

prosecutions. I believe that there is a general public misconception as to my role as the National Director and not a full appreciation of the structure of the National Prosecuting Authority. Whilst I have the power to institute a prosecution, I would only do so in very rare instances. This matter was one of those rare instances, thus if I made a decision to prosecute it would not be competent for me to review my own decision in terms of the Constitution and in terms of the National Prosecuting Authority Act. I am vested with and retain the power to review a decision to prosecute after complying with the provisions of the Constitution and the National Prosecuting Authority Act, as I have already eluded to, hence my invitation to make representations if they wished to do so. I have always been mindful of the Constitutionally entrenched rights that everyone is equal before the law and that everyone has a right to equal protection and equal benefit of the law. Before I speak on the review and prior to informing you of my decision I deem it relevant to first speak of the initial decision to prosecute.

The decision by the head of the PCLU to prosecute Mr Magashula, Mr Pillay and Mr Gordhan on *inter alia* charges of fraud are premised on the following set of facts: Mr Magashula was employed at SARS from 2006 to 2009 as the Head of Human Resources and Corporate Services and as the Commissioner from 2009 to 12 July 2013. Mr Pillay joined SARS in 1999, he was the General Manager of the Enforcement and Risk Unit until his appointment as Deputy Commissioner in 2009 in which capacity he served until his resignation with effect from 31 December 2010. Mr Pillay continued to serve as the Deputy Commissioner of SARS



on contract until the termination thereof in 2015, he also served as the Acting Commissioner of SARS from 12 July 2013 until the appointment of Mr Tom Moyane in 2015. Minister Gordhan served as the Commissioner of SARS from November 1999 to May 2009 and as the Minister of Finance from May 2009 to May 2014 and again from 15 December 2015 to date. From May 2014 to December 2015, Minister Gordhan served as the Cabinet Minister responsible for Cooperative Governance and Traditional Affairs. Mr Pillay first applied to go on early retirement in December 2008 when a vastly experienced Human Resource specialist in the employee of SARS was requested to prepare a memorandum for the early retirement of Mr Pillay. The memorandum was for the attention of the Commissioner, who was Minister Gordhan at the time to recommend to the then Minister to consider approving the early retirement of Mr Pillay in terms of the provisions of section 16(6)(a) and (b) of the Public Service Act. At that stage the reasons advised by Mr Pillay to retire early were to the effect that he wished to pursue other interests. This memorandum was never approved, instead the self-same specialist received [indistinct 00:08:36 - 00:08:42] who was now [indistinct 00:08:44 - 00:09:04] specialist raised concerns to Mr Magashula via emails dated 8 and 9 October 2009 to the effect that in the event the Minister approves Mr Pillay's application on the grounds of personal interests, it may create a precedent in terms of which other employees may submit similar requests for early retirement. Further, that should Mr Pillay's application be approved, it could technically be construed that SARS contributed approximately R340 000 towards the education of Mr Pillay's children. Further, that approving Mr Pillay's



request may put both he and the Minister of Finance [indistinct 00:09:49 - 00:09:51] Mr Pillay is reappointed to the very same position and that the argument could be advanced that Mr Pillay was able to continue with his present functions as his retirement and reappointment was purely to assist him to provide for his children's education. He further confirmed that whilst at SARS he dealt with two other applications for early retirement with full benefits [indistinct 00:10:13 - 00:10:15] as insufficient reasons existed for the Minister to have approved those applications. He is largely corroborated by his supervisor [indistinct 00:10:26 - 00:10:28] Services Executive in SARS. He, along with his supervisor, further advised Mr Magashula against continuing with Mr Pillay's early retirement as it was for personal reasons and did not advance the business interest of the South African Revenue Services. Another SARS official, a Remuneration and Benefits Executive made a statement to the Hawks in which he *inter alia* states that after diligently perusing SARS policies he expressed the view [indistinct 00:10:58 - 00:11:06] and that issues relating to the retirement of SARS officials [indistinct 00:11:10 - 00:11:13] by law are governed by [indistinct 00:11:15 - 00:11:26]. During 2009, Mr Pillay successfully purchased pensionable service for the period 28 February [indistinct 00:11:35 - 00:11:37] 7 April 1994 to enhance [indistinct 00:11:41 - 00:11:42] government [indistinct 00:11:43 - 00:11:45] in August 2010, Mr Pillay [indistinct 00:11:49 - 00:11:51] submitted separate internal memoranda to both Mr Magashula and Minister Gordhan in which he *inter alia* informed them of his decision to retire early, explained that the decision to retire early is largely informed by his



deteriorating medical condition and family responsibilities [indistinct 00:12:12 - 00:12:13] direct result of his dedication to his job at SARS. Mr Pillay further requested to be reappointed in SARS [indistinct 00:12:23 - 00:12:32] his early retirement [indistinct 00:12:33 - 00:12:37] which the Minister approves that the penalty imposed on his pension benefits as envisaged [indistinct 00:12:43 - 00:12:49] paid by SARS [indistinct 00:12:51 - 00:13:11] the relevant sections reads as follows: "[indistinct 00:13:14 - 00:13:29] retirement date in terms of the law governing [indistinct 00:13:32] or a terms and conditions of service and (d) before his/her pension retirement date but not a date prior to the member attaining the age of 55 years provided that such a member has the right to retire on that date in terms of the provision of any act which regulates his/her terms and conditions of employment. Such member shall be entitled to the benefits indicated in rule 14.3(2) or rule 14.3(3) as the case may be. Rule 14.3(2) is only applicable to members with less than 10 years' pensionable service and finds no application in Mr Pillay's matter as Mr Pillay had an excess of 10 years' pensionable service. Rule 14.3(3) applies to members with 10 years or more pensionable service as in Mr Pillay's instance and *inter alia* reads as follows: "(a) A member who retires on account of a reason mentioned in Rule 14.3(1)(a), (b) or (c) and who has at least 10 years' pensionable service to his/her credit shall be paid the benefits referred to in Rule 14.2.1 or 14.2.2 provided that Rules 14.2.3(a) and 14.2.2 shall apply to members referred to in those rules where applicable; (b) A member who retires on account of a reason mentioned in Rules 14.3(1)(d) or (e) and who has at least 10 years'



*pensionable service to his/her credit shall be paid the benefits referred to in Rule (a) above ...*" Now this is very important. *"...provided that such benefits shall be reduced by one-third of 1% for each complete month between the member's actual date of retirement and his/her pension retirement date. The [indistinct 00:15:31] retirement date in terms of the law governing his/her terms and conditions of service; and (d) before his/her pension retirement date but not a date prior to the member attaining the age of 55 years provided that such a member has the right to retire on that date in terms of the provision of any act which regulates his/her terms and conditions of employment"*. Such member shall be entitled to the benefits indicated in Rule 14.3(2) or Rule 14.3(3), as the case may be. Rule 14.3(2) is only applicable to members with less than 10 years' pensionable service and finds no application in Mr Pillay's matter as Mr Pillay had an excess of 10 years' pensionable service. "Rule 14.3(3) applies to members with 10 years or more pensionable service" as in Mr Pillay's instance and *inter alia* reads as follows: "(a) A member who retires on account of a reason mentioned in Rule 14.3(1)(a), (b) or (c) and who has at least 10 years' pensionable service to his/her credit shall be paid the benefits referred to in Rule 14.2.1 or 14.2.2 provided that Rules 14.2.3(a) and 14.2.2 shall apply to members referred to in those rules where applicable; (b) A member who retires on account of a reason mentioned in Rules 14.3.1(d) or (e) and who has at least 10 years' pensionable service to his/her credit shall be paid the benefits referred to in Rule (a) above." Now this is very important "provided that such benefits shall be reduced by one-third of 1% for each complete



month between the member's actual date of retirement and his/her pension retirement date." The reading of Rule 14.3.3(b) is unambiguously clear and concise in that a person in Mr Pillay's position will be subjected to a reduction of pensionable benefits by one-third of 1% for each completed month between his/her actual date of retirement and the date of his or her pensionable date of retirement. In effect, this rule creates what is commonly referred to as a penalty payable by the employee.

In a memorandum dated 12 August 2010, titled "*Early retirement of Deputy Commissioner Ivan Pillay with full retirement benefits*", Mr Magashula requested Minister Gordhan's approval for the early retirement of Mr Pillay, that is whereby SARS pays the penalty to the Government Employment Pension Fund as contemplated in Rule 14.3.3(b) of the Government Employee's Pension Law read with Section 90 of the SARS Act and Section 16(2)(A)(a) of the Public Service Act. Further, to retain Mr Pillay as Deputy Commissioner of SARS on a three year contract with effect from 1 September 2010, further informs Minister Gordhan that Mr Pillay has decided to take early retirement for personal reasons and further motivates that the Government Employment Pension Fund had approved in excess of 3 000 requests for early retirement from various government departments for staff to retire before the age of sixty with full benefits and that the former Minister of Finance and Minister Gordhan himself had approved at least five such requests over the past two years. He also informs Minister Gordhan, well his request to Mr Magashula is also to inform Minister Gordhan that advice was sought from the Acting Director General of the Department of Public

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Service and Administration ("the DPSA") who confirmed that there is no restriction on the appointment to the public service or the same department of that person who has retired on an employee initiated severance package and lastly to advise Minister Gordhan that the financial implication to SARS would be an amount of R1 141 178.11 which SARS will be liable to pay to the Government Employment Pension Fund in terms of the provisions of Section 17(4) of the Government Employment Pension Fund Law of 1996. Section 16(2)(A)(a) of the Public Service Act provides that an officer shall have right to retire from the public service on the date on which he/she attains the age of fifty-five years or on any date thereafter. In terms of Section 17(4) of the Government Employment Pension Fund Law, if any action taken by the employer or if any legislation adopted by Parliament places any additional financial obligation on the fund, the employer or the government or the employer and the government, as the case may be, shall pay to the fund an amount which is required to meet such obligation. It is evident that the provisions of Section 17(4) only places a financial encumbrance on the employer or government in circumstances where the employer has taken action or where legislation as adopted by parliament places any further financial obligations on the Government Employment Pension Fund. It would with respect amount to an absurdity where an employee applies to be released from his/her responsibilities to enjoy early retirement when executive authority exercises his/her discretion to permit such employee to be released prior to his/her actual date of retirement and the employer or government has to carry the bill without any criteria having been applied



by the executive authority. In practice, this would mean that all officials who retire early at their request would benefit financially in the absence of the employer taking any action. The words, "*where the employer has taken action*" it is submitted required some act which would be to the benefit to the department concerned either by way of transformation initiatives or some form of restructuring. It certainly cannot be the mere authorisation by an executive authority of a request by an employee to take early retirement. The Minister of the Department of Public Service and Administration issued a determination on the introduction of an Employee Initiated Severance Package for the Public Service in terms of the provision of Section 3(3)(c) of the Public Service Act with effect from 1 January 2006, as per DPSA circular 1/16/21 dated 16 January 2006. In terms of its scope, the determination is applicable to all employees appointed in terms of the Public Service Act. The purpose of the determination is to allow employees affected by transformation and restructuring who wish to exit the public service to apply for an Employee Initiated Severance Package. In terms of this determination it is only applicable to employees who are affected by transformation and restructuring, who may apply voluntarily to the executive authority or his/her delegee of his/her department to be discharged from the Public Service. The application is subject to the approval of the executive authority, the application must be made on an application form marked Annexure "A" titled "*Process Form - Application for Employee Initiated Severance Package*" which is available from the DPSA website. In consideration of the application, the executive must as a minimum take the





following into consideration; the impact of the employee's exit from the department on its service delivery capabilities; the employee's competence and suitability for continued employment; the manner in which the employee's exit will support the transformation and restructuring of the department; the specific reasons for the employee's request; the ability of the department to finance the cost related to the payment of the severance package including the refunding of the Government Employment Pension Fund, severance pay, leave pay etcetera; the impact of the granting of the severance package on the morale of other employees, whether the employee concerned occupies a post on the department's establishment or not, further, that the following benefits are payable to employees who are members of the Government Employment Pension Fund and who have attained the age of fifty-five years and who have in excess of ten years' service. A gratuity and annuity determined in terms of the formula that applies to the member without scaling down of pension benefits in terms of Rule 14.3(3)(b) and without an addition to the pensionable service in terms of Rule 14.2.4(b). In an affidavit by the then acting Director General of the DPSA, he *inter alia* states the following: he advised Mr Magashula in relation to the Employee Initiated Severance Package and the applicable criteria as previously outlined, that in respect of Mr Magashula's inquiry where the employees exiting the Public Service on an Employee Initiated Severance Package on whether they can be re-employed into the Public Service, he advised generally that there was no restriction on the re-employment of such employees. He further explained that in the event that the employee concerned left on a voluntary



severance package, the employee concerned would only be admitted to be reappointed if the relevant department was unable to recruit suitable candidates and that the re-appointment of such former employee would only be on a fixed term contract limited to a maximum period of 3 years. He further advised that such fixed term could be further extended for a period of no longer than three years.

