.1. BCom (Financial Management) – University of Pretoria

   1.2. LLB - Unisa

   1.3. Duration in LAPD: 1 April 1990 up to date.

2. "Under what circumstances was he asked by Mr Ivan Pillay to consider the elements of his (Pillay's) early retirement"

   2.1. Ivan Pillay requested my views on the elements listed in the Memorandum, as well as my view on the financial soundness of taking the early retirement option.

2.2. I assumed that his request was based on my experience in the field of retirement funds.

3. "The basis of the technical position that he adopted particularly since no reference is made to any legal prescripts. In terms of what legislation can the early retirement (sic) be 'waived'"

3.1. "Mr Pillay has reached the required age for early retirement"

3.1.1. **The South African Revenue Service Act**

The South African Revenue Service Act (the SARS Act) does not specify the retirement age of its employees. However, section 19(1)(b) of the SARS Act determines that a person appointed by SARS is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service mentioned in section 8(1)(a)(i) of the Public Service Act (the PSA).

3.1.2. **The Public Service Act**

Chapter V of the PSA governs the entitlement to pension benefits. Under the provisions of section 16(1)(a), read with section 16(2A)(a) of the PSA, an employee is entitled to retire when reaching 55 and must retire at the age of 65.

3.2. "He is entitled to request the Minister to 'waive' the early retirement penalty"

3.2.1. The Public Service Act

3.2.1.1. Section 16(6)(a) of the PSA permits the relevant "executive authority" (i.e. the relevant Minister) to, on the employee's request, approve a retirement at an age earlier than 60 years.

3.2.1.2. Once approved by the Minister under section 16(6)(a) of the PSA, the employee is then deemed to have retired under section 16(4) of the PSA by virtue of the provisions of section 16(6)(b) of the PSA.

3.2.1.3. Section 16(6)(b) of the PSA states that if "an employee is allowed to so retire, he or she shall, notwithstanding anything to the contrary contained in subsection (4), be deemed to have retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the public service in terms of that subsection".

3.2.1.4. Section 16(4) of the PSA states that an "officer...who has reached the age of 60 years may, subject in every case to the approval of the relevant executive authority, be retired from the public service".

3.2.1.5. Thus, if approval is obtained in the manner described under section 16(6)(a) of the PSA, rule 16(4) of the PSA becomes the reference for purposes of determining the applicable retirement rule under the rules of the Government Employees Pension Fund (GEPF).

3.2.2. The Government Employees Pension Law, 1996

3.2.2.1. Section 19 of the Government Employees Pension Law, 1996 (GEPF Law) governs the age of retirement for GEPF purposes. In terms of this provision, a member has the right to retire on reaching the age determined by the law governing his or her employment.

3.2.2.2. Rule 14.3 of the Rules of the GEPF determines the benefits payable on retirement of a member.

3.2.2.3. In determining the benefits payable by the GEPF the deeming provisions as set out in section 16(6)(b) of the PSA must be accounted for.

3.2.2.4. If, as a result of the application of section 16(6) read together with section 16(4) of the PSA, the GEPF incurs an additional financial obligation, the provisions of rule 20 of the GEPF rules are triggered.

3.2.2.5. Rule 20 of the GEPF rules covers a situation where a retirement results in an additional financial liability to the fund, and reads as follows (irrelevant parts left out):

> Without detracting from the generality of section 17 (4) of the Law, the Government or the employer or the Government and the employer shall, if a member...retires...and at such retirement...becomes entitled to the payment of...an annuity and a gratuity in terms of the rules, and any of these actions result in an additional financial liability to the Fund, pay to the Fund the additional financial obligations as decided by the Board acting on the advice of the actuary. Such payment to the Fund, with interest to account for any delay in payment, shall be in accordance with a schedule approved by the Board."

3.3. "No technicality prevents SARS from appointing him on a contract after his retirement from the GEPF"

I remain unaware of any technicality that prevented SARS from appointing Mr Pillay on a contract after his retirement from the GEPF.

4. "Give light on the (sic) similar cases of this nature he advised them (sic) in the past"

I do not recall receiving requests for consideration of other similar matters.

5. "To which SARS Commissioner did he address his Internal Memorandum dated 17 March 2009"

Assuming the Memorandum's date is correct, the Commissioner on 17 March 2009 was Mr Pravin Gordhan.

6. "Explain in detail what was the SARS's Commissioner reaction after he received the advice from him about Mr Pillay's early retirement with full benefits. Who else at SARS received the same good benefits like Ivan Pillay"

6.1. I have no knowledge of the Commissioner's reaction.

6.2. I am not privy to SARS decisions relating to the retirement of any employee.

7. "How did it came about the (sic) adds (sic) the summary, in particular that the early retirement application should be considered together with the early (sic) application for ministerial approval that SARS pay the GEPF penalty, and that SARS instead of the employee pay the GEPF penalty when the reasons for the employee's early retirement are personal, namely to take his children to school?"

   7.1. No part of the "Summary" states that "SARS instead of the employee" (my underlining) must pay. As explained above, rule 20 of the GEPF rules puts the liability on the employer, not the employee.

   7.2. I was not requested to consider any reasons for his retirement.

Johan Daniel Vlok Symington

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and affirmed before me at Pretoria on this the 20th day of October 2016, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES: KLEINBOOI HLARANE LEGOABE

DESIGNATION: KOMMISSARIS VAN EDE / COMMISSIONER OF OATHS

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