It is clear from the above that the reasons advanced by Mr Pillay do not fall within the qualifying criteria of the Employee Initiated Severance Package. Whilst the memorandum, dated 12 August 2010 is not signed by the erstwhile Deputy Minister of Finance, Mr Nhlanhla Nene, Minister Gordhan's approval is only obtained on 18 October 2010. As a result, Mr Pillay's early retirement with full benefits, as approved by Minister Gordhan, was only implemented with effect from 31 December 2010.

Mr Pillay also entered into a five year employment contract with SARS as the Deputy Commissioner of SARS with effect from 1 January 2011 to 31 December 2015 instead of a three year contract as approved by Minister Gordhan and instead of in a different capacity. In addition, a new employment contract was entered into between Mr Pillay and Minister Gordhan with effect from 1 April 2014 to 31 December 2018, whereby Mr Pillay would serve as a Deputy Commissioner for SARS for a further period of close to four years. This is nine months prior to the initial contract being due to expire and a month before Minister Gordhan was appointed as the Minister of Cooperative Governance and Traditional Affairs. There was no supporting documentation submitted in the ordinary course for Minister Gordhan to apply his



mind to the approval of the renewal of the contract. This was also done contrary to advice from a remuneration and employee service executive whose advice was disregarded including advice on the issue of the renewal of a contract between Minister Gordhan and Mr Pillay in 2014 when there was still a valid contract in existence.

In their warning statements to the Hawks, both Mr Pillay and Mr Magashula in effect elected to remain silent. Minister Gordhan did not subject himself to the taking of a warning statement but did provide his version to the Hawks through his lawyers and in which Minister Gordhan stated that he approved Mr Pillay's early retirement with full benefits on the strength of the recommendations by Mr Magashula. Minister Gordhan is further recorded to have approved Mr Pillay's early retirement with full benefits being mindful that Mr Pillay wanted to gain access to his pension fund to finance the education of his children and that he believed it to be entirely above board and because he thought it appropriate to recognise the invaluable work Mr Pillay had done in the transformation of SARS since 1995.

I would now like to address the review in terms of Section 179(5)(d) of the Constitution. On Friday, 14 October 2016, Freedom Under Law & the Helen Suzman Foundation submitted a communication to me through their lawyers in which they requested me to withdraw the charges against Minister Gordhan unconditionally on or before a specified date failing which they would exercise their right to seek urgent recourse to review and set aside the decision to prosecute Minister Gordhan. On Monday, 17 October and on Tuesday, 18 October 2016, both Mr Magashula and



Mr Pillay requested me to review the decision to prosecute them by way of representations to me in terms of Section 179(5) of the Constitution through their legal representatives.

I consequently informed Freedom Under Law & the Helen Suzman Foundation of the representations that I had received and the request to review the decision to prosecute Mr Magashula and Mr Pillay. The just of Mr Magashula's representation was to the following effect: that he supported the application of Mr Pillay and placed much reliance of the advice of a Mr Symington; that he had regards to the provisions of Section 16(2)(A)(a), Section 16(6)(a) and (b) and 16(4) of the Public Service Act, Section 17(4) of the Government Employment Pension Fund Law and Rule 20 of the Rules to the Government Employment Pension Fund Law; that he lacked the requisite criminal intent as he genuinely believed that the aforementioned empowerment provisions permitted the authorising of the application by Mr Pillay; that Minister Gordhan acted within the scope of the executive discretion extended to him by virtue of the position he holds and the law that in the event Mr Gordhan had exercised his discretion wrongly, it does not amount to criminal intent; that there was an email communication between himself and the Acting DG of the DPSA which confirms the engagement between them in relation to Mr Pillay. The gist of Mr Pillay's representation is much the same as that advanced by Mr Magashula. Mr Pillay also produced a memorandum from a Mr Vlok Symington. Minister Gordhan chose not to make representations to me in a communication dated 18 October 2016 through his lawyers, he aligned himself with the submissions made to

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me by Freedom Under Law & the Helen Suzman Foundation. I am aware of media reports which attribute to Minister Gordhan as his reasons for not making representations, his belief that he could not expect to receive a fair hearing. If these media statements are true, then it is indeed distressing that Minister Gordhan had this perception which was completely unfounded. In a letter dated 5 September 2016 former Head Priority Crimes Investigation Unit addressed the legal representative of Minister Gordhan. The latter was *inter alia* informed that the decision will be made by the Head of the Priority Crime Investigation Unit in consultation with the Director of Public Prosecution Pretoria. He was further informed of the provisions of Section 179(5)(d) of the Constitution and that it will be premature to invoke reviewing provisions of Section 179(5)(d) of the Constitution prior to a decision having been made to prosecute or not. He was further informed that it would be advisable for him to incorporate his further comments, views and version in a warning statement. Mr Pillay and Mr Magashula were accorded a fair and dignified hearing during the making of their representations to me, there is no reason why Minister Gordhan would not have received the same. I also extended an invitation to the Commissioner of SARS as the complainant and to the head of the Hawks as the investigating authority to submit representations to me. Both parties elected not to make any further submissions within the prescribed time limit that had been provided to the parties. I further obtained the views of the prosecuting team and the Acting Special Director. I did consider the representations and/or submission, if I can call



it that, as submitted by Freedom Under Law and the Helen Suzman Foundation. Section 17(4) of the Government Employment Pension Fund Rules and the relevant legal prescripts has been fully addressed earlier herein. I have however noted the omission of any of the persons who made submissions and/or representations to comment on Rule 14.3.3(b) of the Rules to the Government Employment Pension Law. Rule 20 of the Rules to the Government Employment Pension Fund insofar as it is relevant, obligates the employer and/or government to pay an annuity and a gratuity and/or both. It does not waive the penalty to be paid by the employee or the scaling down of benefits requirement provided in Rule 14.3.3(b) of the Rules to the Government Employment Pension Fund Law. Freedom Under Law and the Helen Suzman Foundation also placed reliance on a memorandum from the SARS legal and policy division employee, Mr Vlok Symington. This document only came to the attention of the prosecutors for the first time by way of the submissions by Freedom Under Law and the Helen Suzman Foundation and Mr Pillay and is advised to the Commissioner of SARS as a result of Mr Pillay having requested him to consider firstly his application for early retirement from the Government Employment Pension Fund, secondly, his application to the Minister of Finance to waive early retirement penalty and thirdly, his request to be reappointed on contract after his early retirement from the Government Employment Pension Fund. Mr Symington, *inter alia*, advised as follows: "*Approached individually, all three requests are technically possible under the rules of the Government Employment Pension Fund read with SARS' employment policies, that Mr Pillay is*

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*entitled to request the Minister to waive the early retirement penalty; that no technicality prevents SARS from appointing Mr Pillay on contract after his retirement; that Mr Pillay's decision to apply for early retirement is dependent on whether the Minister approves that SARS pays the early retirement penalty to the Government Employment Pension Fund and that SARS reemploys him on a contract basis after his retirement. Lastly, should the Minister decide not to approve Mr Pillay's request and SARS does not contract Mr Pillay after his retirement, that his decision to apply for early retirement be withdrawn altogether. It is clear from the above that if Mr Pillay's request could not be met, he would withdraw his application to retire early altogether".*

As the result of the representations by Mr Magashula and Mr Pillay and the submissions Freedom Under Law and the Helen Suzman Foundation, I directed further investigations to be conducted which I deemed necessary and relevant to assist me in reaching a decision in the matter. I *inter alia* required the following: confirmation from Mr Symington that he is the author of the document submitted by Freedom Under Law, the Helen Suzman Foundation and Mr Pillay. Mr Symington is now employed in the Legal Counsel division at SARS and he submitted an affidavit dated 20 October 2016 in which he amplified his views when he advised the Commissioner in 2009. He largely relies on all the legal provisions which I have outlined in my address to you with the exception of Rule 14.3(3)(b). I further required an affidavit from SARS clarifying why Mr Pillay's early retirement was processed differently to that of others, where early



retirement had been refused by the Minister. A SARS Remuneration and Employee Services Executive subsequently submitted a further affidavit dated 25 October 2016 in which she expressed the view that SARS had suffered actual prejudice by the early retirement of Mr Pillay as a result of SARS paying the Government Employment Pension Fund penalty which should have been paid by Mr Pillay and Mr Pillay's salary or be it on contract from the date of his retirement until he reach the age of sixty. I further required an affidavit from the Government Employment Pension Fund in which it *inter alia* explains the anomaly between what is contained on page 34 of its member's manual and the provisions of Rule 14.3(3)(b) of the Government Employment Pension Fund Law Rules. I further required clarification around the circumstance under which an employer and the executive authority may exercise a discretion to waive a penalty imposed on the employee by Rule 14.3(3)(b) and information around the alleged three thousand approvals for early retirement with full benefits from various Government Departments. Two affidavits in this regard were obtained from the Chief Executive Officer of the Government Pensions Administration Agency (the "GEPFAA"), the affidavits were somewhat unhelpful to say the least. In this regard, the information around the three thousand approvals with full benefits could not be supplied. He did however confirm that action taken by an employer places an additional financial obligation on the fund which needs to be made good by the employer, I reemphasise actions to be taken. The GEPFAA provides various exits from the fund with full benefits but the employer is liable for the additional liability. It further said there is no contradiction between

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what is contained on page 34 of the member's guide where approval has been granted by an executive authority for early retirement with full benefits. The affidavits fail to clarify the issues I have requested, particularly around Rule 14.3(3)(b). The email communications between the Acting Director General of the DPSA, Mr Magashula as alleged by Mr Magashula was also requested, this I obtained.

In an email communication, dated 23 July 2010, Mr Magashula refers to a discussion the previous day between Mr Gordhan, the Deputy Director General who served as the Acting Director General of the DPSA at the time and himself regarding the early retirement of the Deputy Commissioner of SARS. Mr Gordhan also participated in these discussions in terms of the email concerned. Mr Magashula specifically asks the following questions which came about as a direct result of their discussion: whether there is a precedent for authorising early retirement and re-engaging the same person on a short contract completely different from permanent employment with a scale down responsibility, salary and other conditions of employment? Should same be authorised, what would the impact of cabinet's decision to recognise NSF service at 100% on retirement benefits of the Deputy Commissioner be? To indicate how long he expects the process to take and who can do the estimates to assess the impact of the decision on the Deputy Commissioner's retirement which is anticipated to happen in a month's time. Lastly, whether he has any statistics of how many of early retirement cases without re-engagement have been processed as of date. The Acting Director General responded to the aforementioned email on 3 August 2010 in the following



terms: (i) that an Employee Initiated Severance Package is granted to employees that are generally in excess of the organisation as a result of a restructuring exercise, it includes change to the content of the job or the abolishment of the post, (ii) there is no restriction in the appointment to the public service or to the same department on a person who has left on an EISP. Any new appointment will be to a new post with a new set of conditions; (iii) thirdly, that he did not have figures on how many persons were reemployed but is aware of a few that were; (iv) fourthly, that cabinet memo eight of 2009 recognised full NSF service as pensionable service in terms of the Government Employment Pension Fund Rules for the Department of Defence personnel and lastly, albeit my omission of two or three points that are not relevant for purpose of this discussion, that in the event that the Deputy Commissioner is granted an EISP, his package will be calculated into his current contribution into the Government Employment Pension Fund and amended once the MSF decision has been obtained and implemented. It is evident that Minister Gordhan and Mr Magashula were both uncertain as to whether Mr Pillay's request for early retirement with full benefits and his immediate re-employment into SARS could be approved. This much is clear from the engagement with both Mr Symington and the Acting Director General of the DPSA. In this regard, Minister Gordhan, in hindsight should have consulted his Deputy Minister of Finance, who was Minister Nhlanhla Nene at the time, who could have provided crucial guidance and clarity thereon. The advice of Mr Symington appears to have largely influenced Mr Pillay and Mr Magashula. I foresee great difficulty in proving the requisite animus. In

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order to sustain a conviction it is necessary to prove what is known as animus, namely knowledge of unlawfulness and intention to act unlawfully. In the matter of State v Bartlett's [unsure 00:45:46] Transport (Pty) Limited and Another, 1986 volume 1 (706) a Cape Provisional Division decision, the second appellant had acquired shares in the first appellant which possessed a permit authorising it to convey upholstery materials, carpets, floor mats, curtains, cushions and other soft furnishings. The appellants had been convicted in the Magistrate's Court for contravening Section 31(1)(b) of the Road Transportation Act, 74 of 1977 in that they had unlawfully conveyed three hundred and two cartons of yarn distend for various factories in the Cape Peninsula. Six months before the commission of the offence, the second appellant had obtained an opinion from his legal advisors to the effect that the conveyance of the yarn fell within the definition of conveyance of upholstery materials and as such was authorised by the permit. The Court found that when accused places reliance on legal advice or counsel's opinion taken as a precautionary measure in order to obviate a finding of [indistinct 00:46:46], the opinion should relate to a single transaction or act about to be entered into or about to be carried out and not to a cause of conduct extending over a considerable time in future. That said, the Court held that the appellants had not acted with the requisite degree of circumspection and lacked the requisite *mens rea*. In State v Claassens 1992 volume 2 (SACR) 434 a Transvaal Provincial Division decision, as it was known then, the Court noted that it largely depends on the specific circumstances of each case whether or not a client should place a question mark over the legal advice



having been obtained. In this matter the appellant was convicted in a Regional Court on sixteen counts of contravening Section 2(10) of the Usury Act and sentenced. In an appeal against the conviction, it appeared that the appellant, a Financial Consultant and Broker had been unaware of the provisions of Section 2(10) of the Usury Act. It appeared further that he had consulted his attorney and an advocate and had discussed his business with them. He had also had his client mandate form checked by them when he had started his business. He had however never instructed his attorney to investigate the provisions of the Usury Act. The appellant had been informed by his attorney that there could be no legal problems in the way he conducted his business. He had never been informed by any of the lawyers he had consulted that he was contravening the Act. The Court ultimately held that the appellant had not exceeded the bounds of reasonableness and that he had not been negligent under the circumstances. As a result and in the absence of any other evidence to the contrary I am satisfied that Mr Magashula, Mr Pillay and Minister Gordhan did not have the requisite intention to act unlawfully.

I am of the view that this matter could easily have been clarified, had there been proper engagement and cooperation between the Hawks and Mr Magashula, Mr Pillay and Minister Gordhan. In the circumstance, I have decided to overrule the decision to prosecute Mr Magashula, Mr Pillay and Minister Gordhan on the charges listed in the summonses. As such, I have directed the summonses to be withdrawn with immediate effect and there will thus no longer be any need for Mr Magashula,

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Mr Pillay or Minister Gordhan to appear in Court in respect of the charges listed in the aforementioned summonses. I thank you.

MR LUVUYO: [indistinct 00:49:33 - 00:49:39] Advocate Mzinyathi, Deputy North Gauteng, welcome you joined us a bit late. Ladies and gentlemen let me outline [indistinct 00:49:46]. As a general rule, when we communicate our decision whether to prosecute or not with the subject of [indistinct 00:49:56 - 00:49:57] discretion. This has been an exception you [indistinct 00:50:00] heighten public interest. Moving forward, [indistinct 00:50:04 - 00:50:04] we will not exercise this kind of exception, I hope I make sense. Then, the VP is going to engage [indistinct 00:50:13 to 00:50:18]. We will take questions, please your questions must be very concise, stay to the point, we don't want any stories and secondly you know the rule of engagement your media house and your name. We will start with you [indistinct 00:50:35 - 00:50:43] Tshidi.

MEDIA - TSHIDI MADIA: Thank you so much. Good afternoon, Tshidi Madia from News24, I just want to find out, you know, you speaking about the review and taking everything else into consideration, why did you then push ahead with making an announcement instead of looking at all the facts [00:50:58] and secondly, [indistinct 00:51:00] a lot of talk about this and you stuck by your guns saying that you were doing this in pursuit of justice and independence. There has been lots of allegations about political interference, yes or no but ultimately the question then will be that this is a blunder, the Rand was affected. Will you resign? Thank you.

MR LUVUYO: Karyn.

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MEDIA - KARYN MAUGHAN: Karyn Maughan, ENCA. I would imagine that in a case like this which have such serious repercussions for the economy and for the country that you would have the best minds working on a case like this but it seems the most, the most basic investigation was not done here and the crucial part of intent where the Finance Minister, I know who is involved, has actually got legal advice saying that it was an appropriate thing for them to do, wasn't done. I mean surely there must be consequences where people, officials in the NPA occupy such high office and have such power that when they do make a profound mistake for whatever reasons they have made it, there must be consequences and people should be falling on [indistinct 00:52:05 - 00:52:06] and second of all, you have tried to suggest that were there co-operation with the Hawks, this whole matter could have been clarified. We know the Finance Minister answered twenty-seven questions, numerous leaks came from the Hawks about this investigation. These individuals [interruption] so it is an unfair comment make.

MR LUVUYO: Karyn, Karyn, get to the point, noted please, please, pass the mic. Miss Franny you will be the last one then the queue will stop, then we will take another [indistinct 00:52:32].

MEDIA - FRANNY RABKIN: I have two questions. Franny Rabkin from Business Day. My first question is that Mr Abrahams you spoke thirty minutes talking about why your understanding of the laws around the Government Pension Fund obviously differed from other understandings, but good faith, legal differences on how the law



works are, happen every day. My question is in order prove fraud you need to have intention, you need to have a misrepresentation. What evidence did you have of those two elements before and my second question is, can you confirm that you only saw Mr Symington's memorandum after the charges were announced?

MR LUVUYO: Thanks Franny over to you [indistinct 00:53:19 - 00:53:21]

ADV SHAUN ABRAHAMS: Let me start off by first responding to the first question and thank you for the questions. Why did I make the announcement in respect of the matter? I think we must remember the decisions to prosecute are taken at various levels. Decisions are taken by prosecutors in the lower courts, that is in the District Courts, in the Regional Courts and in the High Courts on a daily basis. Decisions are taken to prosecute by their supervisors who are control prosecutors, senior public prosecutors and chief prosecutors. Decisions are also taken on a daily basis by state advocates, senior state advocates, deputy directors of public prosecutions, directors of public prosecutions and special directors of public prosecutions. In this instance, a decision had been taken by a special director of public prosecutions in consultation with a director of public prosecutions. I cannot *mero motu* intervene in a decision that has been made to prosecute. My powers only come into play when I have to review the decision in terms of Section 179(5)(d) of the Constitution and that is exactly what happened here, a decision had been made, now I was very mindful that this is a decision that had great public interest and as head of the institution it is incumbent upon me to take the public into their confidence and address the public as to why such

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a decision had been made to prosecute, similarly that is why I have addressed you today, I could have simply just have released a media statement but it would not have done justice. You would have asked me more questions, there would be more questions from you than answers and that is why I have called for this media briefing then today to take you into my confidence again. Now you would be very mindful that what I spoke of today was split into various parts, the first part I spoke of, I spoke about the decision that was taken to prosecute. On the facts of that matter, on the facts of the matter on paper, there was a case, there was a case to prosecute and that is what I have been briefed on. I also addressed you on the additional investigations that were conducted, now the additional investigations that were conducted were as a direct result of the representations that were received. Now, the investigators and the prosecutors were unaware of that prior to them making a decision in the matter. This only came about when the representations were made to me and submissions were made to me and that is why I directed the further investigation into the matter. This happens on a regular basis when representations are made to me and when I am asked to review matters. I submit matters back to the relevant offices directing further investigations to seek clarity on issues that will assist me to ultimately make a just decision at the end of the day. This matter was no different to any other matter. You would also be very mindful that I shouldn't pay much attention to political consideration. In effect, what you are asking me is, why didn't you pay due regard to political consideration? I will not pay due regard to political consideration in respect of this matter nor any other matter. The

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second question was, will I resign? Certainly not. Certainly not. Karyn, you asked many questions. Let me first respond to Franny's questions. I can barely read my own handwriting. Franny, the Symington affidavit, I only became aware of the Symington affidavit as a result of the submissions made to me by Freedom Under Law and the Helen Suzman Foundation. I secondly became aware of it when Mr Ivan Pillay's legal team had made representations to me and presented me with a copy of the Symington memorandum or legal opinion, if you can call it that. I was satisfied. Remember the initial decision that was made was not my decision, on the facts presented to me when the presentation was made to me after the decision had been made, I was satisfied that there was a case to answer by all three accused in respect of the matter and when I applied my mind to the matter, when I received representations, remember I only looked at the docket, the relevant statements and the material that the prosecutors had relied upon. When I reviewed the matter, I didn't have a look at it before then. Karyn I am not certain whether I have answered your questions, you know in my responses thus far, but you know if I didn't can you just repeat that. You know you say so much, can you keep them short and concise please. You know, thanks.

MR LUVUYO: Thanks [indistinct 00:59:33] we will take further questions. Remember [indistinct 00:59:38 - 00:59:48].

MEDIA - ELTON: Good afternoon, I am Elton Sibiyi [unsure 00:59:59] from SABC TV News. It almost sounds as though the Hawks investigators withheld some information from the prosecutors who ultimately took the decision to prosecute the Minister, the Minister as well as his two other

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accused, well previously two other accused, has the NPA looked into that matter whether there was a deliberate intention from the Hawks to withhold information from the NPA or from the prosecutors who ultimately took the final decisions and then the question on the SARS Rogue Unit, can you give us an update, how far is that?

MEDIA - KAYA FM: Good morning Advocate and team, I am [indistinct 01:00:42 - 01:00:43] from Kaya FM. Advocate you just said that there is a general misconception of your role by the public following this last briefing, do you believe that has changed or will change? Thank you.

MEDIA - PHILLIP DE WET: Phillip de Wet from the Mail & Guardian. Sir you say you only became aware of what you call the Symington memorandum quite recently, it turns out that that memorandum was put before the Labour Court in 2014 when Ivan Pillay took his matter there. If you were then unaware of it as you say is the incompetency yours? Is it people in your office who failed to follow that case? Is it, as colleague has put it, the Hawks' responsibilities, who withheld that information from you? Alternatively, let's put it bluntly, whose head should roll?

MR LUVUYO: Thank you [indistinct 01:01:39] do you want to respond?

ADV SHAUN ABRAHAMS: Yes. I think Mr De Wet's last question ties up with one of Karyn's questions. I don't think, I have no evidence or information before me indicative of the Hawks investigators or anybody withholding any information from the prosecutors concerned or withholding information from me. The question on the rogue unit, I have been advised that the investigation is still continuing, the investigation has not been



concluded. Hopefully the investigating team will tie up the investigation as soonest and the NPA will be in a position to then make a decision in respect of that particular matter as well. I genuinely believe that the more engagement I have, you know, with the public, with the media, that the public will see the role of the National Director much differently than they previously have. I do hope that, you know, after today's briefing that there is some degree of change in that in the way the public and everybody else sees the role of the National Director. Everybody thinks that when a decision has been made to prosecute, that it is the National Director. I don't know what decisions are taken by prosecutors in every court in the country in the lower courts, there are certain cases that I am aware of, certain matters that are brought to my attention. There are certain matters where I request information around matters, there are also certain instances where I direct or request the Police to conduct specific investigations into matters so as much as I am the head of the institution and that all prosecutions that are conducted are done under the name of the National Director. I cannot comment on each and every prosecution that is taking place, there are many prosecutions that are currently taking place across the country, you know, as we gather here today and if you say to me and asked me, what matter is currently being, is in court, Court 15, in the Pretoria Regional Court or Court 15 in the Pretoria District Court - I can't tell you? So as much as I am the head of the institution, there is accountability at different levels and responsibilities at different levels and that is how we have structured the running of this institution. So ordinarily, if a prosecution takes place in the area of jurisdiction of the



Director of Public Prosecutions of North Gauteng, which is Pretoria and the greater area or prosecutions that are taken within that jurisdiction falls within [indistinct 01:04:57] of the Director of Public Prosecutions of that jurisdiction so too in respect of other areas of jurisdiction across the country. So in effect, the Directors of Public Prosecutions have oversight over those matters and of course I have oversight over everything nationally.

Mr De Wet the issue around the Symington affidavit only came to my attention when the Freedom Under Law and the Helen Suzman Foundation had submitted a letter to me through their lawyers it secondly became, I secondly became aware of it when Mr Pillay's legal representatives had submitted a copy to me on the 17<sup>th</sup> and the 18<sup>th</sup> of this month. I had no knowledge of this document before then. Similarly I have been advised by the prosecutor, head of the PCLU made the decision that he too was not aware of that matter, of it. Of course we rely on investigators, if the Hawks submit a docket and say the investigation is complete, it is incumbent upon us to analyse the material and then to direct further investigations in respect of the matter. Now, if there is no reference remotely in the documents submitted initially to Symington, with Symington's affidavit and no mention was made in a warning statements thereof, you certainly can't expect the prosecutor to wish Symington's name to be present and then to direct further investigation in respect of the matter. The issue around the Labour Court, that it first came out in the Labour Court, I heard that for the first time now. So I think your issue around competence, I think it is a unfair question, I really think it is an

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unfair question insofar as it directed at the investigators, insofar as it directed at, you know, at the prosecutors and insofar as it is directed at the Acting Special Director and/or myself. Should somebody's head roll? I will have to look into that, I certainly will have to look into that as to whether anybody's head should roll in respect of this matter.

MR LUVUYO: Thank you National Director, we will take three hands, last round, I will come to you kindly [indistinct 01:07:45 - 01:07:46] you Ma'am, and you sir, and you sir, just four.

ADV SHAUN ABRAHAMS: I think let me just respond to Karyn's questions first. Firstly, I don't, you know, I certainly don't think this matter, this matter was a blunder. There is certainly differences in legal, in legal interpretation of legal opinions etc. and that is why we are lawyers, as lawyers we differ on interpretation of the law, the application of the law and we will do so until the day we retire, you know from this very noble profession. As to accountability, I have already answered that question. Thank you, can you just take further questions.

MR LUVUYO: [indistinct 01:08:43 - 01:08:45]

MEDIA - ANN7: Thank you so much. My name is [indistinct 01:08:49] I am from ANN7. I just wanted to ask, you know, while everybody is, people have [indistinct 01:08:56] court of law but equally people are highly prejudiced, you know. If they are unfairly [indistinct 01:09:02] prosecuted what redress do you have for those accused in such a high profile case as this one? Thank you so much.

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MEDIA - AMOS: My name is Amos Xaba from SABC Radio News. My question to you [indistinct 01:09:26], is that do you feel embarrassed or disappointed at all that such information relating to the Symington affidavit in such a high profile case was actually not made available to you? Are you disappointed or embarrassed at all by that and in the previous briefing you were so upbeat about the integrity of the institution, what do you think coming to this kind of conclusion would do to that integrity that we are talking about?

MR LUVUYO: Thank you Amos, pass on the mic.

MEDIA - TBC NEWS: Mr Abrahams, [indistinct 01:10:01 - 01:10:02] from TBC News. To follow up on my colleague's question, I am wondering if you fear that your tenure has damaged the credibility of the NPA? I wonder if you think that you owe the country or Minister Gordhan or Mr Pillay or Mr Magashula an apology and I am wondering if you have taken into account what damage your efforts has inflicted on the economy and the country and confidence in state institutions?

MR LUVUYO: You can start with.

MEDIA - TBC NEWS: Sorry can I just ask the second part of my question which the Director didn't answer. I asked you, you seemed to suggest at the tail-end of your statement that somehow there have been co-operation, I think was the word that you used, with Ivan Pillay, Magashula and the Finance Minister it would have been finalised, I mean given that he answered all the questions the Finance Minister given that there was a lot of very well documented co-operation is that really a fair comment to



make because in a perverse way you appear to be victim blaming the people you now admit you didn't really have a case against? Thank you.

MEDIA - NETWERK 24: Sir, [indistinct 01:11:15] van Netwerk 24. I just wanted to find out with regards to the charges now being dropped, when was the president or, or was the president or any other political heads now informed that the charges have been dropped and then I wanted to find out, Dr Pretorius how are you feeling at this stage? Do you feel that you made a mistake to go through with this prosecution?

MR LUVUYO: Thank you. Sir, you are the last one, that is the last round. We are not coming again, you are last, Sir. We are closing after that man.

MEDIA - CNC AFRICA: Hi I am Amphiwe from CNC Africa. I understand, National Director that you can't get a hold of every prosecution and detail and know what is going on with every prosecution [indistinct 01:12:11] but don't you think one that involves our economy, one that has such a media presence, one that you organise yourself a media briefing for two times now, don't you think that you should have taken more responsibility knowing what it is involved in it and like the Symington affidavit for example, all the cases involved in it, don't you think it is quite irresponsible to just do media briefings without the full proper knowledge and then thereafter do a review where you admit that, there wasn't, I mean [indistinct 01:12:47 - 01:12:50] don't you think that as a National Director this case deserve more concentration and prioritisation from you?

MR LUVUYO: Thank you sir, noted, NDVP?



ADV SHAUN ABRAHAMS: Thank you so much. I think, let me first start by responding to the first question around equality before the law. It is a very important question that you have raised around equality of the law and that is precisely why we have checks and balances in the criminal justice system in the NPA and our court system. In our court system, you know, we have appeals all the way to the Constitutional Court and we also have reviews in place, so people have recourse to approach the highest court in the land ultimately and that is in line, you know, with the principle and right to equality before the law, similarly in respect of the work of the National Prosecuting Authority, we have the same principles in place and let me take you through this very, very quickly. In the lower courts, if a prosecutor has made an decision and the lawyer or the attorney is not happy with the decision to prosecute or the complainant is unhappy with the decision to decline to prosecute in respect of a matter, the relevant aggrieved party will then make submissions and/or representations to the control prosecutor or the senior public prosecutor or the chief prosecutor. Ultimately, before that matter ever gets to me, the entire process would have been exhausted where the Director of Public Prosecution of that jurisdiction would have considered those representations, should it get to that specific Director of Public Prosecutions or a Special Director. So, in the provinces, there are checks and balances, if you are unhappy with the decision of a Director of Public Prosecutions or a Special Director, you ultimately can ask me to review that matter, and that is what we have done in respect of this particular matter. I cannot *mero motu* interfere in the work of any prosecutor. I certainly would be flouting the laws associated

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with that and the National Prosecuting Authority Act, so we do have, there is recourse and that is the recourse that is available at the end of the day and of course you have observed that some have decided to take some of our decisions on review to the high courts, either decisions to prosecute or decisions to decline to prosecute as the case, as the case may be. Am I embarrassed or disappointed? I don't really want to answer that question, I certainly don't want to answer that question. The question around whether, the question around me being upbeat about the integrity of the NPA, I am more upbeat than ever about the integrity of the NPA, that is precisely why I have called this press briefing and/or press announcement because I am taking you into my confidence as to what has transpired in this matter, what materials placed before me in reviewing the matter, this what I call transparency and I am accounting to you, I am telling you this is what I had before me, this is what I decided as a result of what I had before me and that is why I am more upbeat than ever about the integrity of the institution. Now, we must always do what is right, we must always do what the law, what is right within the confines of the rule of law and the Constitution, now I have reviewed this matter, neither Mr Pillay nor Mr Gordhan nor Mr Magashula has spent a day in court, they were summonsed, they were summonsed to appear in court in respect of this matter, representations were made to me to review this matter. I have given due regard to the representations and all submissions that were made to me. I applied my mind to the law and to the facts and I have ultimately made a decision. That should really instil confidence in the public that everybody will be treated fairly and I did say earlier on and

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maybe you did not hear me when I said, I review many matters on a regular basis, since my appointment, I have overturned or overruled the decisions of many Directors of Public Prosecutions of many Special Directors either where I have decided that they've declined to prosecute then a prosecution must be instituted and I have done so because the interests of justice dictated and the evidence dictated that that should be the position that must be taken. I have also agreed with them in many instances where I have been asked to review matters where either the decision to prosecute or not to prosecute stands and I have done so again because the interest of justice dictate and the evidence dictate that that is the process that need to be pursued. The question around whether my tenure has damaged the NPA or the integrity of the NPA, I doubt that. Have you look at our annual report, have you looked at what we have achieved as an institution over the last year? There will also be naysayers, there will always be criticism. I accept constructive criticism, we can always do things better and I always strive to be a better leader, I always strive to be a better National Director of Public Prosecutions. I always strive to do the best I possibly can to deliver justice to the people of this country. I certainly do not owe anybody an apology. I certainly do not. There was a back-end of the question around, you know, whether it is fair to raise the issue of co-operation between the Hawks and Minister Gordhan, Mr Pillay and Mr Magashula, the question that you pose somehow only appears to direct, to be directed at Minister Gordhan, there are two other people that are involved in the matter as well. There are two other people that are affected thereby. All three of them, together with the



Hawks could have resolved this matter, this is not just about Minister Gordhan. I have also observed the Freedom Under Law and the Helen Suzman Foundation writes to me and asks me to withdraw the charges against Minister Gordhan but there are two other people that are affected hereby Mr Pillay and Mr Magashula, so when I considered the representations submitted to me by Mr Magashula and Mr Pillay I considered the entire matter, I didn't say because Minister Gordhan has not made representations to me I am not going to consider his matter. I am going to push it under the table, I am not even going to look at it, I am going to look at this matter in isolation only insofar it relates to Mr Pillay and Mr Magashula that is not justice. On the question of whether any political heads have been informed of the, of this decision, yes, I informed the Minister of Justice and Correctional Services of this decision. There was your question about the effect on the economy, such an important matter, does the economy depend on one man? I am asking you a question, this is, we must look at, there are three people that was summonsed, it was Minister Gordhan, it was Mr Pillay and Mr Magashula, all three persons enjoy the right of equality under the rule of law and equal benefit of the law. Now when you look at a matter, irrespective of who the accused person is across the country, whether it is the lowest of citizens or whether it is the most senior citizen in the country, each citizen must be treated fairly and equally so. Now this particular matter was treated like we would treat any other person, why must I give due consideration to the political climate because that is in effect what you are asking me to do?

MEDIA - CNC AFRICA: I think my question was based on ... (interrupted).



MR LUVUYO: Chief, chief, no dialogue here. Are you through with answering? Are you done?

ADV SHAUN ABRAHAMS: I am done. I just want to say thank you for coming and I am very pleased I could answer all your questions.

MEDIA: We have many more questions, sir.

MR LUVUYO: We can't engage in [indistinct 01:23:49 - 01:23:53]

MEDIA: Excuse me sir, we have a press conference, this gentleman is asking a follow-up question, this is not done, he is asking a follow-up question, please.

MEDIA: It's a question of transparency.

MR LUVUYO: Okay, you then next, your follow-up that is all you want, you not taking any.

MEDIA - CNC AFRICA: Okay, I was clarifying my question, my question was on the integrity of the National Director itself and prioritising this case as a whole, it wasn't on Minister Gordhan.

ADV SHAUN ABRAHAMS: Thank you.

MEDIA - CNC AFRICA: Or on Mr Magashula, I was asking whether, shouldn't you as a National Director prioritise this case as a whole and not rely on per say your prosecutor [indistinct 01:24:30]?

ADV SHAUN ABRAHAMS: Thank you for clarifying the matter. You know I've gone at length during the response to some of the questions by explaining the structures of the NPA and how it works and where decisions are made. Now of course I have every confidence in my



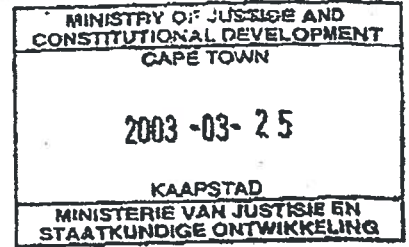
directors of public prosecutions and my special directors when they consider, consider matters and I will continue to have confidence in them in the execution of their responsibilities. I see no need for me at this stage to make any decisions in respect of matters where my directors of public prosecutions and/or special directors can first make those decisions. I hope I have answered your question. Thank you so much.

MR LUVUYO: Thank you colleagues from the Media it is the end of the questions. We are not taking any questions [indistinct 01:25:33]. We don't do that. You are excused Minister.

ADV SHAUN ABRAHAMS: Thank you so much.

MEDIA: We live from that media briefing in Pretoria, in breaking news at this hour, the NPA has announced that it has dropped the charges against the Finance Minister, Pravin Gordhan as well as the former SARS officials Ivan Pillay and Oupa Magashula. National Director of Public Prosecutions, there in picture, Shaun Abrahams who has made that announcement after quite a lengthy explanation of the charges. So that's just a recap for you what came out of that. Abraham's started by giving a summary of the four charges against Minister Gordhan and his former SARS colleagues Oupa Magashula and Ivan Pillay. He said that the NPA had overruled the charges related to their alleged misrepresentation to SARS and Government Employees Pension Fund over Pillay's pension pay-out. Abrahams also said that he was satisfied that the three had not had the intention to act unlawfully and declared the charges withdrawn with immediate effect.

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PROCLAMATION  
BY THE  
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

No. ...., 2003

NATIONAL PROSECUTING AUTHORITY ACT, 1998

Determination of Powers, Duties and Functions of a Special Director of Public Prosecutions

Under section 13(1)(c) of the National Prosecuting Authority Act, 1998(Act No. 32 of 1998), I, hereby confer, impose and assign the following powers, duties and functions on or to Advocate ANTON ROSSOUW ACKERMAN SC, a Special Director of Public Prosecutions, appointed in terms of the said provisions:

To exercise the powers, carry out the duties and perform the functions necessary, within the Office of the National Director of Public Prosecutions as directed by the National Director and—

- (a) in particular, to head the Priority Crimes Litigation Unit and to manage and direct the investigation and prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), and serious national and international crimes, which include acts of terrorism and sabotage committed under the Internal Security Act, 1982(Act No. 74 of 1982), high treason, sedition, foreign military crimes committed by mercenaries, or such other priority crimes to be determined by the National Director; and
- (b) generally, giving such advice or rendering such assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred or imposed on or assigned to him by the Constitution or any other law.

Given under my Hand and the Seal of the Republic of South Africa at.....PRETORIA.....on this.....24th.....day of.....MARCH.....Two Thousand and Three.

*T. M. Mbeki*  
T. M. MBEKI  
President

*P. M. Maduna*  
P. M. MADUNA  
Minister of the Cabinet

*[Handwritten signature]*

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**URGENT**

Your reference

Our reference

Date

V Movshovich / P Dela / A De Meyer  
3001134

19 September 2016

Dear Sir

**Freedom Under Law (RF) NPC ("FUL") // National Director of Public Prosecutions ("the NDPP") / Nomcgobo Jiba ("Jiba") / President of the Republic of South Africa ("the President") / Lawrence Sithembiso Mrwebi ("Mrwebi") and others (GP case no: 89849/2015) ("the Application")**

1. As you know, we act for FUL ("our client") in the Application.
2. You will also know that the matter between the General Council of the Bar of South Africa and Jiba and Mrwebi was heard on 30 May 2016 - 1 June 2016 (GP case no 23576/2015). Judgment in that matter was handed down on 15 September 2016 by the Honourable Legodi and Hughes JJ ("the Judgment") in terms whereof Jiba and Mrwebi were struck from the roll of advocates on the basis that they were not fit and proper. The effect of the Judgment, as set forth in section 9(1) of the National Prosecuting Authority Act, 1998 and para [23] of the Judgment, is that Jiba and Mrwebi may no longer occupy their positions within the National Prosecuting Authority ("NPA").
3. Over the weekend, it was reported that Jiba and Mrwebi have indicated that they would seek leave to appeal against the Judgment. It was also reported that, pursuant to Jiba and Mrwebi's requests, they have been placed on "*special leave*" by the NPA.
4. The Court found Jiba and Mrwebi to be dishonest and lack integrity and probity required of officers of court. The findings are damning and conclusive.
5. Pursuant to the Judgment, our client reiterates its position, as articulated in the Application, that Jiba and Mrwebi are not fit and proper to hold their high office. You will remember that the Application seeks for Jiba and Mrwebi to be suspended and disciplined under section 12(6) of the Act; and for the criminal charges against them to be reinstated.

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: RB Africa NG Alp OA Ampofo-Anti RL Appelbaum BA Baillie JM Bellew AE Bennett DHL Booysen AR Bowley PG Bradshaw EG Brandt JL Brink MS Burger RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies ME Davis PM Daya JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley KZ Dlothi G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans GA Fichardt DT Fisher-Jeffes JB Forman MM Gibson H Goolam CI Gouws JP Gouws PD Greal A Harley VW Harrison JM Harvey MH Hathorn JS Henning KR Hillis NA Hlatshwayo XNC Hlatshwayo S Hockey CM Hofeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser MD Kota J Lamb PSG Leon PG Leyden L Marais S McCafferty MC McIntosh M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu VS Moodaley LA Morphet VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips C Pillay HK Potgieter S Rajah D Ramjettan NJA Robb DC Rudman JW Scholtz KE Shepherd DMJ Simaan AJ Simpson J Simpson N Singh AA Sourvas MP Spalding L Stein PS Stein LJ Swaine ER Swanepoel Z Swanepoel A Thakor A Toefy D Vallabh PZ Vanda SE van der Meulen ED van der Vyver M van der Walt N van Dyk A van Niekerk MM van Schaardenburgh JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson JWL Westgate KL Williams K Wilson RH Wilson M Yudaken Chief Operating Officer: SA Boyd

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6. It is imperative for Jiba and Mrwebi (even if they institute applications for leave to appeal against the Judgment) to have disciplinary processes instituted against them, as contemplated in section 12(6) of the Act, without any further delay. Such relief is sought in the Application. It is simply unacceptable for persons who have been found to be plainly unfit for office to continue for months or years to be classified as Deputy National Director of Public Prosecutions and Director of Public Prosecutions and to draw a salary. There must be a disciplinary process and it must happen immediately.
7. The prosecution into Jiba's misconduct, as contemplated in the Application, must likewise be reinstated without delay.
8. Our client calls on the President of the Republic of South Africa, the National Director of Public Prosecutions and the National Prosecuting Authority to confirm, by no later than 26 September 2016, that the steps in paras 6 and 7 above will be implemented forthwith, failing which our client will take steps to exercise its rights, including approaching the Honourable Deputy Judge President for the Application to be heard by way of special allocation as a matter of urgency.
9. The implementation of steps in paras 6 and 7 above may also obviate substantial time and costs in the Application, which would clearly be in the public interest. Should those steps not be implemented, our clients will supplement their papers to seek punitive costs orders against your clients in their individual capacities.

Yours faithfully

**WEBBER WENTZEL****V Movshovich**

Direct tel: +27 11 530 5867

Direct fax: +27 11 530 6867

Email: vlad.movshovich@webberwentzel.com





## Wesley Timm

---

**From:** Wesley Timm  
**Sent:** 01 November 2016 13:09  
**To:** 'presidentrsa@presidency.gov.za'; 'president@po.gov.za';  
'president@presidency.gov.za'; 'ntoeng@presidency.gov.za';  
'nmajake@presidency.gov.za'  
**Cc:** 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za';  
'jppretorius@npa.gov.za'; Vlad Movshovich; Dylan Cron; Pooja Dela; Daniel  
Rafferty; Tayla Dye  
**Subject:** RE: Impropriety and unfitness for office of the National Director of Public  
Prosecutions  
**Attachments:** Annex A part 3.PDF

I attach part 3 of annex A.

---

**From:** Wesley Timm  
**Sent:** 01 November 2016 13:08  
**To:** 'presidentrsa@presidency.gov.za'; 'president@po.gov.za'; 'president@presidency.gov.za';  
'ntoeng@presidency.gov.za'; 'nmajake@presidency.gov.za'  
**Cc:** 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za'; 'jppretorius@npa.gov.za'; Vlad  
Movshovich; Dylan Cron; Pooja Dela; Daniel Rafferty; Tayla Dye  
**Subject:** RE: Impropriety and unfitness for office of the National Director of Public Prosecutions

I attach part 2 and annex A.

---

**From:** Wesley Timm  
**Sent:** 01 November 2016 13:08  
**To:** 'presidentrsa@presidency.gov.za'; 'president@po.gov.za'; 'president@presidency.gov.za';  
'ntoeng@presidency.gov.za'; 'nmajake@presidency.gov.za'  
**Cc:** 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za'; 'jppretorius@npa.gov.za'; Vlad  
Movshovich; Dylan Cron; Pooja Dela; Daniel Rafferty; Tayla Dye  
**Subject:** Impropriety and unfitness for office of the National Director of Public Prosecutions

Dear Sirs

I attach a letter for the attention of His Excellency, President JG Zuma.

The letter has two annexes, A and B. Due to the size of annex A, I will send this annex in several parts. Attached to this email are parts 1 and 4 of annex A as well as annex B. Parts 2 and 3 of annex A will follow in separate emails.

Yours faithfully

Wesley Timm  
Associate

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[www.webberwentzel.com](http://www.webberwentzel.com)

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**Wesley Timm**

---

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**Cc:** 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za';  
'jppretorius@npa.gov.za'; Vlad Movshovich; Dylan Cron; Pooja Dela; Daniel  
Rafferty; Tayla Dye  
**Subject:** RE: Impropriety and unfitness for office of the National Director of Public  
Prosecutions  
**Attachments:** Annex A part 2.PDF

I attach part 2 and annex A.

**From:** Wesley Timm  
**Sent:** 01 November 2016 13:08  
**To:** 'presidentrsa@presidency.gov.za'; 'president@po.gov.za'; 'president@presidency.gov.za';  
'ntoeng@presidency.gov.za'; 'nmajake@presidency.gov.za'  
**Cc:** 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za'; 'jppretorius@npa.gov.za'; Vlad  
Movshovich; Dylan Cron; Pooja Dela; Daniel Rafferty; Tayla Dye  
**Subject:** Impropriety and unfitness for office of the National Director of Public Prosecutions

Dear Sirs

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The letter has two annexes, A and B. Due to the size of annex A, I will send this annex in several parts. Attached to this email are parts 1 and 4 of annex A as well as annex B. Parts 2 and 3 of annex A will follow in separate emails.

Yours faithfully

Wesley Timm  
Associate

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[www.webberwentzel.com](http://www.webberwentzel.com)

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**Wesley Timm**

---

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**Sent:** 01 November 2016 13:08  
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'nmajake@presidency.gov.za'  
**Cc:** 'skabrahams@npa.gov.za'; 'hzwart@npa.gov.za'; 'kbenjamin@npa.gov.za';  
'jppretorius@npa.gov.za'; Vlad Movshovich; Dylan Cron; Pooja Dela; Daniel  
Rafferty; Tayla Dye  
**Subject:** Impropriety and unfitness for office of the National Director of Public Prosecutions  
**Attachments:** Letter to the President 01112016.pdf; Annex B.PDF; Annex A part 1.PDF; Annex A  
part 4.PDF

Dear Sirs

I attach a letter for the attention of His Excellency, President JG Zuma.

The letter has two annexes, A and B. Due to the size of annex A, I will send this annex in several parts. Attached to this email are parts 1 and 4 of annex A as well as annex B. Parts 2 and 3 of annex A will follow in separate emails.

Yours faithfully

Wesley Timm  
Associate

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**His Excellency, Mr JG Zuma**  
**The President of the Republic of South Africa**  
 Union Buildings  
 Government Avenue  
 Pretoria  
 0001

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**president@po.gov.za; president@presidency.gov.za;**  
**ntoeng@presidency.gov.za; nmajake@presidency.gov.za**

Your reference

Our reference

Date

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

1 November 2016

Dear Sir

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

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

**Background**

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

Senior Partner: JC Els Managing Partner: SJ Hulton Partners: RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley EG Brandt JL Brink S Browne MS Burger RI Carrim T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davles PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman CP Gaul KL Gawith MM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy A Harley JH Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Hoffeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston CJ Kok J Lamb L Marais S McCafferty MC McIntosh SJ McKenzie M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu S Mogale J Moolman VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe A Ngubo ZH Mtshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips D Ramjattan GI Rapson NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DMJ Simaan AJ Simpson N Singh P Singh MP Spalding L Stein PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen A van Niekerk JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken Chief Operating Officer: SA Boyd

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Page 2

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

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

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

**Mr Abrahams**

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



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



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Page 4

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

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



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





**JP Pretorius SC and S Mzinyathi**

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



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Page 7

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

**Conclusions**

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

Yours faithfully



P.P. **WEBBER WENTZEL**

**V Movshovich**

Direct tel: +27 11 530 5867

Direct fax: +27 11 530 6867

Email: vlad.movshovich@webberwentzel.com

**Cc: The National Director of Public Prosecutions, by email: skabrahams@npa.gov.za; hzwart@npa.gov.za**

**Dr JP Pretorius SC, by email: kbenjamin@npa.gov.za; jppretorius@npa.gov.za**

**Sibongile Mzinyathi, by email: skabrahams@npa.gov.za; hzwart@npa.gov.za; kbenjamin@npa.gov.za; jppretorius@npa.gov.za**





THE PRESIDENCY  
REPUBLIC OF SOUTH AFRICA  
Private Bag X1000, Pretoria, 0001

Messrs Webber Wentzel  
P O Box 61771  
Marshalltown  
2107  
For Attention: V Movshovich

Dear Sirs,

**RE: IMPROPRIETY AND UNFITNESS FOR OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS (NDPP)**

1. The Presidency acknowledges receipt of your letter dated 01 November 2016, which was subsequently referred to the Legal & Executive Services Unit to liaise with your office regarding an extension.
2. Whilst we were obliquely aware of media reports pertaining thereto, your letter came to the attention of the President and his legal advisors only today due to the fact that the only correct addressee was [Ntoeng@presidency.gov.za](mailto:Ntoeng@presidency.gov.za).
3. None of the purported addressees are authorised to receive correspondence for and on behalf of the President, nor does it fit into their portfolios and we suggest that you liaise with our office to provide you with the correct details so as to avoid a recurrence and the attendant delay.
4. In light of the above, the Presidency requests an extension until 21 November 2016. This will afford President Zuma a proper opportunity to address what no doubt is a serious matter with the effected parties in

**IMPROPRIETY AND UNFITNESS FOR OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS (NDPP)**

A handwritten signature in black ink, appearing to be 'J. M. M.' followed by a flourish.

anticipation of any action he may contemplate, after having considered such in its entirety.

Yours faithfully



**Mr Geoffrey Mphaphuli**

**Acting Head: Legal & Executive Services**

**Date:** 07/11/2016





14 November 2016

Dear Dr Pretorius,

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

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

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

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

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

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

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

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

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

A handwritten signature in black ink, appearing to be 'M. J. S.', is located in the bottom right corner of the page.

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

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

Yours sincerely,

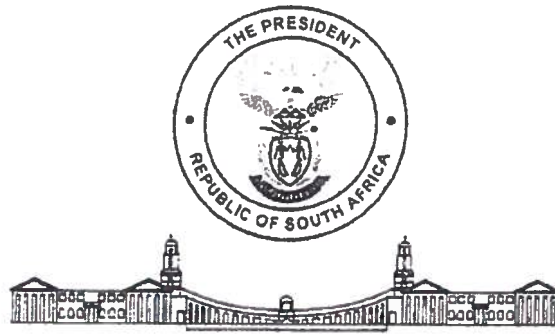


**Mr Jacob Gedleyihlekisa Zuma**  
**President of the Republic of South Africa**

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

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





14 November 2016

Dear Adv. Abrahams,

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

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

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

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

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

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

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

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

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

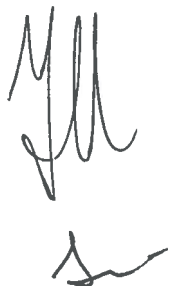
Yours sincerely,



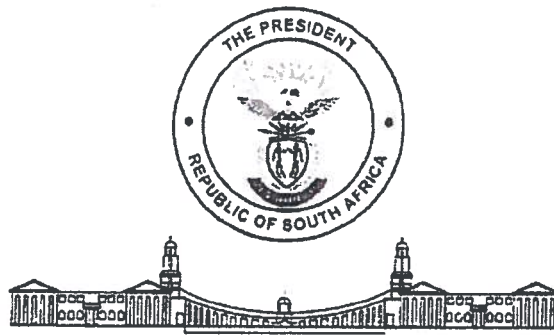
**Mr Jacob Gedleyihlekisa Zuma**  
**President of the Republic of South Africa**

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

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







14 November 2016

Dear Adv. Mzinyathi,

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

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

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

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

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

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

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

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

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

*[Handwritten signature]*  
2

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

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

Yours sincerely,



**Mr Jacob Gedleyihlekisa Zuma**  
**President of the Republic of South Africa**

Advocate Sibongile Mzinyathi  
Director of Public Prosecutions  
Gauteng North  
Pretoria  
0001

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



**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: 87643/2016

In the matter between:

**HELEN SUZMAN FOUNDATION**

First Applicant

**FREEDOM UNDER LAW NPC**

Second Applicant

and

**THE PRESIDENT OF THE REPUBLIC**

**OF SOUTH AFRICA**

First Respondent

**SHAUN ABRAHAMS**

Second Respondent

**DR JP PRETORIUS SC**

Third Respondent

**SIBONGILE MZINYATHI**

Fourth Respondent

**THE NATIONAL PROSECUTING AUTHORITY**

Fifth Respondent

---

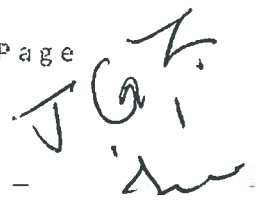
**FIRST RESPONDENT'S ANSWERING AFFIDAVIT**

---

I, the undersigned,



J.P.S



**JACOB GEDLEYIHLEKISA ZUMA**

do hereby make oath and state that:

1. I am the President of the Republic of South Africa duly appointed in terms of section 87 of the Constitution of the Republic of South Africa, 108 of 1999 (“the Constitution”). I am the first respondent in this application.
2. The facts contained herein fall within my personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, both true and correct.
3. Any legal submissions that are made by me are made on the advice of my legal representatives.

**THE RELIEF SOUGHT**

4. The applicants seek, on an urgent basis:
  - 4.1 to review and set aside my alleged *failures* to institute an enquiry as against the second to fourth respondents and to provisionally suspend them pending the enquiry;



6.5.4 It is untrue that the decision to suspend or to hold an enquiry is a foregone conclusion as alleged by the applicants. The decision is not a foregone conclusion as all relevant facts and circumstances should be taken into account and these facts and circumstances are not before this Honourable Court and/or me. In fact I have not received all the facts and circumstances to make a decision.

## SECTION 12(6) REQUIREMENTS

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

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

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

T.S.S.  

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

7.4 the fourth and last ground on which an NDPP can be suspended or removed from office is on account thereof that he or she is no longer a fit and proper person to hold the office concerned. "*Fit and proper*", I am advised, have two elements to it. The one relates to formal qualification and the other to integrity. The applicants are not questioning the formal qualifications of the second to fourth respondents the only thing they seek to impugn is the integrity of the second to fourth respondents.

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



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

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

8.3 To the extent that the applicants seek to impute ulterior motive, one would expect that the applicants would furnish facts which, when established, would point to ulterior motive. This they do not do. At the very least this attack appears to find inspiration from the fact that the second respondent attended a meeting at Juthuli House with, amongst others, myself. That meeting had nothing to do with the charges that were to be proffered against Minister Gordhan. That meeting concerned the student protests.

8.4 Although the applicants are obliged to make their case in the founding papers, I still invite the applicants in the reply to give concrete facts which, if established, would point to any ulterior motive, utter recklessness and incompetence. Because of the importance of this assertion of ulterior motive I will approach the above Honourable Court to grant me leave to supplement my answering affidavit, this is crucial. I still invite the applicants to disclose those facts which inform their conclusion that there was ulterior motive in contrast to an incorrect decision in charging Minister Gordhan.

#### WHY THE RELIEF SOUGHT IS INCOMPETENT

9. I deny that I have *failed* alternatively refused to act in accordance with section 12 (6) of the NPA Act. The clear uncontested facts show that this allegation is clearly incorrect. I say so because:

9.1 The *failures*, alternatively refusal by me to institute an enquiry, under section 12(6)(a) of the NPA Act, into the second respondent's fitness to hold the office of the National Director of Public Prosecutions, is not competent. Annexure **FA12** read with annexure **AA1** demonstrably show on the facts that I have initiated the process in terms of section 12(6)(a) of the NPA Act. These facts cannot be disputed by the applicants. These facts clearly evinces that I have not *failed* to institute an enquiry. These facts clearly show that I have not refused to institute

TS  
JG  
is



## WEBBER WENTZEL

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**His Excellency, Mr JG Zuma**  
**The President of the Republic of South Africa**  
Union Buildings  
Government Avenue  
Pretoria  
0001

c/o The State Attorney

Mr RJ Sebelemetsa

By email: [rsebelemetsa@justice.gov.za](mailto:rsebelemetsa@justice.gov.za)

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F +27 11 530 5111  
[www.webberwentzel.com](http://www.webberwentzel.com)

Your reference

Our reference

Date

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

7 December 2016

Dear Sir

### Impropriety and unfitness for office of Mr Abrahams, Mr Mzinyathi and Dr Pretorius SC ("the Prosecutors")

1. As you know, we act for Freedom Under Law NPC and the Helen Suzman Foundation ("our clients").
2. We refer to your letters to Mr Abrahams, Mr Mzinyathi and Dr Pretorius SC ("the Prosecutors") dated 14 November 2016, in which you requested reasons as to why the Prosecutors should not be suspended from their respective offices at the National Prosecuting Authority pending inquiries into the Prosecutors' respective fitness for office ("the requests"). We note that the requests gave the Prosecutors until 28 November 2016 to respond.
3. Our clients request that any representations received from the Prosecutors ("the representations") be made available to our clients as soon as possible.
4. Furthermore, our clients request that you indicate, as soon as possible, a date on which you will make your decision, under section 12(6) of the National Prosecuting Authority Act,

**Senior Partner:** JC Els **Managing Partner:** SJ Hutton **Partners:** RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley EG Brandt JL Brink S Browne MS Burger RJ Carrim T Cassim RS Coelho KL Collier KN Colman KE Coster K Couzyn CR Davidow JH Davies PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen NJR Evans AA Feleki GA Fichardt JB Forman CP Gaul KL Gawith MM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hills XNC Hlatshwayo S Hockey CM Hofeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston CJ Kok J Lamb L Marais S McCafferty MC McIntosh SJ McKenzie M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu S Mogale J Noolman VH Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe A Ngubo ZM Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips D Ramjettan GI Rapson NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DMJ Simaan AJ Simpson N Singh P Singh NP Spalding L Stein PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen A van Niekerk JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken **Chief Operating Officer:** SA Boyd



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Page 2

1998 ("NPA Act"), as to whether you will institute the enquiries into fitness and propriety of the Prosecutors and suspend the Prosecutors pending such enquiries. We note that you and your legal representatives have previously indicated that this is a matter of urgency and great public importance.

5. Please note that our clients reserve all their rights in respect of the judgment of the Full Court handed down on 24 November 2016 in respect of GP case no. 87643/2016, including their right to seek leave to appeal.

Yours faithfully

**WEBBER WENTZEL****V Movshovich**

Direct tel: +27 11 530 5867

Direct fax: +27 11 530 6867

Email: vlad.movshovich@webberwentzel.com

Cc: *The State Attorney, acting for the National Director of Public Prosecutions; Dr JP Pretorius SC; and Sibongile Mzinyathi; by email: rsebelemetsa@justice.gov.za*





the doj & cd

FA 17 224

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE STATE ATTORNEY: JOHANNESBURG

Private Bag X9, JOHANNESBURG, 2000  
10<sup>TH</sup> Floor, North State Building, 95 Albertina Sisulu Street (cnr Kruis), JOHANNESBURG, 2001

Docex 688, Johannesburg  
Tel 011 330 7600

My ref : Mr Lekabe/P1

Your ref: V Movshovich/P Dela/ D Cron/  
W Timm/ J Coyle/ T Dye

Enq : MR KG Lekabe

E-mail : [KLekabe@justice.gov.za](mailto:KLekabe@justice.gov.za)

Fax : 086 587 1152

Date: 13 December 2016

WEBBER MENTZEL  
P.O BOX 61771  
JOHANNESBURG  
2107

"per fax.: 011 530 6867&  
email.: vlad.movshovich@webberwentzel.com

Dear Sir/Madam

**RE: HELEN SUZMAN FOUNDATION & FREEDOM UNDER LAW**

1. We refer to your letter dated the 07<sup>th</sup> December 2016 and note the contents thereof.
2. Submissions were received by the office of the Presidency from the relevant parties, the purpose of which was to place His Excellency President Zuma in a position to give due and proper consideration to the same in light of the serious allegations levelled, coupled with the request directed to the President to act against the mentioned individuals.
3. Indeed the matter is both urgent and of public importance and it is within this context that President Zuma will apply his mind

(Always quote my reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc; LLM) (Law); ; Z N S O Nhlayisi (B Proc); V Dhulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsele (B Proc, LLB); S L Makenna (B Proc); S J Manishana (B Proc); L Flatela (B Proc, LLM) ; Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);V Manamela (B Proc) :F Patel( BA;LLB); R T Poole (B Proc); J H Van Schalkwyk (LLB) ; H R Jaskolka ( B Proc , LLB) S Naidoo ( BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Malape (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Setshatole (B Proc, LLB); R R NemaKonde (LLB, LLM); D Mphephu (B Proc);K Thaver (B.Iuris,LLB) M L Makabate(LLB);A Netshifhefhe (LLB);L Makunga (LLB);O S Matjila (LLB); Z Sahib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Magcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB); K A Phokwane (LLB)

having regard to all the prescripts of law which apply, where after an evaluation will be done and a decision made.

4. The decision will firstly be communicated to the affected parties and thereafter communicated publicly.

Yours faithfully

  
**K.G LEBABE (MC)**  
**STATE ATTORNEY**

(Always quote my reference number)

**STATE ATTORNEY:** K G Lekabe (B Proc, LLB, LLM) **DEPUTY STATE ATTORNEYS:** T Pillay (B Proc; LLM) (Law); ; Z N S O Nhlaysi (B Proc); V Dhulam (B Proc, LLM) **SENIOR ASSISTANT STATE ATTORNEYS:** B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsele (B Proc, LLB); S L Makenna (B Proc); S J Manitshana (B Proc); L Flatela (B Proc, LLM) ; Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc);;V Manamela (B Proc) :F Pataki (BA;LLB); R T Poee (B Proc); J H Van Schalkwyk (LLB) ; H R Jaskolka ( B Proc , LLB) S Naidoo ( BA Law; LLB) **ASSISTANT STATE ATTORNEYS:** H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Malape (LLB);, LLB); M H Maponya (B Proc);E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Setlhatole (B Proc, LLB); R R Nematikonde (LLB, LLM); D Mphephu (B Proc);K Thaver (B.Iuris,LLB) M L Makabata(LLB);A Netshifhefhe (LLB);L Makunga (LLB);O S Matjila (LLB); Z Sahib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Magcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB) ; K A Phokwane (LLB)


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Your reference

Mr Lekabe/P1

Our reference

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

Date

3 January 2017

Dear Sir

### Impropriety and unfitness for office of Mr Abrahams, Mr Mzinyathi and Dr Pretorius SC ("the Prosecutors")

1. We acknowledge receipt of your letter of 13 December 2016 advising on behalf of the President that he received the submissions by the Prosecutors on 28 November 2016 ("the Submissions") and confirming (i) that the allegations are serious; and (ii) that *"the matter is both urgent and of public importance"*.
2. Our clients are, however, concerned to note that notwithstanding the acknowledged seriousness of the complaints and their urgent public importance, and notwithstanding their receipt several weeks ago, President Zuma has not yet applied his mind. While appreciating that the President has a busy and demanding schedule, it is respectfully submitted, that such delay is unreasonable in a matter of such *"urgen[cy]"* and *"public importance"*.
3. Your letter, moreover, provides no indication of when the President intends or is likely to take a decision. To date, it would appear that no decision has been taken by the President. Our clients thus respectfully yet urgently request that the President indicate, as soon as possible, when his decision on this matter may be expected.

**Senior Partner:** JC Els **Managing Partner:** SJ Hutton **Partners:** RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley EG Brandt JL Brink S Browne MS Burger RJ Carrim T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman CP Gaul KL Gawith MM Gibson SJ Gilmore H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XHC Hlatshwayo S Hockey CM Hofeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston CJ Kok J Lamb L Marais S McCafferty MC McIntosh SJ McKenzie M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu S Mogale J Moolman VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe A Ngubo ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips D Ramjattan GI Rapson NJA Robb DC Rudman N Sader JW Scholtz KE Shepherd DMJ Simaan AJ Simpson H Singh P Singh MP Spalding L Stein PS Stein MW Straeuli LJ Swaine Z Swanapoel A Thakor A Toefy PZ Vanda SE van der Meulen A van Niekerk JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken **Chief Operating Officer:** SA Boyd

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Page 2

4. Furthermore, in our letter of 7 December 2016, our clients requested that the Submissions be made available to them. Your letter did not address this request.
  
5. Bearing in mind the public importance of the matter, the interests of transparency and the legitimacy of the NPA, and the fact that (as conceded by the President) our clients have standing to challenge any decision reached by him in this matter, our clients repeat their request that the representations be made available to them, and indeed to the public without further delay.

Yours faithfully



S.P.

**WEBBER WENTZEL**

**V Movshovich**

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Direct fax: +27 11 530 6867

Email: vlad.movshovich@webberwentzel.com

Cc: *The State Attorney, acting for the National Director of Public Prosecutions; Dr JP Pretorius SC; and Sibongile Mzinyathi; by email: rsebelemetsa@justice.gov.za*



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Your reference	Mr Lekabe/P1
Our reference	V Movshovich / P Dela / D Cron / W Timm / J Coyle / T Dye 3012607
Date	21 February 2017

Dear Sir

**Improprity and unfitness for office of Mr Abrahams, Mr Mzinyathi and Dr Pretorius SC ("the Prosecutors")**

1. We refer to your letter on behalf of the Honourable President Jacob Zuma ("the President") dated 13 December 2016 ("your letter"), as well as our letter of 3 January 2016 ("our letter").

2. Notwithstanding the acknowledgement in your letter that "the matter is both urgent and of public importance", we are yet to receive a response to our letter. Moreover, it has now been almost three months since the President received the submissions by the Prosecutors on 28 November 2016 ("the Submissions"). Despite the acknowledgment in your letter, it appears that, to date, no decision has been made in respect of the propriety and fitness of the Prosecutors to hold office ("the Decision").

3. As you will no doubt appreciate, this is a matter of paramount public importance and, with respect, a reasonable time has elapsed since receipt of the Submissions. The President's delay in the making of the Decision is unreasonable and, respectfully, does violence to his constitutional mandate.

Senior Partner: JC Eis Managing Partner: SJ Hutton Partners: RB Africa NG Alp OA Amporo-Anti RL Appelbaum AE Bennett DHL Booyesen AR Bowley EG Brandt JL Brink S Browne MS Burger RJ Carrim T Cassim RS Coelho KL Collier KM Coiman KE Coester K Couzyn CR Davidow JH Davies PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diamond DA Dinglley G Diver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Feleki GA Fichardt JB Forman CP Gau KL Gawith M Gibson SJ Gillmour H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston C Kok J Lamb L Marais S McCaffery MC McIntosh SJ McKenzie M McLaren SI Metzger SM Methula CS Meyer AJ Mills JA Miller D Hillo NP Mngomezulu S Mogale J Moolman VM Novshovich M Ntshali SP Nalaker RA Neilson BP Ngqope A Nguibo ZN Ntshona MB Nzimande L Odenaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane RA Phillips D Ramjethan GI Rapson NJA Robb DC Rudman N Sader JW Schoitz KE Shephard DM Simaan AJ Simpson N Singh P Singh RJP Spalding L Stein PS Stein MW Straeuli U Swaine Z Swanepoel A Takor A Toefy PZ Vanda SE van der Neulen A van Niekerk JE Veeran D Venter B Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken Chief Operating Officer: SA Boyd

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4. You will further be aware that the Full Court of the High Court, Pretoria, has handed down judgment on the understanding that the President is actively discharging his mandate under section 12(6) of the National Prosecution Authority Act, 1998. The President's failure to act, however, is inconsistent with the version presented to (and accepted by) the Court.<sup>1</sup>

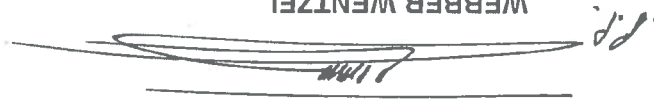
5. We accordingly repeat, as a matter of great urgency, our clients' request that you:

5.1 provide an indication as to when the President intends to take the Decision; and

5.2 provide our clients with the Submissions.

6. Should our clients not receive a response to these requests by 7 March 2017, they will assume that the President does not intend to make the Decision, in which case our clients will be forced to approach a court for appropriate relief.

Yours faithfully



**WEBBER WENTZEL**  
**V Movshovich**

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Direct fax: +27 11 530 6867  
Email: vlad.movshovich@webberwentzel.com

*Cc: The State Attorney, acting for the National Director of Public Prosecutions; Dr JP Pretorius  
SC; and Sibongile Mzinyathi; by email: rsebelemeisa@justice.gov.za*

<sup>1</sup> Our clients do not, however, necessarily accept the correctness of the Court's findings and reserve all rights in this regard.







**the doj & cd**

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

**FA 20 230**

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My ref : Mr KG Lekabe

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**Date: 03 March 2017**

**WEBBER WENTZEL ATTORNEYS  
SANDTON**

"Fax no.: 011 530 6867"

"Email.: [vlad.movshovich@webberwentzel.com](mailto:vlad.movshovich@webberwentzel.com)"

Sir

**RE: IMPROPRIETY AND UNFITNESS FOR OFFICE OF MR  
ABRAHAMS, MR MZINYATHI AND DR PRETORIUS SC ("the  
Prosecutors")**

We refer to your letter dated 21 February 2017 and respond as follows:

1. The President is alive to the fact that it does not fall within the purview of the President to adjudge whether Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi are guilty of misconduct or are not 'fit and proper' to hold office. That is the task of an inquiry, if established, in terms of s12(6) of the National Prosecuting Authority Act. What falls within the purview of the President is to establish whether, prima facie, there is evidence of misconduct or lack of fitness and propriety to hold

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STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc; LLM) Law); ; Z N S O Nhlayisi (B Proc); V Dhulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitseia (B Proc, LLB); S L Makenna (B Proc); S J Manishana (B Proc); L Flatela (B Proc, LLM); Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc); V Manamela (B Proc); F Patel (BA; LLB); R T Poole (B Proc); J H Van Schalkwyk (LLB); H R Jaskolka (B Proc, LLB) S Naidoo (BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Malape (LLB);, LLB); M H Maponya (B Proc); E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Setthathole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphphu (B Proc); K Thaver (B. Iuris, LLB) M L Makabata (LLB); A Netshifhefhe (LLB); L Makunga (LLB); O S Matjila (LLB); Z Sahib (Bsoc; LLB); S Shaik (Bsoc; LLB); S Magcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB); K A Phokwane (LLB)

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office on the part of Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi.

2. In considering your request that the President must establish an enquiry to look into the fitness or otherwise of Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi to hold office, the President had to place weight to the constitutional provisions of section 179 of the Constitution of the Republic of South Africa, 1996, which guarantees the independence of the National Prosecuting Authority and those of its officials.
3. The President also took into consideration the provisions of section 12(5) of the National Prosecuting Authority Act, 1998 which prohibits the provisional suspension or removal of office of an NDPP except in accordance with the provisions of subsection 6, 7 and 8 of the National Prosecuting Authority Act, 1998.
4. Having considered the concerns raised by your clients, Dr Pretorius and Advocate Mzinyathi, the President could not find substantiation for the claim that their conduct was actuated by ulterior motive or any other improper motive which would give rise to a charge of misconduct or that any one of them is no longer fit and proper to hold office.
5. The President has also considered the career records of Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi, both qualifications and experience have to date of their decision to charge and to review the charges against Minister Gordhan, Mr Pillay and Mr

(Always quote my reference number)

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Magashula, stood above reproach.

6. The President is of the view that there is no prima facie evidence pointing to the conduct of Advocate Shaun Abrahams, the NDPP, Dr Pretorius and Advocate Mzinyathi, constituting misconduct or lack of fitness and propriety to warrant the invocation of the provisions of section 12(6) of the National Prosecuting Authority Act.
7. Having carefully considered the matter the President decided not to provisionally suspend Advocate Shaun Abrahams, Dr Torie Pretorius and Advocate Sibongile Mzinyathi and institute an enquiry into their fitness to hold office.

Yours faithfully



**K.G LKABE (Mr)**  
**STATE ATTORNEY**  
**JOHANNESBURG**

(Always quote my reference number)

STATE ATTORNEY: K G Lekabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc; LLM) I Law); : Z N S O Nhlaysi (B Proc); V Dhulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preez (B. Iuris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Makenna (B Proc); S J Maniashana (B Proc); L Flatela (B Proc, LLM); Malherbe (B Iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc); V Manamela (B Proc); F Patel (BA; LLB); R T Poole (B Proc); J H Van Schaikwyk (LLB); H R Jaskolka (B Proc, LLB) S Naidoo (BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Malape (LLB); LLB); M H Mponya (B Proc); E L Matlou (B Iuris, LLB); H T Ngobeni (B Iuris, LLB); B P N Nkoana (LLB); M J Sethunya (LLB); C T Setshatole (B Proc, LLB); R R NemaKonde (LLB, LLM); D Mphphu (B Proc); K Thaver (B. Iuris, LLB) M L Makabate (LLB); A Netshifhefhe (LLB); L Makunga (LLB); O S Matjila (LLB); Z Sahib (Bsoc; LLB); S Shalk (Bsoc; LLB); S Magcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB); K A Phokwane (LLB)

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Your reference	Our reference	Date
Mr Lekabe/P1	V Movshovich / P Dela / D Cron / W Timm / J Coyle / T Dye 3012607	8 March 2017

Dear Sir

**Impropriety and unfitness for office of Mr Abrahams, Mr Mzinyathi and Dr Pretorius SC ("the Prosecutors")**

1. We refer to your letter on behalf of the Honourable President Jacob Zuma ("**the President**") dated 3 March 2017 ("**your letter**").
2. We note that the President has taken the decision not to suspend the Prosecutors provisionally and not to establish an enquiry into the propriety and fitness of the Prosecutors to hold office ("**the Decision**"). Your letter further points out that the President considered:
  - 2.1 the concerns raised by our clients;
  - 2.2 the submissions received by the President on 28 November 2016 ("**the Submissions**"); and
  - 2.3 the career records, qualifications and experience of the Prosecutors ("**the additional information**").

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley EG Brandt JL Brink S Browne MS Burger RI Carrim T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies PN Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen NJR Evans AA Felekis GA Fichardt JB Forman CP Gaul KL Gawith MM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Hoffeld PM Holloway HF Human AV Ismail KA Jarvis NE Jarvis CH Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston CJ Kok J Lamb L Marais S McCafferty MC McIntosh SJ McKenzie M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu S Mogale J Moolman VM Movshovich M Mitchell SP Naicker RA Nelson BP Ngoepe A Ngubo ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige ANI Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips D Ramjattan GI Rapson NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DMJ Simaan AJ Simpson N Singh P Singh MP Spalding L Stein PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen A van Niekerk JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson N Yudaken Chief Operating Officer: SA Boyd



3. We assume your letter encompasses the reasons for the Decision. Should our assumption be incorrect we ask that you provide us with the reasons by no later than Monday, 20 March 2017.
4. We again request that you provide our clients with the Submissions. Furthermore and in light of the Decision, we request that you provide our clients with the additional information and any other documentation or information on which the President relied in coming to the Decision.
5. Please furnish the Submissions and all other information and documentation to our clients by 20 March 2017.

Yours faithfully



P.P.

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## Exclusive: Pravin to be charged again

2016-11-06 06:05

Abram Mashego - **City Press**

Finance minister Pravin Gordhan is expected to be charged again next month.

And this time, a determined Hawks and National Prosecuting Authority (NPA) team want to make sure they have a strong case against him and his co-accused.

The new charges will relate to the establishment of the so-called rogue unit in 2007, when Gordhan was commissioner of the SA Revenue Service (Sars).

Two senior Hawks officials and an NPA executive close to the investigation have told City Press that Gordhan and his former Sars deputy, Ivan Pillay, will be charged "before Christmas".

"This is not overnight work. There is a lot that we still have to do, but they will be charged before Christmas," said a senior Hawks official this week.

Another senior Hawks officer said: "The charges laid against them will include fraud, defeating the ends of justice and contravention of the Regulation of Interception of Communications and Provision of Communication-Related Information Act."

City Press has learnt that the Hawks and the NPA are aiming to list Gordhan as "accused number 1" on the charge sheet.

National Director of Public Prosecutions Shaun Abrahams surprised many on October 11, when he announced charges against Gordhan, Pillay and former Sars commissioner Oupa Magashula.

He spent most of that press briefing speaking about the alleged illegal Sars unit – but opted instead to charge the three with fraud and contraventions of the Public Finance Management Act relating to Pillay's early retirement.

City Press has also established that the Hawks team investigating Sars' High Risk Investigation Unit, dubbed the rogue unit, has been beefed up with an additional two investigators as it scrambles for further evidence against Gordhan and several other former Sars employees, including former group executive for investigations Johann van Loggerenberg.

The Hawks detectives "recently" approached former deputy finance minister Jabu Moleketi for a statement, and asked him to provide information about the formation of the investigation unit, which he initially opposed.

According to a "secret" information note sent by the Hawks to State Security Minister David Mahlobo on January 20, Moleketi had expressed misgivings about the unit's establishment in February 2007, when Gordhan approved it and then finance minister Trevor Manuel signed it off.

In the note, it states that Moleketi wrote on Gordhan's application: "Supported – however, this is a strange way of executing what I consider to be an economic mandate of NIA [the National Intelligence Agency]. It seems as though it is an add-on rather than part of NIA's mandate."

Moleketi yesterday confirmed he was approached to provide a statement to the Hawks.



Finance Minister Pravin Gordhan.

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A senior Hawks officer said the probe into the unit was a "prosecutorial-led investigation", and the NPA was providing the team with guidance and instructions.

The information note sent to Mahlobo by lead investigating officer Brigadier Nyameka Xaba alleges that Gordhan and Pillay were instrumental in the creation of the rogue unit. Xaba heads up a specialised Hawks unit, which has been set up to probe crimes against the state.

City Press has learnt that the NPA has allocated four prosecutors – all from the Priority Crimes Litigation Unit, which Abrahams used to head – to lead the investigation team.

Abrahams told Parliament during his grilling before the justice portfolio committee on Friday that the investigation into the rogue unit was at an advanced stage, "and we will make sure we do not make the same mistakes here".

A senior prosecutor, based at the NPA's headquarters in Silverton in Pretoria, said it was the "first time I have seen four prosecutors being allocated to one case".

The prosecutor, who spoke on condition of anonymity, said Hawks detectives Xaba – as well as a Colonel H Maluleka, a Lieutenant Colonel S Palaza and a Captain M Sewele – were "regulars" in Abrahams' office.

"They always meet in Shaun's office. Lately, they have been given access cards. They are no longer required to sign the visitors' registry and are no longer escorted through the building," the prosecutor said.

NPA spokesperson Luvuyo Mfaku said no decision to prosecute Gordhan had yet been taken, adding: "The investigation is still under way."

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